2019 IL App (2d) 160666-U
Nos. 2-16-0666, 2-16-0667, 2-16-0668 cons.
Order filed May 1, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VICTOR AJAZI, Defendant-Appellant.	)))))))))))	Appeal from the Circuit Court of Kane County. Nos. 12-CF-349 13-CF-1071 14-CF-1587 Honorable David P. Kliment, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Birkett and Justice Zenoff concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not ineffective for failing to request that bail be set, as we presumed that counsel was acting strategically and, in any event, per the trial court's finding, defendant was not in custody and thus was not subject to bail.

¶ 2 While defendant, Victor Ajazi, was on probation, he allegedly committed new crimes and was taken into custody. The court subsequently revoked his probation and sentenced him to concurrent terms of two years' imprisonment. On appeal, defendant contends that his counsel

was ineffective for failing to request that bail be set in the probation-revocation cases, which failure, he claims, deprived him of 96 days of credit against his sentences. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In July 2012, defendant pleaded guilty to attempted aggravated battery of a police officer (720 ILCS 5/8-4(a), 12-3.05(d)(4) (West 2012)) and domestic battery (*id.* § 12-3.2(a)(1)), and he was sentenced to 30 months of probation and 120 days in jail with credit for 99 days served (case number 12-CF-349). Almost one year later, in June 2013, defendant pleaded guilty to violating an order of protection (*id.* § 12-3.4(a)(1)), and he was sentenced to 30 months of probation and 82 days in jail with credit for 41 days served (case number 13-CF-1071). Over one year after that, in November 2014, defendant pleaded guilty to domestic battery, and he was sentenced to 24 months of probation and 81 days in jail with credit for 81 days served (case number 14-CF-1587).

¶ 5 On August 26, 2015, defendant allegedly committed domestic battery and resisting a peace officer (*id.* § 31-1(a)), and he was taken into custody for those offenses (case number 15-CF-1359). On September 17, 2015, the State petitioned to revoke defendant's probation in case numbers 12-CF-349, 13-CF-1071, and 14-CF-1587 (the PTR cases), because he had committed these new offenses. All the cases were subsequently consolidated. Defendant was held in lieu of bail in case number 15-CF-1359. However, nothing in the record indicates that bail was set in the PTR cases or that defendant was held in lieu of bail in those cases. Defendant represented himself until November 6, 2015, when counsel was appointed in all the cases.

¶ 6 On February 9, 2016, defendant pleaded guilty to resisting a peace officer in case number 15-CF-1359. The State asked the court to set bail in the PTR cases, and bail was set at $5000. The court then released defendant on his own recognizance in those cases. No report of proceedings for

that hearing or a substitute for it was filed in this court. See Ill. S. Ct. R. 323(c), (d) (eff. July 1, 2017).

¶ 7 On May 12, 2016, after taking judicial notice of the fact that defendant pleaded guilty to resisting a peace officer in case number 15-CF-1359, the trial court found defendant in violation of his probation. The court sentenced defendant to concurrent terms of two years' imprisonment in the PTR cases.

¶ 8 Defendant moved the court to reconsider, arguing, *inter alia*, that he should receive 168 days of credit toward his two-year sentences. This represented the time he was in custody from his arrest in case number 15-CF-1359 (August 26, 2015) until he pleaded guilty in that case to resisting a peace officer (February 9, 2016). The court denied the motion, ruling as follows:

> "Matter was continued a couple times for me to review the court file with respect to a certain portion of the *** motion to reconsider sentence filed by the defense; particularly for me to determine the proper amount of credit that [defendant] was due, that he spent in custody waiting for his trial in [case number] 15 CF 1359.
>
> The defense argues that because the orders in the files *** reflected that he was remanded to the custody of the Kane County sheriff for transport, *** he was in custody on those other cases [(the PTR cases)] and should be given credit for those days.
>
> I do not find that that argument has merit because had he posted bond or been released on 15 CF 1359, *** the case he was [a]waiting trial on, he would be [*sic*] have been released from the custody of the Kane County sheriff. He was not in custody on those other cases, so I don't believe he's entitled to credit for time served on those cases because he was not in custody on those cases."

Defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 At issue in this appeal is whether defense counsel was ineffective for failing to request, upon his appointment on November 6, 2015, that bail be set in the PTR cases. According to defendant, if counsel had done so, defendant would have received 96 days of credit (for time served through February 9, 2016). See 730 ILCS 5/5-4.5-100(b) (West 2016).

¶ 11 We first observe that we asked the parties to submit supplemental briefs on whether defendant's claim is foreclosed by section 5-4.5-100(e) of the Unified Code of Corrections (Code) (*id.* § 5-4.5-100(e)). After considering those briefs, we will assume, *arguendo*, that it is not.

¶ 12 Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See also *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). Under *Strickland*, defense counsel was ineffective only if (1) counsel's performance fell below an objective standard of reasonableness and (2) counsel's error prejudiced the defendant. *Strickland*, 466 U.S. at 687-88.

¶ 13 To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Id.*

¶ 14 Here, as the State points out, the record does not rebut the presumption that counsel strategically chose not to request bail in the PTR cases. Defendant essentially posits that counsel could not have had *any* strategic reason for such inaction, as if a request for bail could only have served defendant's interests. However, as the State observes, counsel might well have decided, perhaps even with defendant's approval, that "the setting of additional bail *** on the probation

revocation cases would only hinder his release." That is, although defendant assails counsel for not ensuring that he receive credit, against a then-hypothetical sentence, for time spent in presentencing custody, counsel might have simply been trying to avoid obstacles to defendant's *release* from presentencing custody. We have been repeatedly warned to "evaluate counsel's performance from his perspective at the time, rather than through the lens of hindsight." *People v. Perry*, 224 Ill. 2d 312, 344 (2007).

¶ 15 In any event, the fact remains that we simply do not know counsel's thinking on the matter. (An official account of the hearing at which bail was eventually set, at *the State's* request, might or might not have shed light on the issue.) Thus, we simply cannot hold that counsel's thinking was so misguided as to amount to constitutionally deficient performance. See *People v. Blair*, 2015 IL App (4th) 130307, ¶ 47 ("Although we can identify no apparent reason in the record for trial counsel's failure to withdraw defendant's bond ***, the lack of such evidence does not foreclose the possibility that counsel had a legitimate reason ***. Thus, we decline to rule on defendant's ineffective assistance of counsel claim as it would be better brought under the Post-Conviction Hearing Act [citation] where an adequate record can be developed.").

¶ 16 As the State also points out, however, defendant's claim fails for an additional reason: the trial court specifically found that defendant was in custody only in case number 15-CF-1359, not in the PTR cases. If defendant was not in custody in the PTR cases, then obviously he was not entitled to bail in those cases. See 725 ILCS 5/102-6 (West 2016) (bail secures release of person in custody). And, just as obviously, he was not entitled to credit for any such custody.

¶ 17 Defendant does not assert that the trial court's finding was wrong. Instead, citing section 5-6-4(b) of the Code (730 ILCS 5/5-6-4(b) (West 2016)), he asserts as follows: "If counsel had asked, the court would have been required to set bail on the probation revocation cases. Even if the

court [had] set an extremely high bail or denied it outright, [defendant] would have been held in custody in the probation revocation cases and entitled to presentencing credit for time served." But we fail to see how the court would have been required to set bail in the PTR cases when defendant was not in custody in those cases, or how the court's mere denial of bail would have meant that defendant *was* in custody in those cases. Indeed, as the State suggests, the court might have simply denied bail on the ground that defendant was *not* in custody in those cases.

¶ 18 Counsel cannot be deemed ineffective for having failed to make a motion unless that motion would have been meritorious. See *People v. Wise*, 2019 IL App (2d) 160611, ¶ 53. Here, per the trial court's finding that defendant was not in custody in the PTR cases, counsel's request for bail would not have been meritorious.

¶ 19 III. CONCLUSION

¶ 20 For these reasons, the judgment of the circuit court of Kane County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 21 Affirmed.