2011 IL App (1st) 100514-U

SECOND DIVISION
September 20, 2011

No. 1-10-0514

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. 05 CR 11164
	)	
GILBERT SANABRIA,	)	Honorable
	)	Dennis J. Porter,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

O R D E R

¶ *1* *Held:* Defendant's *pro se* postconviction petition was erroneously dismissed at the second stage where it adequately asserted a constitutional claim of ineffective assistance of trial counsel at his trial on a burglary charge where his counsel refused his request to ask that the jury be instructed on the lesser uncharged offense of theft.

¶ 2 Defendant Gilbert Sanabria appeals from the second-stage dismissal of his petition for postconviction relief. He contends his *pro se* postconviction petition, alleging his trial counsel was ineffective in failing to tender a lesser-offense jury instruction at defendant's request, made a substantial showing of a constitutional violation so as to entitle him to an

evidentiary hearing. Defendant also challenges the trial court's order imposing fees and costs for filing a frivolous postconviction petition. We reverse the trial court's orders.

¶ 3 Defendant was charged in a one-count information with burglary and opted for a jury trial. The following evidence was adduced at trial.

¶ 4 At about 8:25 a.m. on April 10, 2005, George Lin was driving through the alley behind his residence on McLean Avenue in Chicago. When he was about two garages away from his own garage, he saw defendant walk past his car. Defendant was carrying a set of Lin's car speakers and a case containing Lin's car jack. Lin entered his garage and confirmed that the items he had seen defendant carrying were missing from the garage. Lin also observed that items he had stored on garage shelves had been lined up on the floor. The garage service door had been pried open. Lin had never seen defendant before that day and did not authorize him to enter Lin's garage.

¶ 5 After phoning the police, Lin drove around the neighborhood. About 15 minutes later, Lin observed defendant nearby and noted that defendant was then carrying only the car jack. Lin followed defendant and saw him stop at various stores where people would come up to him and examine the car jack. Lin observed defendant stop next to a vehicle at a parking lot, have a conversation with a man and a woman, and place the jack in the trunk of the vehicle. Lin flagged down Officer Willie Crawford. At Lin's direction, Crawford approached the vehicle, a Nissan Sentra, and spoke with the woman, Ruth Rodriguez, who owned the Sentra. Rodriguez consented to a search of the car trunk from which Crawford recovered the case containing a pneumatic car jack. Lin identified defendant and the car jack, and defendant was placed under arrest.

¶ 6 For the defense, Ruth Rodriguez testified that she met defendant for the first time shortly before his arrest. Rodriguez had been driving with her boyfriend who, upon seeing

defendant, his friend, asked her to stop her car. Rodriguez agreed that she would give defendant a ride after she took a load of clothes to the laundry, and "he said he was going to go and do something, grab a bite to eat or something. I don't remember." Defendant returned about 15 or 20 minutes later with a car jack case that he placed in her car trunk. A police detective testified on defendant's behalf that no suitable fingerprints were found in Lin's garage.

¶ 7 The jury instructions conference was not held on the record, but the trial court read into the record the results of that conference. Only one jury instruction proffered by the defense was to be given, an instruction that the jury was not to hold against defendant the fact that he did not testify. Upon the court's inquiry, defense counsel stated in defendant's presence that there were no other instructions the defense wished the court to consider.

¶ 8 In closing argument, defense counsel argued, *inter alia*, that there was no conclusive evidence the car jack was Lin's jack, or defendant may have purchased the jack from the actual burglar. "And, yeah, it might have been hot, and Mr. Sanabria might be theoretically guilty of possession of stolen property, but that doesn't make him guilty of burglary." The jury returned a verdict finding defendant guilty of burglary.

¶ 9 At the sentencing hearing, defendant attempted to submit to the court a *pro se* written posttrial motion. The court refused to allow him to file the motion because his trial counsel had already tendered a written motion. This led to a discussion concerning matters about which an accused must defer to his counsel, as opposed to matters in which defendant has the final say. The court enumerated the five matters in the latter category, including whether to tender lesser-included instruction. This in turn led to the following exchange:

> "THE DEFENDANT: I brought it to my lawyer's attention I wanted to inform the court of a lesser included offense and he didn't think it was a good idea.

