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2014 IL App (3d) 120988-U

Order filed July 11, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-12-0988
AARON HOUSTON,	)	Circuit No. 02-CF-660
Defendant-Appellant.	)	Honorable Timothy M. Lucas, Judge, Presiding.

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PRESIDING JUSTICE LYTTON delivered the judgment of the court.  
Justices Schmidt and Wright concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The trial court did not err in dismissing defendant's amended postconviction petition at the second stage of proceedings.

¶ 2 Defendant, Aaron Houston, appeals from the second stage dismissal of his postconviction petition arguing that he made a substantial showing that trial counsel was ineffective for failing to move to suppress defendant's statements to the police. We affirm.

¶ 3 **FACTS**

¶ 4 In 2002, defendant was charged by superceding indictment with armed robbery for taking the wallet from Wesley Fleming on July 11, 2002. 720 ILCS 5/18-2(a)(2) (West 2002). At defendant's jury trial, Fleming, assistant manager of a Pizza Hut in Peoria, Illinois, testified he was closing the restaurant on the night of the incident. At approximately 1 a.m., two men with masks over their faces entered through the back door. The shorter of the two men pointed a handgun at Fleming and demanded that he open the safe. After Fleming explained that he was unable to open the safe, the shorter man told him to open the register. Fleming explained that he was also unable to open the register. The shorter man yelled at Fleming and shot him in the leg. Fleming gave the men his wallet, and they ran out of the restaurant. Fleming stated that he believed the back door was closed before the robbery, but that it could be opened from the outside by entering a combination on the keypad.

¶ 5 Andrew Albee, the restaurant delivery driver, testified he was doing dishes in the restaurant when he heard the back door open, and two men entered. The taller man had a cloth over his face, and the shorter man had a bandanna over his face. The shorter man, who had a handgun, told Albee to lie on the ground. Albee heard the men arguing with Fleming. Albee then heard a gunshot, and the men ran out of the restaurant. Albee testified that the rear door of the restaurant was closed and locked before the men entered.

¶ 6 Peoria police officer Terry Esser testified that he was patrolling the area near the restaurant when he noticed two African-American men running from the rear of Pizza Hut. As he approached, he saw the two men attempting to get into a black vehicle that had two occupants inside. The vehicle was then abandoned when all four men fled the area on foot. The vehicle was later identified as being registered to defendant's mother. Esser pursued the men in his squad car and later on foot into a wooded area. The four men split up, and Esser continued to

chase one man until he lost sight of him. Additional police officers arrived, including a canine unit, and they searched the area for the individuals, finding a black wig on the roadside. Esser then found an African-American man, later identified as defendant, lying on the ground just inside the wooded area next to the road. The man got up and fled. Esser and the other officers chased after him, but they lost sight of the man momentarily when he crossed a fence. Shortly thereafter, the man was found lying on the ground, and was taken into custody.

¶ 7 Craig Hightower, a crime scene technician, testified he processed the scene for evidence. He located bullet casings, bullet fragments, live rounds, a hairpiece in the road, and a bandanna and a gray stocking cap near the restaurant.

¶ 8 Detective Michael Mushinsky testified he and Detective Fred Ball interviewed defendant at the police station at 8 p.m. on July 11, 2002. Defendant was first asked whether he recalled his *Miranda* rights from an earlier interview at about 5:40 a.m. Defendant acknowledged that he understood his *Miranda* rights. Defendant told the detectives he was clearer on what happened that evening than he had been in the previous interview. Defendant said he was an employee of the restaurant and had gone there with his brother and a third person to get leftover pizza. When defendant and his brother entered through the rear door, his brother pulled out a handgun and demanded that the manager open the safe. Defendant had seen his brother acquire the handgun earlier that day, but did not know he brought it to the restaurant. Defendant said that when his brother pointed the handgun at the manager, the gun went off. Defendant and his brother took the manager's wallet, ran out through the rear door, and got into a car. When they saw the police pulling up, they fled the scene on foot. Defendant admitted wearing a wig, but stated that he removed it while running through the woods. When asked why he was wearing a wig and a mask if he was going to get leftover pizza, defendant said he did not know.

¶ 9 During trial, defendant testified that he worked at the Pizza Hut where the robbery took place. Around noon on July 10, 2002, defendant drove his white car to the restaurant to get his paycheck. Defendant returned home afterward. That evening, defendant was drinking heavily and smoking marijuana. Sometime between midnight and 3 a.m., he took his car to visit a friend. On the way there, defendant was in the area of the restaurant when he saw a police car. Defendant became nervous because he had been drinking heavily, had marijuana in his pocket, and had no car insurance. In order to avoid being pulled over, defendant pulled ahead of the police car, parked his car, and got out. When defendant saw the police car approaching, he ran until the officer told him to stop and get on the ground. Defendant complied, but when a canine unit arrived, he became afraid of the dog and ran into a wooded area. A short time later, defendant was stopped in the woods by the police.

¶ 10 Defendant testified that he did not go to the restaurant that evening, noting that he would not go to get leftover pizza because the restaurant did not give out pizza. Defendant recalled being interviewed by the police, but denied giving the detectives a statement about the robbery. When asked whether he received *Miranda* warnings during the first interview, defendant said he did not recall because he had been smoking and drinking. Defendant also stated that he was not read his *Miranda* rights during the first interview. During the second interview, defendant said Ball asked him whether he remembered his *Miranda* rights. Defendant did not answer, but Ball proceeded with the interview. Defendant testified that he was threatened with charges. Defendant also testified that he could not explain why his mother's car was at the scene of the robbery.

