2012 IL App (1st) 081709

FIRST DIVISION
April 23,2012

No. 1-08-1709

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.	)	No. 06 CR 21549
	)	
	)	Honorables
GREGORY CASTELLANO,	)	Daniel P. Darcy and
	)	Angela Petrone,
Defendant-Appellant.	)	Judges Presiding.
	)	

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

SUPPLEMENTAL O R D E R

¶ 1 ***Held*****:** Defendant was not denied effective assistance of counsel. The victim's statement to police was not testimonial.

¶ 2 This case is presently before this court following a hearing on defendant’s claim

of ineffective assistance of counsel. On June 29, 2010, we issued *People v. Gregory Castellano*, No. 1-08-1709 (June 29, 2010) (unpublished order pursuant to Supreme Court Rule 23), wherein we disposed of all of defendant's claims but his claim of ineffective assistance of counsel. With respect to that claim, we remanded to the trial court "for an evidentiary hearing on *the very limited question* of why trial counsel failed to deliver the alibi defense as promised to the jury." *People v. Castellano*, No. 1-08-1709, slip op. at 33 (June 29, 2010) (emphasis in original). The trial court was instructed to conduct a hearing and to transmit a report of the court's findings and a record of the proceedings. After we reviewed the circuit court's findings, we issued a supplemental order on October 25, 2010, wherein we affirmed the judgment of the circuit court with respect to defendant's ineffective assistance of counsel claim.

¶ 3 On May 25, 2011, our supreme court, pursuant to its supervisory authority, instructed us to vacate our supplemental judgment entered on October 25, 2010, to retain jurisdiction and to issue an order remanding the cause for an evidentiary hearing on defendant's claim of ineffective assistance of counsel, at which hearing defendant should be appointed counsel. Our supreme court also directed the circuit court to submit its findings and a record of the proceedings to this court following the hearing and allowed the parties to submit supplemental briefs in this court. On July 15, 2011, we issued an order withdrawing our supplemental order dated October 25, 2010, and remanding the cause to the circuit court for an evidentiary hearing, at which defendant was to be afforded counsel. We instructed the circuit court to submit a report of its findings, as well as a record of the proceedings within 120 days of the order. Upon

receipt of the report and transcript, we indicated that the parties would be allowed to file supplemental briefs.

¶ 4 Additionally, our supreme court directed us to reconsider our original judgment entered on June 29, 2010, on the issue of whether defendant's right of confrontation was violated by admission of the victim's statement to police at the crime scene in light of *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), to determine if a different result is warranted.

¶ 5 We are in receipt of the circuit court's findings at the evidentiary hearing, as well as a record of the proceedings. In addition, we have received supplemental briefs from the parties.

¶ 6 ANALYSIS

¶ 7 At the hearing, defendant's trial attorney, Mr. David Wiener, testified that he was retained by defendant's family several months after the victim was shot and killed in this case, to represent defendant. As part of his investigation, his investigator, Thomas Romano, interviewed Sylvana and Abraham Castellano, defendant's parents. Mr. Wiener was not present during the interview. Following the interview, Mr. Romano obtained two handwritten notes signed by Abraham and Sylvana Castellano. In those notes, both Abraham and Sylvana Castellano provided information that they remembered the date of August 11, 2006, and they were present with their son at their home. Abraham Castellano told the investigator that on August 11, 2006, they barbequed some ribs and defendant was present the entire day. Sylvana Castellano told the investigator that she did not work on August 11, 2006, but had worked the day

prior. She and her husband and son barbequed some ribs on August 11, 2006, and defendant did not leave the house that day. Subsequently, Mr. Wiener spoke with Abraham and Sylvia Castellano at his office and began preparing them for trial. He had no reason to doubt what they were saying was true.

¶ 8 Mr. Wiener was concerned that Abraham would not be a good witness because he "became more and more agitated, more and more nervous." He also expressed a hope that he might not be called as a witness because he was "very, very, very nervous." Nevertheless, based on the information he learned from Abraham and Sylvana, Mr. Wiener indicated in opening statements that he would present defendant's parents as alibi witnesses on defendant's behalf.

