2011 IL App (1st) 092494-U

FIRST DIVISION
December 12, 2011

No. 1-09-2494

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 92 CR 20236
JOHNNIE PLUMMER,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Jorge Luis Alonso,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 ***Held:*** (1) Defense counsel's failure to request a continuance to obtain a witness's mental health records was not ineffective assistance of counsel. (2) This court lacked jurisdiction to review the defendant's claim of ineffective assistance of appellate counsel.

¶ 2 Defendant Johnnie Plummer appeals from an order of the Circuit Court of Cook County

denying his petition for postconviction relief following an evidentiary hearing. On appeal, he contends that (1) he was denied the effective assistance of both defense counsel and appellate counsel by defense counsel's failure to request a continuance to obtain the mental health records of a witness, and appellate counsel's failure to raise the ineffectiveness of defense counsel on his direct appeal, and (2) he was entitled to an evidentiary hearing on his claim that appellate counsel was ineffective for failing to argue that the prosecutor's prejudicial remarks denied him a fair trial. We affirm the order of the circuit court.

¶ 3 On June 16, 1991, Perrijean East was a passenger in a car driven by Jeannette Pole. While sitting at a stoplight at 63rd and Halsted Streets, Ms. Pole heard a male voice coming from the direction of the right passenger side of the car, but she could not understand what was said. As she turned toward the window, Ms. Pole observed the right hand of a black male sticking through the car window, holding a gun pointed toward the inside of the car. As Ms. Pole attempted to close the passenger window and drive away, Mrs. East was shot in the head. Ms. Pole did not see the face of the shooter. Mrs. East died as a result of the shooting.

¶ 4 10 months later, defendant Plummer was arrested and charged with the murder and the attempted armed robbery of Mrs. East. At trial, the key pieces of evidence against defendant Plummer were his fingerprint and palm print on the outside of Ms. Pole's car, and the testimony of Erica Frazier.

¶ 5 Immediately after the shooting, a latent finger print and a palm print were obtained from the exterior passenger side of Ms. Pole's car. In order to establish that the prints were left by the shooter, the State presented testimony as to how often the car was washed, the weather

conditions prior to the shooting, and how frequently Mrs. Pole's car was in the area of the shooting.

¶ 6 On February 2, 1998, prior to the commencement of defendant Plummer's jury trial, defense counsel informed the trial court that there were outstanding subpoenas for some of Ms. Frazier's mental health records. In light of the State's motion *in limine* to bar any reference to Ms. Frazier's mental history, the trial court allowed the parties to question Ms. Frazier as to the nature and extent of her alleged treatment for mental illness. Ms. Frazier testified that she suffered from epilepsy and took phenobarbital and dilantin for seizures. In 1990, she began receiving social security because of her epilepsy. She was evaluated by a psychiatrist in connection with receiving social security.

¶ 7 Ms. Frazier further testified that in 1990, she attempted to commit suicide and was hospitalized for depression. She was not prescribed any medication when she was discharged from the hospital. She denied having any problems with her memory or suffering from hallucinations.

¶ 8 Based on Ms. Frazier's testimony, the trial court found that defense counsel had not demonstrated the relevancy of Ms. Frazier's mental health history. The court granted the motion *in limine* and barred defense counsel from introducing evidence of Ms. Frazier's mental history.

¶ 9 According to her trial testimony, Ms. Frazier was serving a three-year sentence for forgery. On the night of the shooting, Ms. Frazier overheard a conversation between defendant Plummer and another man in which defendant Plummer stated that he was hoping to get a gold chain by

robbing someone. Two days after the murder of Mrs. East, Ms. Frazier decided to tease defendant Plummer and told him it was her cousin whom he shot, whereupon defendant Plummer apologized to her. When she told him it was not her cousin, defendant Plummer appeared relieved. Subsequently, Ms. Frazier met Latoya Mills, Mrs. East's granddaughter. In April 1992, Ms. Frazier invited Ms. Mills to go shopping with her in the area of 63rd and Halsted Streets. Ms. Mills refused and told Ms. Frazier that her grandmother had been killed there. After questioning Ms. Mills as to the details surrounding her grandmother's death, Ms. Frazier told her that the shooter was the defendant. After speaking with Ms. Frazier, the police were able to match the prints found on Mrs. Pole's car. Defendant Plummer was arrested and charged with Mrs. East's murder.

