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2014 IL App (3d) 130930-U

Order filed October 8, 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 14th Judicial Circuit, Henry County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0930
	)	Circuit No. 09-CF-267
AWAD R. RASRAS,	)	Honorable
Defendant-Appellant.	)	Richard A. Zimmer, Judge, Presiding.

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JUSTICE HOLDRIDGE delivered the judgment of the court.  
Justices McDade and Carter concurred in the judgment.

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**ORDER**

¶ 1 *Held:* The defendant received effective assistance of counsel.

¶ 2 The defendant, Awad R. Rasras, appeals from the dismissal of his third-stage postconviction petition. The defendant argues that the trial court erred in granting the State's motion to dismiss the petition because he made a substantial showing that he was denied his right to effective assistance of trial counsel. We affirm.

¶ 3 **FACTS**

¶ 4 On August 7, 2009, the defendant was charged with retail theft (720 ILCS 5/16A-3(a) (West 2008)), a Class 3 felony. On June 11, 2010, the case proceeded to a bench trial. The trial evidence established that an asset protection associate at the Kewanee Wal-Mart observed the defendant place a suspiciously large quantity of baby formula into his shopping cart. The defendant proceeded to the checkout area and placed only part of the formula on a register conveyor belt. The defendant asked that the purchase be divided into three transactions and handed the cashier, Kami Verway, some of the cans of formula. A second cashier told Verway to enter the items by quantity instead of scanning each item. The defendant provided the quantities, but the cashier had some difficulty understanding the defendant. The cashier also tried to count how many items the defendant had in his cart to verify the numbers the defendant had provided. After the transaction, the asset protection associate approached the defendant and asked to see the defendant's three receipts. The defendant's cart contained 18 cans of baby formula for which he had not paid. The defendant told the associate that the discrepancy occurred because of a cashier mistake.

¶ 5 The defendant testified that he had stacked the items in his cart to make them easier to count and he told Verway the number of items. The defendant did not notice a discrepancy but said that he was tired, distracted, and going through some personal problems. He also stated that he had been treated since 1996 for concentration issues and forgetfulness.

¶ 6 The trial court found the defendant guilty and sentenced the defendant to 24 months' conditional discharge. The defendant appealed. On direct appeal, we affirmed the defendant's conviction and sentence. *People v. Rasras*, 2012 IL App (3d) 110176-UB.

¶ 7 On March 21, 2013, private counsel Nate Nieman filed a postconviction petition on behalf of the defendant. The petition argued that the defendant was denied effective assistance

of counsel because his trial counsel, Scott Clemens, underestimated the strength of the State's case and advised the defendant to go to trial instead of accepting a plea to a lower charge. The petition was supported by a letter from the State that offered the defendant an open plea to a misdemeanor theft charge. The State filed a motion to dismiss the defendant's petition, and the court advanced the matter to a third-stage evidentiary hearing.

¶ 8 At the hearing, the defendant testified that he hired Clemens to represent him on the retail theft charge. Before trial, Clemens notified the defendant of a plea offer from the State. In exchange for the defendant's guilty plea, the State offered to reduce the charge to misdemeanor retail theft. Clemens told the defendant that he had a "strong case and the State [had] a weak case," and the State would have a difficult time proving the defendant knowingly left the store with stolen merchandise. The defendant was concerned about the effect of a conviction on his job and reputation, and Clemens' statements regarding the strength of the case convinced the defendant to go to trial.

¶ 9 On cross-examination, the defendant stated that Clemens never said the defendant would win the case but the defendant had a strong case. The defendant explained that Clemens used the words "winning" and "strong" and the defendant thought " 'winning'—is as 'strong.' " Overall, Clemens made no guarantee.

¶ 10 Clemens testified that he discussed the State's plea offer with the defendant "in terms of the risk involved if we went to trial, as far as [the defendant] being convicted of a felony." Clemens explained to the defendant that a felony conviction was far worse than a misdemeanor conviction, but the defendant was very concerned that he might lose his job if he received any conviction. Clemens told the defendant that if he pled guilty to the misdemeanor charge, Clemens would ask the court for a sentence of court supervision, but the defendant remained

concerned that a misdemeanor conviction and sentence of court supervision would negatively impact his employment. The defendant felt very strongly that he had "done nothing wrong and that he wanted to be able to have his day in court[.]" Clemens did not give the defendant any guarantee that he would be found not guilty, but felt the defendant had a good case because he had not attempted to conceal the merchandise.