¶ 9 After opening statements, the State indicated to Mr. Wiener that they had information that contradicted information provided by Sylvana. If Sylvana were called to testify, the State would call a witness to impeach her based on her previous statements regarding where she worked, when she worked and how often she worked.

¶ 10 As the State's witnesses testified, Mr. Wiener's trial strategy began to change to a theory of misidentification because he thought that:

> "the evidence that came in with regard to the identification of an African-American young man couldn't possibly have been [defendant] caused me to believe that that combined with the agitation that Mr. Castellano showed to me and Mrs.Castellano's work records caused me to believe we could win this case based on the misidentification of the defendant, and he was misidentified."

¶ 11 Prior to resting his case, Mr. Wiener spoke with defendant and his parents about

the evidence the State had presented. The evidence showed that the police report described the offender as an African-American man. Based on the evidence, and his concern that defendant's parents would be unable to withstand cross-examination, Mr. Wiener suggested that they rest without calling Sylvana and Abraham. Defendant and his parents agreed.

¶ 12 Mr. Wiener did not explain to the jury in closing arguments why he did not call defendant's alibi witnesses. Mr. Wiener explained he did not comment on his failure to present the alibi witnesses because he didn't want to call attention to the fact that he didn't call the alibi witnesses, but instead wanted the jury to focus on "the issue of an identification made of somebody else who as a completely different race than Mr. Castellano."

¶ 13 After hearing all of the testimony, the trial court found defendant's ineffective assistance claim lacked merit where,

> "[d]efendant was not prejudiced as there was only one sentence in opening statement about alibi. The jury was told by the judge that opening statements are not evidence, and the State did not mention failure to present alibi testimony in its closing. Counsel's decision not to provide the promised alibi testimony was sound trial strategy and not so irrational or unreasonable that Counsel's performance fell below an objective standard of reasonableness."

¶ 14 As we stated in *People v. Castellano*, No. 1-08-1709, slip op. at 28-29 (June 29, 2010), a defendant in any criminal case is constitutionally guaranteed effective assistance of counsel. U.S. amend. VI, XIV; ILL CONST., 1970, Art. 1 § 8; *Strickland v.*

Washington, 466 U.S. 668 (1984); adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984). Generally, the determination as to whether counsel is ineffective is subject to *de novo* review. *Strickland*, 466 U.S. at 698.

¶ 15 The *Strickland* court set forth the two requirements that a defendant must show to prevail in an ineffective assistance claim; (1) counsel's performance fell below an objective standard of reasonableness and; (2) there is reasonable probability that, but for counsel's errors, the result of the trial would have been different. The burden is on the defendant to overcome the strong presumption that defense counsel rendered adequate assistance using reasonable professional judgment pursuant to sound trial strategy. *Strickland*, 466 U.S. at 689-90.

¶ 16 Further, defendant must show there was a reasonable probability that defense counsel's errors *affected* the outcome of the proceeding. *Strickland*, 466 U.S. at 694 (emphasis added). A reasonable probability is one sufficient to "undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. It is the "confidence in" and "reliability of" the outcome that is in question. *Id. a*t 694. In making this inquiry, *Strickland* dictates that we must consider the "totality of the evidence before the judge or jury." *Id*. at 695. In *Kyles v. Whitley*, 514 U.S. 419 (1995), the U.S. Supreme Court explained that the test is not whether the remaining evidence was sufficient to convict, but whether, absent defense counsel's errors, the jury could have viewed the remaining evidence in a different light as to undermine the confidence in the verdict. *Kyles*, 514 U.S. at 434-45.

¶ 17 Given the procedural posture of this case, we must determine whether the trial

court's finding that defendant's ineffective assistance claim lacked merit was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008). "[T]he question of whether defendant's ineffective assistance claims are meritorious is necessarily grounded in the specific facts of the case, so it is appropriate for us to give deference to the finding of the trial court." *McCarter*, 385 Ill. App. 3d at 941; see also *People v. Woodson*, 220 Ill. App. 3d 865, 877 (1991); *People v. Brandon*, 157 Ill. App. 3d 835, 846 (1987).