THE COURT: Well, I asked you about that, didn't I?

THE DEFENDANT: I am just telling you what my lawyer told me.

THE COURT: He might have been right. Might have been right. In retrospect, hindsight is 20/20."

¶ 10 The court sentenced defendant as a Class X offender to 24 years in prison for burglary. On direct appeal, in which the only issue raised was excessiveness of sentence, we affirmed the judgment of the trial court. *People v. Sanabria*, No. 1-06-0494 (2007) (unpublished order under Supreme Court Rule 23).

¶ 11 Subsequently, petitioner filed a *pro se* petition for postconviction relief, containing allegations of ineffectiveness of his counsel at trial and on direct appeal. Among defendant's claims was that his trial counsel "failed to tender a jury instruction on the lesser-included offense of theft in this burglary charge." The petition alleged that defendant informed his trial counsel "that I wanted the jury instructed on the lesser included offense of theft. He responded, 'I DON'T THINK THAT'S A GOOD IDEA. WHY GIVE THE JURY SOMETHING TO GRASP ON TO [*sic*]?' I stood on my request." The petition alleged that neither the trial court nor defendant's trial attorney informed him "that the decision to tender a lesser included offense [instruction] is ultimately up to the defendant." Attached to the petition were pages from the trial transcript, including the portion of the sentencing hearing when defendant stated he had told his trial attorney he wanted a lesser-included offense to be considered.

¶ 12 The petition further alleged that the evidence defendant had actually entered the garage was circumstantial and the State's evidence proved, at most, that defendant had committed the lesser offense of theft; and that, if the jurors had been instructed on the lesser

included offense, they would have had a third option and the outcome of his trial may have been different.

¶ 13 The court appointed counsel to represent defendant in the postconviction proceedings. Appointed counsel filed a certificate pursuant to Supreme Court Rule 651© (eff. Dec. 1, 1984). The State filed a motion to dismiss the postconviction petition. Counsel's response to the State's motion argued in pertinent part that "[t]rial counsel failed to inform Petitioner that the decision to request the lesser-offense instruction was solely Petitioner's to make and proceeded with the 'all-or-nothing' approach, to no avail. *** [H]ad he been informed by his counsel that the decision to request the lesser offense instruction was solely his to make he would've had the jury instructed. Only at sentencing, too late then, was Petitioner informed by the court what decisions were his to make." Subsequently, petitioner filed a *pro se* amended postconviction petition. When the cause came before the court on the State's motion to dismiss, neither party presented argument on the ineffective counsel issue with respect to a lesser-included offense instruction. The court granted the State's motion to dismiss. The court's written order stated that the issues raised by defendant were frivolous and patently without merit. The court also entered a separate order assessing defendant $105 (a $90 fee for filing the postconviction petition and $15 for mailing costs) under section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2008)), for filing a frivolous lawsuit.

¶ 14 On appeal from those orders, defendant contends he made a substantial showing of a violation of his constitutional right to effective assistance of trial and appellate counsel in contending that his trial counsel failed to follow his directive to tender a lesser-included offense instruction.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a remedy for defendants who have suffered a substantial violation of their constitutional

rights at trial. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires both deficient performance by counsel and prejudice to the defendant from the deficient performance. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *People v. Colon*, 225 Ill. 2d 125, 135 (2007). A defendant's trial attorney is ineffective for violating the defendant's right to decide ultimately whether to tender a lesser-included offense instruction. *People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010). Under the second prong, the defendant must show that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135. A postconviction petition will be dismissed at the second stage where its allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Marshall*, 381 Ill. App. 3d 724, 730 (2008). When a petition does make a substantial showing of a violation of constitutional rights, an evidentiary hearing is required. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). The second-stage dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶ 16 Before resolving the issue of whether counsel was ineffective in not tendering the requested instruction, we must first determine whether defendant was entitled to such an instruction under the facts and circumstances of this case. We conclude that he was.