¶ 11 After the hearing, the trial court denied the defendant's postconviction petition. The defendant appeals.

¶ 12 ANALYSIS

¶ 13 On appeal, the defendant argues that the trial court erred in granting the State's motion to dismiss because he made a substantial showing that he received ineffective assistance of trial counsel.

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions. *People v. Hodges*, 234 Ill. 2d 1 (2009). At the third stage, the petition advances to a hearing where the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence," and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2010). The defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458 (2006). The trial court's findings of fact and credibility determinations are reviewed for manifest error. *Id.* Manifest error is error that is clearly evident, plain and indisputable. *People v. Morgan*, 212 Ill. 2d 148 (2004).

¶ 15 To make a substantial showing of ineffective assistance of trial counsel, the defendant must establish that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's

unprofessional errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319 (2011); *Strickland v. Washington*, 466 U.S. 668 (1984). There is a strong presumption that counsel's performance was objectively reasonable. *Strickland*, 466 U.S. at 687-88. Failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003).

¶ 16 The defendant argues the instant case is controlled by the Supreme Court's decision in *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376 (2011). In *Lafler*, the parties agreed that counsel's performance was deficient, and the sole issue was whether the petitioner was prejudiced by counsel's advice to reject a plea offer and proceed to trial. The Supreme Court held that to satisfy the prejudice prong in the context of a rejected plea, a petitioner must show a reasonable probability that: (1) he would have accepted the earlier plea offer had he been afforded effective assistance of counsel; (2) the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. *Id.*

¶ 17 In the instant case, unlike *Lafler*, the parties do not agree that Clemens' performance was deficient. The defendant and Clemens testified that Clemens did not make any guarantees as to the outcome, but expressed confidence in the probability of a favorable trial outcome. Generally, defense counsel's "honest assessment of a case" is not a basis to allow a defendant to withdraw a guilty plea. *People v. Witherspoon*, 164 Ill. App. 3d 362, 365 (1987). Analogously, defense counsel's honest assessment of the possibility of success at trial does not evince deficient performance. However, the defendant argues that Clemens' performance was further deficient because his assessment was derived from a misinterpretation of the law. The defendant argues

that Clemens' belief that the State would have difficulty proving the intent element was wrong. See *People v. Mays*, 62 Ill. App. 3d 17 (1978).

¶ 18 In *Mays*, the defendant was observed placing items into his briefcase while in a store. *Id.* The defendant testified that he placed the items into the briefcase out of convenience; however, a store security officer testified that the briefcase was closed and indicated an intent to conceal the items. The reviewing court determined that such a conflict of evidence and credibility determination was best resolved by the trial court and concluded that the record showed that the defendant had the requisite criminal intent to sustain the charge of retail theft. *Id.*

¶ 19 Here, unlike *Mays*, there was no indication that the defendant had attempted to conceal the cans of baby formula. At the evidentiary hearing, Clemens stated that part of the reason he felt the defendant had a strong case was because the defendant had not attempted to conceal any of the items. In light of Clemens' statement, it is unlikely that consideration of the *Mays* decision would have altered his assessment of the case. Further, the *Mays* decision tends to support Clemens' assessment of the case because, unlike *Mays*, there was no evidence that the defendant concealed any of the items. In cases where an alleged shoplifter is apprehended before leaving the store, concealment of an item supports the inference of criminal intent. *People v. Cortez*, 26 Ill. App. 3d 829 (1975). Thus, Clemens' assessment of the case was not deficient.

¶ 20 Alternatively, the defendant has not made a substantial showing of prejudice. Clemens testified that the defendant was very concerned about receiving any conviction and strongly felt that he was innocent of the charges. The defendant also testified that he was very concerned about the impact a conviction would have on his job and reputation. As a result, Clemens stated that the defendant wanted to have his day in court even after he was advised that a misdemeanor conviction was less onerous. In light of this evidence, the defendant has not shown that he

would have accepted the plea offer if Clemens had not advised the defendant as to the perceived strength of the case. Therefore, we affirm the trial court's denial of the defendant's postconviction petition.

¶ 21

#### CONCLUSION

¶ 22

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

¶ 23

Affirmed.