2011 IL App (1st) 101815-U

Third Division
November 30, 2011

No. 1-10-1815

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	03 CR 6617
	)	
DEAUNTE ERWIN,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Steele and Justice Salone concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed the postconviction petition as patently without merit, where the petitioner's allegations of ineffective assistance of appellate counsel failed to overcome the presumption that appellate counsel had sound strategic reasons for his choices of the issues he raised on the direct appeal.

¶ 2 This case involves an appeal from a dismissal of a postconviction petition at the first stage of postconviction proceedings. A jury found Deaunte Erwin guilty of murder and armed robbery based primarily on his confession. This court affirmed the conviction on the direct appeal. Erwin

then filed a postconviction petition in which he contended that he did not receive effective assistance of counsel on the direct appeal. The trial court dismissed the petition as patently without merit.

¶ 3 In this appeal, Erwin argues that his counsel for the direct appeal provided ineffective assistance when he failed to argue (1) that the prosecutor's closing argument deprived Erwin of a fair trial, and (2) that Erwin's trial counsel provided ineffective assistance when he mentioned a lie detector and when he failed to request verdict forms specifically distinguishing a finding on felony murder from a finding on intentional murder.

¶ 4 We hold that Erwin has not stated the gist of a claim for deprivation of his constitutional right to effective assistance of appellate counsel. Erwin has not overcome the presumption that strategic purposes justified appellate counsel's decision to focus argument on the issue of whether the trial court erred when it denied Erwin's motion to suppress his confession, and not to raise weaker arguments concerning the prosecutor's closing remarks and trial counsel's alleged errors. Therefore, we affirm the dismissal of the postconviction petition.

¶ 5 BACKGROUND

¶ 6 After 9 p.m. on December 23, 2002, Carlyle Barnhill pulled his SUV into his driveway. He got out and headed to his house, leaving his passengers, Larry Martin and Christopher Holmes, to wait for him in the SUV. Some men wearing ski masks and holding guns accosted Barnhill, Martin and Holmes. One of the masked men robbed Martin and Holmes. A few minutes later, Barnhill died in his house of gunshot wounds.

¶ 7 Police arrested Marcus Hamer, Brian McMorris and Deaunte Erwin. All three gave videotaped statements in which each admitted his own involvement in the crimes. A grand jury

charged all three with murder and armed robbery. Hamer and McMorris pled guilty, but Erwin chose a jury trial.

¶ 8 Erwin's attorney moved to suppress his statement based primarily on the length of time police kept Erwin in custody before he made any inculpatory statement. At the hearing on the motion to suppress, police admitted that Erwin remained in custody, subject to intermittent questioning, for 30 hours before his first inculpatory statement, and he made the videotaped statement about 40 hours after the arrest. Erwin testified that police kept him handcuffed to a wall and fed him very little before he made the confession. He said police failed to mention his legal rights for more than 16 hours. Police scheduled a polygraph examination for him, and when he arrived at the testing center, the officer performing the test told Erwin about his rights. Erwin testified that he refused to take the polygraph test and he asked for a lawyer. Police did not honor his request. Erwin made his first inculpatory statement half a day later, after police showed him a videotaped statement they obtained from Hamer implicating Erwin. Erwin just followed most of Hamer's statement, as police suggested, but he named Hamer as the man who shot Barnhill, while Hamer named Erwin as the shooter.

¶ 9 Police officers contradicted much of Erwin's testimony about his treatment at the police station. The officers specifically testified that Erwin never requested an attorney. The court found the officers more credible, and it denied the motion to suppress the statements.

¶ 10 At the trial, Erwin's attorney said in his opening statement that a police officer wanted Erwin to take a lie detector test. The prosecutor promptly objected. In a sidebar, defense counsel explained that he mentioned the test because he wanted the jurors to know that police did not inform

Erwin of his constitutional rights until they took him for the lie detector test, more than 16 hours after they arrested him. The court sustained the prosecutor's objection to defense counsel's remark, and neither party made any further reference to a lie detector.