¶ 11 The jury found defendant guilty of armed robbery. The trial court denied defendant's motion for a new trial and sentenced him to 20 years' imprisonment. Defendant's conviction was

affirmed on direct appeal. *People v. Houston*, 363 Ill. App. 3d 567 (2006). Following a remand to the trial court, this court's decision was affirmed by the supreme court. *People v. Houston*, 226 Ill. 2d 135 (2007); *People v. Houston*, 229 Ill. 2d 1 (2008).

¶ 12 On March 30, 2009, defendant filed a *pro se* postconviction petition. Defendant was appointed postconviction counsel, who filed an amended petition on May 21, 2010. In the petition, defendant alleged trial counsel was ineffective for failing to file a motion to suppress defendant's statements to the police. Defendant attached a portion of a police report, which indicated that he was interviewed by the police at 5:40 a.m. and 8:35 p.m. on July 11, 2002, received *Miranda* warnings before the first interview, and described defendant as "extremely lethargic and [he] was having a hard time staying focused on our interview. [Defendant] made a comment that he had been smoking dope and was high." The report indicated that defendant denied involvement in the robbery, and officers terminated the first interview because it was early in the morning and defendant had not had any sleep. Further, during defendant's second interview, he was asked whether he understood his *Miranda* rights, but he was not re-Mirandized. Defendant said he still understood his rights and would answer questions. The officers noted that defendant was much clearer with his answers. Based on the description in the police report of defendant's condition during the first part of the interview, defendant argued that he did not voluntarily waive his *Miranda* rights. Defendant also argued that because appellate counsel did not have access to the discovery from the case, counsel was unable to raise this issue on direct appeal.

¶ 13 The State filed a motion to dismiss defendant's petition on the basis that the issue had been forfeited and defendant failed to meet the standard for ineffective assistance. On

October 30, 2012, the trial court granted the State's motion and dismissed the petition. Defendant appeals.

¶ 14

#### ANALYSIS

¶ 15

Defendant argues the trial court erred when it dismissed his postconviction petition at the second stage because he made a substantial showing of ineffective assistance of trial counsel. Specifically, defendant argues that counsel should have filed a motion to suppress his statements to the police because the initial waiver of his *Miranda* rights was invalid based on his condition at the time.

¶ 16

The Post-Conviction Hearing Act provides for a three-stage review process for criminal defendants who challenge their convictions based on constitutional violations. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Domagala*, 2013 IL 113688. In order to proceed to a third-stage evidentiary hearing, the allegations set forth in the petition, as supported by the record or accompanying affidavits, must make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403 (2003). In making this determination, all well-pleaded facts in the petition and affidavits are to be taken as true. *Id.* We review *de novo* the dismissal of a petition without an evidentiary hearing. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 17

A defendant alleging ineffective assistance of counsel must demonstrate that his counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040; *Strickland v. Washington*, 466 U.S. 668 (1984). The failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *Henderson*, 2013 IL 114040. To prevail on a claim of ineffective assistance based on counsel's failure to file a motion to suppress, defendant must show that: (1) the motion was

meritorious; and (2) a reasonable probability exists that the trial outcome would have been different had the evidence been suppressed. *Id.*

¶ 18 A valid waiver of *Miranda* rights must be knowingly and intelligently made. *People v. Braggs*, 209 Ill. 2d 492 (2003). The validity of a waiver is determined by the facts and circumstances of each case, including the suspect's background, experience, and conduct. *Id.*

¶ 19 Defendant argues that the police report alone called into question the validity of his waiver, noting he had been smoking and drinking, was only 17 at the time, had not slept since his arrest, and was lethargic. Defendant emphasizes that the detectives terminated his initial interview due to his condition. The report stated that defendant understood his *Miranda* rights and agreed to answer the detectives' questions. The report also stated that following defendant's continued denial of his involvement in the robbery, the interview was terminated so defendant could get some sleep. There is no indication that the interview was terminated for any other reason. Moreover, defendant admits his testimony at trial was insufficient to question the validity of his initial waiver. The report fails to show that a motion to suppress would have succeeded.

¶ 20 Nevertheless, even assuming defendant's motion to suppress would have been meritorious if argued in the trial court, defendant cannot show there was a reasonable probability the outcome of his trial would have been different. Defendant was proven guilty by strong evidence. Restaurant employees testified that two men with masks entered the rear of the restaurant, noting that the rear door had been locked, but could have been opened using a combination on the keypad. Defendant was an employee of the restaurant and was in the area at the time of the robbery. Following the robbery, a police officer witnessed two men run from the rear of the restaurant and attempt to get into a vehicle registered to defendant's mother.

Defendant could not explain why his mother's car was at the scene of the robbery. The men ran into the woods and were pursued by the police. Defendant admitted that he ran from the police. He was apprehended shortly thereafter and was arrested. In light of the evidence supporting defendant's guilt, even absent the statements he made to the police, we cannot say there was a reasonable probability that the outcome of his trial would have been different. The trial court properly denied defendant's second stage amended postconviction petition.

¶ 21

#### CONCLUSION

¶ 22

The judgment of the circuit court of Peoria County is affirmed.

¶ 23

Affirmed.