

No. 1-09-0655

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FIFTH DIVISION
February 18, 2011

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. 01 CR 359
)	
VINCENT LEDESMA,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and Epstein concurred in the
judgment.

O R D E R

HELD: Second-stage dismissal of defendant's post-conviction petition affirmed where he failed to make a substantial showing of a violation of his right to effective assistance of counsel.

This case comes before us following a remand to the circuit court for second-stage proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2004)), where

the circuit court granted the State's motion to dismiss defendant Vincent Ledesma's petition and amended petition. In this appeal from that ruling, defendant contends that he made a substantial showing of ineffective assistance of trial and appellate counsel for failing to challenge the circuit court's imposition of consecutive sentences where the State presented no evidence that the victim suffered severe bodily injury.

The record of defendant's bench trial shows that he was convicted of two counts of aggravated battery with a firearm for firing a gun into the back of an automobile, striking two of its occupants, including the victim in question, Benigno Solis. At the sentencing hearing, the court found that section 5-8-4 of the Unified Code of Corrections (Code) (730 ILCS 5/5-8-4 (West 2000)) mandated consecutive sentences because defendant caused severe bodily injury to Solis, then sentenced him to consecutive terms of 18 and 6 years' imprisonment. This court affirmed that judgment on direct appeal, over defendant's contention that his sentence was excessive. *People v. Ledesma*, No. 1-02-1774, order at 8 (2004) (unpublished order under Supreme Court Rule 23).

Defendant then filed a *pro se* post-conviction petition alleging, *inter alia*, ineffective assistance of appellate counsel for failing to file a complete record on direct appeal, and that the imposition of consecutive sentences was improper because the circuit court did not expressly find severe bodily injury. The

circuit court summarily dismissed the petition after finding his claims patently without merit.

On appeal, this court remanded the petition for further proceedings under the Act, finding that defendant presented the gist of a claim of ineffective assistance of appellate counsel for counsel's failure to complete the record on appeal. *People v. Ledesma*, No. 1-05-0078, order at 5 (2007) (unpublished order under Supreme Court Rule 23). We also found consideration of defendant's consecutive sentencing claim premature because post-conviction counsel could amend, supplement, or withdraw the claim. *Ledesma*, No. 1-05-0078, order at 6.

On remand, the circuit court appointed post-conviction counsel, who supplemented defendant's petition with a claim of ineffective assistance of appellate counsel for failing to challenge the circuit court's imposition of consecutive sentences. Defendant claimed therein that the consecutive sentences were improper because the circuit court did not make an express finding, nor was there a sufficient showing, that the victim suffered severe bodily injury. Defendant maintained that the State only introduced general trial testimony concerning the injuries the victim received and that the mere fact that he was shot is insufficient to satisfy the statutory requirement that there be evidence of severe bodily injury. He further claimed that *res judicata* and waiver do not apply because he was denied

his right to effective assistance of appellate counsel; and, further, that an illegal sentence can be challenged at any time.

The State filed a motion to dismiss defendant's *pro se* and supplemental petitions asserting that defendant forfeited his claim of trial court error for failing to raise it on direct appeal. The State further asserted that defendant failed to show that appellate counsel was ineffective for failing to file the record for the appellate court to consider his challenge to the trial court's ruling on his pre-trial motion to suppress, and for failing to challenge the imposition of consecutive sentences where the record supported a finding of severe bodily injury.

After a hearing on March 13, 2009, the circuit court granted the State's motion to dismiss and defendant now appeals from that ruling. He contends that he made a substantial showing in his post-conviction petition that both trial and appellate counsel were ineffective for failing to challenge the consecutive sentences imposed by the court where the State presented no evidence that the victim's injury rose to the level of "severe bodily injury," the court made no explicit finding to that effect, and, consequently, that the circuit court's sentencing order was void.

To survive dismissal at the second stage of a post-conviction proceeding, defendant must make a substantial showing that his constitutional rights were violated. *People v. Harris*,

206 Ill. 2d 1, 13 (2002); *People v. Haynes*, 192 Ill. 2d 437, 465 (2000). To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). In determining whether to grant an evidentiary hearing, all well-pleaded facts in the petition and in any accompanying affidavits are taken as true. *Harris*, 206 Ill. 2d at 13. We review the dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

In this case, defendant asserted claims of ineffective assistance of trial and appellate counsel for failing to challenge the imposition of consecutive sentences on his conviction. When asserting a claim of ineffective assistance of counsel, defendant must allege facts showing that counsel's performance was objectively unreasonable and that it resulted in prejudice to him. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *People v. Enis*, 194 Ill. 2d 361, 376 (2000). To succeed on his claim, defendant must provide evidence to support both prongs of the *Strickland* test. *People v. Wilson*, 191 Ill. 2d 363, 370 (2000). The failure to satisfy either prong precludes a finding of ineffective assistance of counsel under *Strickland*. *Wilson*, 191 Ill. 2d at 370.