¶ 11 The prosecution presented McMorris as a witness. McMorris testified that he robbed Martin and Holmes in the SUV, while Hamer took Barnhill, at gunpoint, into the house. When Hamer came out, he and McMorris ran from the scene. McMorris said he did not see Erwin on the night of the murder, and Erwin took part in neither the murder nor the robbery.

¶ 12 Prosecutors then presented McMorris's videotaped confession as a prior inconsistent statement admissible as substantive evidence. See 725 ILCS 5/115-10.1 (West 2002). In that statement, McMorris said that Erwin asked him and Hamer to help Erwin rob Barnhill. Erwin got masks and gloves for all three participants. Erwin and Hamer accosted Barnhill when he got out of his SUV and forced him into his house. Hamer and Erwin both came out later, and all three left the area together and split the proceeds of the robbery.

¶ 13 The prosecution relied primarily on Erwin's videotaped confession. In that statement, Erwin admitted that he, McMorris and Hamer planned to rob Barnhill. Erwin had a .9 millimeter handgun and Hamer had a semiautomatic gun. Erwin and Hamer took Barnhill into his home at gunpoint and beat him until he told them where he kept drugs hidden in the house. When Barnhill tried to run upstairs, Hamer shot him repeatedly. Erwin admitted that he, too, shot his gun.

¶ 14 A medical examiner found 5 bullets in Barnhill, including one .9 millimeter bullet. According to a ballistics expert, the 5 bullets came from at least two different guns.

¶ 15 For the defense, Erwin's girlfriend testified that he stayed with her on the evening of the

murder. They went to a motel together, but she did not like its condition and they returned the key. The motel's records showed that Erwin checked in at 10:04 p.m. and checked out at 10:37 p.m. on the night of the murder. No physical evidence connected Erwin to the murder scene.

¶ 16 In closing argument, the prosecutor said:

> "[W]e have to prove our case beyond a reasonable doubt. It is not some insurmountable burden. It is proof beyond a reasonable doubt, not beyond any doubt, beyond a shadow of a doubt, beyond all doubt. It is beyond a reasonable doubt. ***
>
> Ladies and gentlemen, that burden is met in this building in every courtroom almost every day of the week. That is not some farfetched, huge mountain you have to climb to get to."

¶ 17 The prosecutor also attacked McMorris's testimony:

> "You can't believe Brian Mc Morris. You can't believe him because he is a convicted felon. ***
>
> Doesn't common sense tell you criminals about to go out with guns to rob someone don't usually ask *** law abiding citizens to be their partner?
>
> Criminals stick together. Criminals commit crimes together. They don't go wandering up asking people who follow the law *** to come with them [to] commit armed robbery[.]"

The court overruled defense counsel's objection.

¶ 18 In response to defense counsel's argument that the prosecution failed to show the jury the gun Erwin allegedly used, the prosecution answered:

> "We don't have the gun. You know what, the gun, blame Deaunte Erwin. He didn't tell him where the gun was at. You want to know where the gun [is] at, you blame him that we don't have it. He is the one that ran out with it that night. He got rid of it. That is not our fault. We don't get to pick the evidence."

Again, the court overruled defense counsel's prompt objection.

¶ 19 The court instructed the jurors that they should find Erwin guilty of first degree murder if they found all the elements of either intentional murder or felony murder. Defense counsel did not request separate verdict forms for felony murder and intentional murder. The jury returned a general verdict finding Erwin guilty of murder, and separate verdicts finding him guilty of the armed robberies of Martin and Holmes. The jury specifically found that Erwin personally discharged a firearm in the course of the murder. The court sentenced Erwin to 25 years in prison for the murder, plus 20 years because he personally discharged a firearm, and 10 years on each armed robbery count. The two armed robbery sentences run concurrently with each other, but consecutively to the 45 year sentence for the murder, making a total sentence of 55 years.