¶ 18 Mr. Wiener stated that he did not call Abraham and Sylvano Castellano as alibi witnesses as a matter of trial strategy. Specifically, Mr. Wiener testified that based on the testimony at trial, he was able to adopt a defense theory of mistaken identity. Furthermore, he was informed after opening statements that a State witness would be called in rebuttal to potentially discredit Sylvana's recollection of the events on August 11, 2006. In addition, he feared defendant's parents would not withstand cross-examination. Also, Mr. Wiener testified that he did not make any reference to the promised alibi during closing argument so as not to detract from the mistaken identification defense. Counsel's decisions here clearly fall within the ambit of trial strategy and the trial court correctly found as such.

¶ 19 We also find that *Michigan v. Bryant,* 131 S. Ct. 1143 (2011), does not alter the outcome of our prior holding with respect to whether Varela's statement to the police is testimonial. In our original order in this case, we discussed at length our reasoning for finding that Varela's statements to the police were not testimonial:

"The sixth amendment's confrontation clause provides that, "[i]n all criminal

prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." U.S. Const., amend. VI. In *Crawford*, the Supreme Court held that the confrontation clause barred out-of-court testimonial statements unless the declarant was unavailable to testify and the defendant had a prior opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374. The Court however, left "for another day any effort to spell out a comprehensive definition of 'testimonial.'" *Crawford*, 541 U.S. at 68, 124 S. Ct. at 1374.

Defendant does not argue that the statements were improperly admitted as exceptions to the hearsay rule as excited utterances. Instead, defendant argues that pursuant to *People v. Sutton*, 233 Ill. 2d 89 (2009), the victim's excited utterance, *i.e*., "Greg shot me", must be excluded under *Crawford* as testimonial.

In *Sutton*, our supreme court considered whether two statements made by the victim, one to a police officer at the scene of the crime and one to a police officer in an ambulance on the way to the hospital were testimonial.

"Officer Moroney testified that when he arrived at the scene, he saw Janik coming off the front porch of a home. Officer Moroney said that Janik was "staggering down the stairs." Janik walked up to Moroney and said that he had been robbed and shot and that his girlfriend also had been shot. Moroney testified that Janik had a large amount of blood on his face and some blood on

his clothing. Moroney asked Janik “who did this to you” and also asked where Janik's girlfriend was. Janik said that the offenderwas a black male, approximately 30 to 35 years old, with a moustache, wearing a dark coat and a dark hat. When Moroney asked where the person went, Janik said that he ran off and pointed in a westerly direction, through an alley. Janik also said that his girlfriend had been shot and was in her vehicle, then pointed to the vehicle. At that point, Moroney called for two ambulances for Janik and for Rinaldi.” *Sutton*, 233 Ill. 2d at 116.

In determining whether the victim’s statement to Officer Moroney was testimonial, the Sutton court looked to *Davis v. Washington*, 547 U.S. 813, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006). In *Davis*, the Supreme Court considered two separate cases where, in one case the victim's statements were made to a 911 call operator and in the other case, the victim's handwritten statements in an affidavit were given to a police officer. The Court determined that:

"[s]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

Davis, 547 U.S. at 822, 126 S. Ct. at 2273-74.

Ultimately, the Davis court held that the victim's statements made to the 911 call operator were not testimonial because the "interrogation conducted in connection with a 911 call, is ordinarily not designed primarily to 'establis[h] or prov[e]' some past fact, but to describe current circumstances requiring police assistance." *Davis*, 547 U.S. at 827, 126 S. Ct. at 2276. In contrast, in the other case, the Davis court held that the victim's written statements in the battery affidavit that were given to a police officer were testimonial because "the interrogation was part of an investigation into possible criminal past conduct." *Davis*, 547 U.S. at 829, 126 S. Ct. at 2278. The Davis court further explained that viewed objectively, " the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime." *Davis*, 547 U.S. at 830, 126 S. Ct. at 2278.

After considering *Davis*, the *Sutton* court found that the victim's statement to Officer Moroney was not testimonial because the questioning was part of Officer Moroney's reasonable effort to assess what had happened and to determine if there was an ongoing danger. "Viewed objectively, the nature of what was asked and answered was such that the elicited statements were necessary to be able to resolve an ongoing emergency rather than to simply learn what had happened in the past." *Sutton*, 233 Ill. 2d at 116.