¶ 10 The jury found defendant Plummer guilty of first degree murder and attempted armed robbery. In her motion for a new trial, defense counsel stated that, after the trial had concluded, she received records previously subpoenaed from the Social Security Administration. The records contradicted Ms. Frazier's statements regarding her mental health history and could have been used for impeachment purposes. In ruling on the motion for a new trial, the trial court stated that it had read the reports from social security. After considering the nature of the reports and Ms. Frazier's testimony, the trial court denied the motion for a new trial.

¶ 11 The trial court sentenced defendant Plummer to natural life imprisonment without the possibility of parole on the murder conviction and five years' imprisonment on the attempt armed robbery conviction. His convictions and sentences were affirmed on direct appeal. *People v. Plummer*, 318 Ill. App. 3d 268 (2000). Defendant Plummer filed a *pro se* petition for

postconviction relief. See 725 ILCS 5/122-1 *et seq.* (West 2000). The circuit court dismissed the petition as frivolous and patently without merit. Defendant Plumber appealed, and the reviewing court reversed the dismissal and remanded the case for further proceedings. *People v. Plummer*, 344 Ill. App. 3d 1016 (2003). The court found that the information contained in the social security records would have allowed defense counsel to cross-examine Ms. Frazier regarding her ability to perceive the events she testified to at trial. Therefore, defendant Plummer had stated the gist of a constitutional deprivation unrebutted by the record. *Plummer*, 344 Ill. App. 3d at 1024.

¶ 12 On remand, postconviction counsel filed a supplemental petition, raising a number of issues. The State filed a motion to dismiss. The circuit court granted the motion to dismiss all but the ineffective assistance of counsel claim for failing to seek a continuance to obtain the social security records. The testimony from the evidentiary hearing on that claim is summarized below.

¶ 13 On examination by postconviction counsel, Assistant Public Defender Jean Herigodt, defendant Plummer's defense counsel, testified that she located Ms. Frazier in a Wisconsin correctional facility and interviewed her there. In the interview, Ms. Frazier told APD Herigodt about her hospitalization in 1990 and that she had applied for social security benefits. Based on that information, APD Herigodt obtained an order for release of Ms. Frazier's mental health records and issued a subpoena for them.

¶ 14 On February 2, 1998, APD Herigodt informed the trial judge that she still did not have the social security records. The trial judge tendered a letter he had received from social security

to the prosecutor and APD Herigodt. The letter stated that Ms. Frazier's records were in storage and that it could take up to 60 days to retrieve them. According to social security's computer records, Ms. Frazier had received benefits for an affective disorder, but she no longer received benefits. According to APD Herigodt, an affective disorder was a mood disorder, and she already had that information from other records she had received. Based on her interview with Ms. Frazier, the mental health records she had received and the letter from social security, she decided to proceed to trial without the social security records.

¶ 15 APD Herigodt acknowledged that she had no formal training in psychiatry or psychology. She further acknowledged that persons suffering from depression could experience psychotic episodes, though it was rare. Ms. Frazier did not exhibit any signs of mental illness when APD Herigodt interviewed her. When APD Herigodt received the social security records, she believed them to be material and relevant because they impeached Ms. Frazier's *in camera* testimony that she did not experience hallucinations. While she could have asked for a continuance, she believed it would not have been granted.

¶ 16 On examination by the State, APD Herigodt testified that, had she believed the social security records would have been helpful, she would have asked for a continuance. However, based on her experience with the trial judge, she did not believe such a request would be granted. Based on the *in camera* examination of Ms. Frazier and the letter from social security, APD Herigodt believed that Ms. Frazier was being truthful. According to APD Herigodt, the "lynchpin" of the State's case was the fingerprint and palm print evidence. When she did receive the social security records, she included them in her motion for a new trial. The trial judge read

the records but denied the motion.