¶ 20 On the direct appeal, appellate counsel argued only that the trial court erred when it denied Erwin's motion to suppress his videotaped confession. The appellate court found that Erwin confessed voluntarily, so the court affirmed the conviction. *People v. Erwin*, No. 1-07-0687 (2009) (unpublished order under Supreme Court Rule 23).

¶ 21 Erwin filed his postconviction petition in March 2010. He alleged that his trial and appellate counsels provided ineffective assistance. The trial court dismissed the petition at the first stage of postconviction proceedings, finding it patently without merit. Erwin now appeals.

¶ 22 ANALYSIS

¶ 23 Standard of Review

¶ 24 Erwin argues on appeal only that he did not receive effective assistance of appellate counsel for his direct appeal. Because the trial court dismissed the petition without holding an evidentiary hearing, we review the dismissal *de novo. People v. Coleman,* 183 Ill. 2d 366, 388-89 (1998). The standards for determining whether a defendant has had effective assistance of trial counsel also apply for determining whether a defendant has had effective assistance of appellate counsel. *People v. West,* 187 Ill. 2d 418, 435 (1999). We accept as true all assertions of fact in defendant's postconviction petition and his supporting affidavit, unless the trial record proves the assertions false. *Coleman,* 183 Ill. 2d at 380-82. The defendant must state the gist of a claim that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficiencies in counsel's performance resulted in prejudice to defendant. *People v. Manning,* 241 Ill. 2d 319, 326 (2011). We presume that appellate counsel made competent strategic choices, and the defendant bears the burden of stating the gist of a claim that overcomes that presumption. See *People v. Gale,* 376 Ill. App. 3d 344, 352 (2007). Appellate counsel should not raise every conceivable issue on appeal. *People v. Bailey,* 141 Ill. App. 3d 1090, 1102 (1986). Counsel's failure to raise issues cannot qualify as ineffective assistance unless an argument on that issue would likely have produced a better outcome on the direct appeal. *People v. Coleman,* 168 Ill. 2d 509, 523 (1995).

¶ 25 Erwin contends that his appellate counsel should have raised two issues in addition to the one issue counsel raised on the direct appeal. According to Erwin, counsel should have argued that the prosecutor's misconduct in closing argument deprived Erwin of a fair trial, and Erwin's trial counsel provided ineffective assistance.

¶ 26 Closing Argument

¶ 27 Erwin argues that three of the prosecutor's remarks in closing argument unfairly prejudiced him. The prosecutor (1) defined reasonable doubt and belittled the burden of proving guilt; (2) implied that Erwin committed other crimes; and (3) claimed that Erwin chose the evidence the prosecution presented.

¶ 28 Our supreme court clarified that remarks on the burden of proof, very much like the remarks made here, do not improperly prejudice defendants. Prosecutors may remind jurors that every day, the State meets its burden of proving defendants guilty beyond a reasonable doubt of charges brought against them. *People v. Kidd*, 175 Ill. 2d 1, 40 (1996). We find that appellate counsel likely could not have persuaded this court, on the direct appeal, that the trial court abused its discretion when it permitted the remarks on the burden of proof here. See *People v. Gacho*, 122 Ill. 2d 221, 255 (1988).

¶ 29 In the discussion of McMorris's credibility, the prosecutor urged the jurors not to believe McMorris because he had committed a felony. The prosecutor added, "Criminals commit crimes together. They don't go wandering up asking people who follow the law *** to come with them [to] commit armed robbery[.]" The remark alludes to evidence that Erwin asked McMorris to help him

rob Barnhill. Thus, the remark refers to Erwin as a criminal.