When he got into the ambulance, Officer Moroney initiated a

conversation with the victim. Moroney testified, “I asked him, can you please tell me again exactly what happened tonight.” Janik then gave Moroney a narrative of the events of the evening. When asked what he did with that information, Moroney said that when he returned to the crime scene, he gave the information to the investigator and returned to the station and did his report. Moroney did not dispatch the information obtained in the ambulance to other police agencies.” *Sutton*, 233 Ill. 2d at 118-119.

Again relying on *Davis*, the *Sutton* court found the victim’s statement to Officer Moroney in the ambulance to be testimonial because “ Officer Moroney's questions were not directed at addressing the ongoing emergency” because the crime scene had been secured. Moreover, Officer Moroney prefaced the conversation by asking the victim to tell him “again” what had happened. *Sutton*, 233 Ill. 2d at 119.

Here, Gustavo’s statement to the bystanders, and to Officer Garcia when he arrived on the scene, are analogous to the statement the victim made to Officer Moroney at the scene in *Sutton*. Maria and Gabrielle Vasquez and Shorty were present at the scene when Gustavo was shot. After he collapsed, they ran to him. He said, “Greg did it. I’m not going to make it. I can’t breathe.” Subsequently, when Officer Garcia arrived at the scene and asked Varela what happened, Varela repeated essentially the same thing, “Greg shot me.” At that instance, the nature of what was asked and answered was such that the elicited

> statements were necessary to be able to resolve an ongoing emergency rather than to simply learn what had happened in the past. *Sutton*, 233 Ill. 2d at 116. Consequently, we find that Gustavo's statements identifying the shooter were not testimonial and do not implicate *Crawford*. Hence, no error occurred and plain error analysis is improper." *People v. Castellano*, No. 1-08-1709 (June 29, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 20 In *Bryant*, 131 S. Ct. 1150, police arrived at the scene of a shooting and found the victim with a gunshot wound to the abdomen. When asked what happened, the victim responded that he had been shot 25 minutes earlier outside the defendant's home. Police spoke with the victim for 5 to 10 minutes until an ambulance arrived. The victim was in great pain and spoke with difficulty. He was transported to the hospital where he later died. *Bryant,* 131 S. Ct. at 1150.

¶ 21 In determining whether the victim's statements to the police were testimonial, the supreme court examined the "ongoing emergency" rule established by *Davis* (statements to police are nontestimonial when the primary purpose of the interrogation that produced them is to enable police to assist in an ongoing emergency.) *Bryant,* 131 S. Ct. at 1156 (quoting *Davis*, 547 U.S. at 822). The *Bryant* court considered the context of the interrogation and held that "the circumstances of the encounter as well as the statements and actions of [the victim] and the police objectively indicate that the 'primary purpose of the interrogation' was to enable police assistance to meet an ongoing emergency." *Bryant*, 131 S. Ct. at 1166-67 (quoting *Davis*, 547 U.S. at 822).

Accordingly, the statement at issue was not testimonial and its admission at trial did not violate the confrontation clause.

¶ 22 The facts of this case are analogous to those in *Bryant.* When Officer Garcia arrived on the scene and asked Varela what happened, Varela replied that "Greg shot me." As in *Bryant*, Varela was shot, in pain and having difficulty breathing. He was lying on the sidewalk across the street from where he was shot, awaiting the arrival of medical services. Similar to the court in *Bryant,* we conclude that the circumstances of the encounter with police, as well as the statements and actions of Varela and the police indicate that the " 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency. ' " *Bryant*, 131 S. Ct. at 1166-67 (quoting *Davis*, 547 U.S. at 822). Therefore, the victim's statement to police was not testimonial and its admission at trial did not violate the confrontation clause. As such, no error occurred and plain error analysis is improper.

¶ 23 CONCLUSION

¶ 24 Based on the foregoing, we affirm the judgment of the circuit court as to defendant's ineffective assistance of counsel claim.

¶ 25 We also affirm the judgment of the circuit court with respect to those issues disposed of in *People v. Castellano*, No. 1-08-1709, as filed June 29, 2010, for the reasons stated therein.

¶ 26 Affirmed.