¶ 17 On examination by defendant Plummer, attorney Thomas Finnegan testified that he represented defendant Plummer on appeal. Attorney Finnegan was aware that there were medical records indicating Ms. Frazier had visual and audio hallucinations, but he did not raise them on appeal. He agreed with APD Herigodt that the key to the State's case was the fingerprint and palm print evidence. Whether or not Ms. Frazier suffered from hallucinations, she had correctly linked defendant Plummer to the murder through the fingerprint and palm print evidence. Attorney Finnegan opined that the fact that APD Herigodt tried the case without waiting to receive the outstanding social security records did not meet the criteria to establish ineffective assistance of counsel.

¶ 18 On examination by the State, attorney Finnegan testified that he raised three issues on appeal: reasonable doubt, introduction of other crimes by defendant Plummer, and the failure to allow defense counsel to inquire into Ms. Frazier's mental health history. In his opinion, the strongest issue was the introduction of the other crimes evidence and defendant Plummer's gang affiliation. Attorney Finnegan pointed out that in its opinion, the reviewing court found the admission of defendant Plummer's gang affiliation to be error though harmless. See *Plummer*, 318 Ill. App. 3d at 278.

¶ 19 In ruling on the petition, the circuit court acknowledged that APD Herigodt's decision not to seek continuance had to be reasonable but that the decision must be placed within the context of her performance during the entire trial. The court noted that she succeeded in having defendant Plummer's confession suppressed, obtained a recantation from a State's witness, found

a doctor at the last minute to rebut photographic evidence and made an effort to obtain expert testimony to rebut the fingerprint evidence.

¶ 20 The court further observed that APD Herigodt went to Wisconsin to interview Ms. Frazier. It was during that interview that she learned from Ms. Frazier that she had a history of mental illness. She found Ms. Frazier to be a credible witness because she volunteered her mental health information. APD Herigodt followed up the interview by serving subpoenas for the records. The records that she received confirmed that the mental health information was not going to be helpful.

¶ 21 The court also observed that defendant Plummer had been incarcerated since 1992, and his trial was set for February 1998. Based on the information from the social security computer, APD Herigodt made a tactical decision not to continue the case for another two months.

¶ 22 The circuit court found that APD Herigodt made reasonable efforts to uncover discoverable material and that she exercised reasonable judgment when she made the decision to proceed to trial without waiting for the social security records. The court concluded that defendant Plummer did not meet his burden of proof and denied the petition. This timely appeal followed.

¶ 23 ANALYSIS

¶ 24 I. Ineffective Assistance of Defense Counsel and Appellate Counsel

¶ 25 Defendant Plummer contends that he was denied the effective assistance of counsel by APD Herigodt's failure to seek a continuance in order to obtain Ms Frazier's social security records. He further contends that he was denied the effective assistance of appellate counsel

when counsel failed to raise APD Herigodt's ineffectiveness on appeal.

¶ 26 A. *Standard of Review*

¶ 27 When a postconviction petition has advanced to a third-stage evidentiary hearing, where fact-finding and credibility determinations are involved, the reviewing court will not reverse the circuit court's decision unless it is manifestly erroneous. *People v. Pendleton*. 223 Ill. 2d 458, 473 (2006). "Manifest error is error that is clearly evident, plain and indisputable." *People v. Marshall*, 375 Ill. App. 3d 670, 675 (2007). At the third stage of a postconviction proceeding, the defendant bears the burden of showing a constitutional violation. *Pendleton*, 223 Ill. 2d at 473.

¶ 28 B. *Discussion*

¶ 29 To determine if a defendant has been denied the effective assistance of counsel, the court applies the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that he suffered prejudice as a result of this deficiency. *People v. McCarter*, 385 Ill. App. 3d 919, 929 (2008). A defendant must satisfy both prongs of the *Strickland* test. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). "[If] the ineffective assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's performance was constitutionally deficient." *People v. Evans*, 186 Ill. 2d 83, 94 (1999). The *Strickland* test also applies to ineffective assistance of appellate counsel claims. *People v. Buchanan*, 403 Ill. App. 3d 600, 603 (2010).