¶ 30 However, in the remark the prosecutor did not state that Erwin had committed prior crimes. The prosecutor more directly asserted that Erwin, as the evidence showed, wanted to rob Barnhill, so Erwin sought out persons he knew who had committed felonies, like McMorris. To obtain a reversal based on this remark, appellate counsel for the direct appeal would have needed to convince this court that the trial court abused its discretion when it overruled defense counsel's objection to the remark, and that the remark substantially prejudiced Erwin. *People v. Emerson*, 189 Ill. 2d 436, 488 (2000). We find that appellate counsel would not likely have obtained a better result if he had raised the issue on the direct appeal. See *People v. Evans*, 209 Ill. 2d 194, 220-21 (2004).

¶ 31 The prosecutor also said that prosecutors "don't get to pick the evidence." The trial court overruled defense counsel's prompt objection to the remark. In the context of the argument, the remark referred to the fact that when a defendant destroys or effectively conceals some pieces of evidence, the prosecution does not have that evidence in its possession and therefore cannot present that evidence to the jury. The remark implies that Erwin concealed the gun he used to kill Barnhill. We see nothing objectionable about the remark in this context. Jurors would not likely have misunderstood the remark to mean that Erwin actually chose the evidence the prosecution showed the jury at trial, as that evidence included the videotaped confessions he and McMorris gave. Again, we find that appellate counsel would not likely have obtained a better result if he had raised the issue on the direct appeal. We cannot say that Erwin has presented the gist of a claim that his appellate counsel acted incompetently, or that counsel's actions fell below an objective standard of

reasonableness, when counsel decided to forego weak arguments based on the alleged misconduct of the prosecutor, and instead elected to focus the appellate court's attention on the stronger argument, that the trial court erred by denying Erwin's motion to suppress his confession. Thus, the prosecutor's allegedly improper remarks do not justify relief here.

¶ 32 Ineffective Assistance of Counsel

¶ 33 Erwin contends that appellate counsel should have argued that Erwin received ineffective assistance of counsel at trial. He claims that trial counsel acted objectively unreasonably when counsel mentioned the lie detector test in opening arguments, and when counsel failed to request separate verdict forms for intentional murder and felony murder.

¶ 34 Regarding the separate verdicts, the appellate court has repeatedly rejected arguments effectively indistinguishable from the argument Erwin raises here. See *People v. Braboy*, 393 Ill. App. 3d 100, 108 (2009); *People v. Mabry*, 398 Ill. App. 3d 745,756 (2010); *People v. Calhoun*, 404 Ill. App. 3d 362, 383-84 (2010). We cannot say that appellate counsel acted unreasonably when he chose not to raise the argument that lost in those other cases.

¶ 35 Finally, Erwin argues that appellate counsel provided ineffective assistance because counsel failed to argue, on the direct appeal, that trial counsel acted objectively unreasonably when counsel mentioned a lie detector in opening argument. Counsel said that a police officer "wanted [Erwin] to take a lie detector test." For this argument, we have an unequivocal statement of trial counsel's strategy, since he told the court he raised the issue to emphasize the length of time that passed after the arrest and before police informed Erwin of his constitutional right to remain silent and to have

the help of an attorney. The reference to the lie detector suggests that Erwin did not take the test, and the prosecutor's objection to the remark suggests that any evidence concerning the lie detector would favor the defense. Erwin has not overcome the presumption that a competent trial strategy led to the remark, and he has not overcome the presumption that a competent appellate strategy led appellate counsel not to argue that Erwin's trial counsel acted incompetently.

¶ 36 CONCLUSION

¶ 37 Erwin's postconviction petition does not state the gist of a claim that his appellate counsel deprived him of his right to effective assistance of appellate counsel, because Erwin has not stated facts that would arguably overcome the presumption that appellate counsel had sound strategic reasons for choosing not to argue that the prosecutor's closing argument deprived Erwin of a fair trial, or that Erwin received ineffective assistance of trial counsel. Accordingly, we affirm the trial court's decision to dismiss Erwin's postconviction petition as patently without merit.

¶ 38 Affirmed.