We initially observe that defendant raised a sentencing issue on direct appeal and seeks to avoid the implications of

waiver and *res judicata* by asserting that the consecutive sentences imposed by the court are void. We find this of no avail where it is clear that the circuit court had jurisdiction of the parties and the subject matter, as well as the authority to sentence defendant to consecutive terms. Thus, any error as to whether the victim's injuries were sufficient to satisfy the severe bodily injury requirement of the Code rendered the judgment voidable, not void, and therefore, not subject to collateral attack. *People v. Davis*, 156 Ill. 2d 149, 156 (1993); *People v. Kizer*, 318 Ill. App. 3d 238, 242 (2000).

We also observe that defendant may not avoid the implication of waiver by couching his sentencing claim in the context of ineffective assistance. *People v. Flores*, 153 Ill. 2d 264, 277 (1992). To prevail on a claim of ineffective assistance of appellate counsel, defendant must show that the failure to raise the issue on appeal was objectively unreasonable and that this decision prejudiced him. *People v. Jones*, 219 Ill. 2d 1, 23 (2006). Appellate counsel may refrain from developing nonmeritorious issues without violating *Strickland*, because a defendant suffers no prejudice unless the underlying issue is meritorious. *Jones*, 219 Ill. 2d at 23. We, thus, examine the merits of defendant's underlying claim to assess whether he was prejudiced by appellate counsel's failure to raise it on direct appeal. *Jones*, 219 Ill. 2d at 23.

Section 5-8-4 of the Code provides, in relevant part, that the circuit court "shall not impose consecutive sentences for offenses which were committed as part of a single course of conduct *** unless, one of the offenses for which defendant was convicted was a Class X or Class 1 felony and the defendant inflicted severe bodily injury." 730 ILCS 5/5-8-4(a) (West 2000). Bodily harm has been defined as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions." *People v. Mays*, 91 Ill. 2d 251, 256 (1982). Severe bodily injury, as in the Code, requires an injury of a more grave and serious character than simple bodily harm. *People v. Ruiz*, 312 Ill. App. 3d 49, 62 (2000). A gunshot wound, in and of itself, does not automatically qualify as a severe bodily injury. *People v. Gonzalez*, 351 Ill. App. 3d 192, 207 (2004).

The evidence adduced at trial showed that defendant fired a gun into the back window of a car, striking the victim in the head and injuring another occupant with shattered glass. The victim's head wound required three stitches, but the bullet did not penetrate the membrane of his brain. He was treated and released from the hospital, advised to get two weeks of bed rest and to take anti-seizure medication for six weeks. At the time of trial, the bullet in the victim's head had not been removed.

Defendant argues that these facts do not support a finding of severe bodily injury because only minimal medical treatment

was required and the victim did not testify that he suffered any significant pain or lasting effects from the wound. The length of a victim's stay in the hospital is not determinative of whether he suffered severe bodily injury; it is one of several factors to be considered. *Gonzalez*, 351 Ill. App. 3d at 208.

Although this court has found that injuries do not rise to the level of severe bodily where the victim sought no treatment at the hospital (*People v. Jones*, 323 Ill. App. 3d 451, 461 (2001); *People v. Durham*, 312 Ill. App. 3d 413, 420 (2000)), we have generally found injuries to be severe where there has been some level of medical treatment (*Gonzalez*, 351 Ill. App. 3d at 207; *People v. Knight*, 139 Ill. App. 3d 188, 196-97 (1985)). Here, the record shows that the victim was treated at the hospital and released with three stitches and a bullet lodged in his head. He was also confined to bed rest for two weeks and on medication for six weeks. We find that, similar to *Gonzalez*, 351 Ill. App. 3d at 207, these facts were sufficient for the trial court in its discretion to find severe bodily injury in order to support consecutive sentences.

Defendant also argues that the victim's post-shooting behavior demonstrates that he was not severely injured. The supreme court has been clear that a victim's post-shooting behavior is not indicative of the severity of the injury. *People v. Deleon*, 227 Ill. 2d 322, 334-35 (2008); *People v. Johnson*, 149

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Ill. 2d 118, 128-29 (1992). The record shows that the victim blacked out, spoke to police upon waking, and was then taken to the hospital. That he was able to speak to police does not minimize the severity of the injury - a gunshot wound to the head.

Based on our determination that the record supports the finding of severe bodily injury entered by the circuit court, defendant cannot demonstrate that he was prejudiced by appellate counsel's failure to challenge that finding on direct appeal. Accordingly, we conclude that defendant failed to make a substantial showing that his constitutional rights were violated and we affirm the dismissal of his post-conviction petition without an evidentiary hearing.

Affirmed.