¶ 30 To satisfy the prejudice prong of the *Strickland* test, the "defendant must show that 'the

probability that counsel's errors changed the outcome of the case is 'sufficient to undermine confidence in the outcome.' " *McCarter*, 385 Ill. App. 3d at 935 (quoting *Strickland*, 466 U.S. at 694). The defendant "need only demonstrate that ' "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ' " *McCarter*, 385 Ill. App. 3d at 935 (quoting *People v. Albanese*, 104 Ill. 2d 504, 525 (1984), quoting *Strickland*, 466 U.S. at 694). In order to determine the impact of counsel's errors, we consider the totality of the evidence before the fact finder. *McCarter*, 385 Ill. App. 3d at 936.

¶ 31 It is undisputed that the social security records contradicted Ms. Frazier's *in camera* testimony that she did not suffer from hallucinations. Defendant Plummer argues that as hallucinations can interfere with a person's perception of events, there was a reasonable probability that the jury would have determined that Ms. Frazier was not a credible witness and rejected her testimony that she overheard him planning to rob someone and that he acknowledged two days later to her that he had shot a person, later identified as Mrs. East. Defendant Plummer maintains that without Ms. Frazier's testimony, there was a reasonable probability that the outcome of his trial would have been different.

¶ 32 We disagree. Even if the jury had rejected Ms. Frazier's testimony regarding defendant Plummer because she experienced hallucinations, her testimony as to her discussion with Ms. Mills and the information she then gave to the police about defendant Plummer was corroborated by the evidence that the defendant's fingerprint and palm print were found on Mrs. Pole's car. Our supreme court has held that "a conviction may be sustained solely on the basis of fingerprint evidence, where a defendant's fingerprints have been found in the immediate vicinity

of the crime under such circumstances as to establish beyond a reasonable doubt that they were impressed at the time of the commission of the crime." *People v. McDonald*, 168 Ill. 2d 420, 445 (1995). Evidence of the particular location of the fingerprint can satisfy the time/placement criterion. *McDonald*, 168 Ill. 2d at 446. The attendant circumstances can also support an inference that the print was made at the time the offense was committed. *McDonald*, 168 Ill. 2d at 446.

¶ 33 The evidence at trial established that the fingerprint and palm print were left on Ms. Pole's car at the time of the attempted armed robbery and shooting of Mrs. East. An expert in fingerprint identification testified that the fingerprint and palm print were located on the exterior passenger side of Ms. Pole's car and that the prints matched those of defendant Plummer's left hand. *Plummer*, 318 Ill. App. 3d at 271. Ms. Pole routinely washed her car once a month. Although she parked her car on the street in1991, Ms. Pole had not been in the area of the shooting for at least a year. See *McDonald*, 168 Ill. App. 3d at 446 (State is not required to negate every conceivable possibility that the print was impressed at some time other than during the commission of the offense).

¶ 34 We conclude that APD Herigodt's failure to request a continuance in order to receive Ms. Frazier's social security records did not render the outcome of the trial unreliable or the proceedings fundamentally unfair. Therefore, defendant Plummer failed to establish his claim of ineffective assistance of counsel. Since ADP Herigodt was not ineffective for failing to request the continuance, appellate counsel was not ineffective for failing to raise the alleged error on appeal. *People v. Hayden*, 338 Ill. App. 3d 298, 311 (2003).

¶ 35 II. Ineffective Assistance of Appellate Counsel

¶ 36 Defendant Plummer contends that appellate counsel was ineffective when he failed to challenge the allegedly prejudicial statements made by the prosecutor in closing and rebuttal argument. He maintains that he presented a substantial violation of a constitutional right and is entitled to an evidentiary hearing on that claim. We do not reach the merits of this claim because we lack jurisdiction over the circuit court's order granting the State's motion to dismiss.

¶ 37 Illinois Supreme Court Rule 303(b)(2) requires that the notice of appeal "specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). On June 18, 2008, the circuit court dismissed all of defendant Plummer's postconviction claims, except for his claim of ineffective assistance of counsel based on the failure to request a continuance. On August 26, 2009, the court denied defendant Plummer postconviction relief. On September 2, 2009, defendant Plummer filed his notice of appeal. The notice specified the judgment appealed from as "[d]enial of postconviction relief" and the date of the judgment as "August 26, 2009."

¶ 38 "A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal." *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). The notice of appeal serves to inform the prevailing party that the other party seeks review of the circuit court's decision. The notice should be considered as a whole, and where it fairly and adequately sets forth the judgment complained of and the relief sought so as to advise the prevailing party of the nature of the appeal, the notice will be

deemed sufficient. *General Motors, Corp.*, 242 Ill. 2d at 176.

¶ 39 Defendant Plummer correctly notes that the notice of appeal is to be liberally construed, and a deficiency in the notice does not deprive the reviewing court of jurisdiction where the deficiency is to form rather than substance, and the appellee is not prejudiced. *People v. Smith*, 228 Ill. 2d 95, 105 (2008). Even under a liberal construction, the notice of appeal in this case did not fairly or adequately set forth that defendant Plummer was appealing from the June 18, 2008, order dismissing his ineffective assistance of appellate counsel claim. This was more than a defect in form. See *Smith*, 228 Ill. 2d at 105 (the notice not only failed to mention the February 21, 2006, order; it specifically mentioned a different judgment and only that judgment).

¶ 40 Nonetheless, an appeal will encompass an order not specified in the notice of appeal where the non-specified order was " but a 'step in the procedural progression leading to the judgment' " specified in the notice of appeal. *Burtell v. First Charter Service Corp.*, 76 Ill. 2d 427, 436 (1979). The fact that the unspecified order precedes the specified order is not enough; rather, the two orders must be sufficiently intertwined to make the preceding unspecified order a step in the procedural progression leading to the subsequent specified order. *McGrath v. Price*, 342 Ill. App. 3d 19, 34 (2003).

¶ 41 In *Edward E. Gillen Co. v. City of Lake Forest*, 221 Ill. App. 3d 5 (1991), the plaintiff argued on appeal that the trial court erred in dismissing his unjust enrichment claim and in granting judgment on the pleadings to the defendant on a damages claim. The notice of appeal did not specify the dismissal order. The reviewing court rejected plaintiff's argument that the dismissal of the unjust enrichment claim was a step in the procedural progression leading to the

order granting judgment on the pleadings, which was specified in the notice of appeal. Therefore, the reviewing court had no jurisdiction over the order dismissing the unjust enrichment claim. *Edward E. Gillen Co.*, 221 Ill. App. 3d at 11.

¶ 42 In this case, defendant Plummer claimed he was denied the effective assistance of defense counsel and appellate counsel based on the refusal to request a continuance and denied the effective assistance of his appellate counsel, based only on the failure to raise error as to prosecutor's allegedly prejudicial remarks. The claims were based on unrelated acts and were disposed of at different stages of the postconviction procedure. The advancement of defendant Plummer's claim of ineffective assistance based on the failure to request a continuance to a third-stage evidentiary hearing did not require the dismissal of the claim of ineffective assistance of appellate counsel based on the failure to raise the prosecutor's remarks. The June 18, 2008 dismissal order and the August 26, 2009 order denying the postconviction petition were not so intertwined as to make the dismissal of defendant Plummer's ineffective assistance of appellate counsel claim a step in the procedural progression leading to the denial of postconviction relief.

¶ 43 Defendant Plummer argues that the State failed to show that it was prejudiced by his failure to include the June 18, 2008, order in his notice of appeal. However, the question of prejudice to the prevailing party is pertinent only if there is jurisdiction. See *Burtell*, 76 Ill. 2d at 436. We also reject defendant Plummer's argument that the circuit court's remark that it had dismissed multiple filings and that all pending matters were dismissed, showed that the court treated his postconviction claims as consolidated. The court's remarks were made when, following the evidentiary hearing, the issue of defendant Plummer's filing of a separate section

2-1401 petition was raised. 735 ILCS 5/2-1401 (West 2008). Moreover, the court had entered the dismissal order more than a year before the evidentiary hearing, and it could not be considered pending.

¶ 44 We conclude that we have no jurisdiction to consider the dismissal of defendant Plummer's claim that he was denied the effective assistance of appellate counsel for failing to raise as error the prosecutor's remarks.

¶ 45 CONCLUSION

¶ 46 The order denying postconviction relief to defendant Plummer is affirmed.

¶ 47 Affirmed