¶ 17 Generally, a defendant may not be convicted of an offense with which he has not been charged. *People v. Hamilton*, 179 Ill. 2d 319, 323 (1997). However, a defendant may be convicted of an uncharged offense (1) if it is a lesser-included offense of a crime expressly charged in the charging instrument, and (2) the evidence adduced at trial rationally supports a

conviction on the lesser-included offense and an acquittal on the greater offense. *People v. Kolton*, 219 Ill. 2d 353, 360 (2006), citing *People v. Novak*, 163 Ill. 2d 93, 108 (1994).

¶ 18 We utilize the charging instrument approach as the appropriate method to determine the first step, *i.e.*, whether the lesser offense of theft is included in the charged offense of burglary for purposes of jury instructions. *Kolton*, 219 Ill. 2d at 361. We look initially to the relevant statutory definition of the uncharged crime. *Id*. at 368-69. Here, the uncharged crime is theft. A person commits theft when he knowingly obtains or exerts unauthorized control over property of the owner and intends to deprive the owner permanently of the use or benefit of the property. 720 ILCS 5/16-1(a) (West 2006).

¶ 19 We then look to the charged offense in the charging instrument to determine whether the facts alleged there contain a broad foundation or main outline of the uncharged offense. The sole count of the felony information alleged in pertinent part that defendant committed the offense of burglary "in that he, without authority, knowingly entered into a building, the garage of George Lin located at 2334 West McLean Avenue, Chicago, Cook County, Illinois, with the intent to commit the offense of theft, therein ***." By alleging in the indictment that defendant entered the Lin garage with the intent to commit a theft, the information necessarily inferred that defendant intended to obtain unauthorized control over and deprive another of property. Here, the intent can be inferred through showing an actual taking of property. Where the information expressly charged the specific intent to commit theft, this has been held sufficient to satisfy the first step of the charging instrument approach. *Hamilton*, 179 Ill. 2d at 325. Although the burglary information did not mention all of the statutory elements of theft--notably, the element of obtaining or exerting unauthorized control over property--the supreme court has ruled that, "to warrant instructions on a lesser offense under the charging

instrument approach, it is not necessary for the charging instrument to expressly allege all the elements of the lesser offense." *Hamilton*, 179 Ill. 2d at 325.

¶ 20 The second step in our analysis is to examine the evidence adduced at trial and decide whether that evidence would permit a jury to rationally find the defendant guilty of the lesser offense yet acquit him of the greater offense. *Hamilton*, 179 Ill. 2d at 324. Here, defendant was charged with entering the garage of George Lin with intent to commit a theft therein. There was ample evidence of the theft. Lin saw defendant just two garages down from his own garage and defendant was carrying the victim's property--two car speakers and a car jack. A short time later, Lin again observed defendant, who apparently was attempting to sell the car jack to various individuals on the street. After Lin saw defendant place the jack in a car trunk, he summoned police who retrieved the car jack from the trunk. This was direct evidence of the theft of Lin's property. There was also direct evidence that Lin's garage had been burglarized. The service door had been jimmied, the speakers and jack defendant had been seen carrying away were missing, and other items had been removed from their shelves and lined up on the garage floor. However, there was no direct evidence that defendant had been the person who entered the garage, removed the speakers and car jack, and lined up the other items of property. Defendant's fingerprints were not found in the garage. This evidence would have permitted a jury to rationally find the defendant guilty of the lesser offense (theft) yet acquit him of the greater offense (burglary). We conclude that defendant would have been entitled to an instruction on the lesser crime of theft. See *People v. Medina*, 221 Ill. 2d 394, 405 (2006).

¶ 21 We must now determine whether defendant's trial counsel was ineffective in failing to tender the requested theft instruction. A defendant who is entitled to the option of tendering a lesser included offense instruction is faced with an important decision. Where a lesser included instruction is tendered, the defendant is exposing himself to potential criminal

liability for that offense; if the instruction is not given, the defendant might be passing up an important third option to the jury. *Medina*, 221 Ill. 2d at 405-06. A defendant requires counsel to assist him to make an intelligent and informed decision in that regard, and the decision "is unavoidably intertwined with[] strategic trial calculations, matters within the sphere of counsel." *Id*. at 406.

¶ 22 Nevertheless, the defendant, not his counsel, has the ultimate responsibility for making the decision to tender an instruction on a lesser included offense. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). In *Brocksmith*, where defense counsel, rather than the defendant, made the decision to tender a lesser included offense instruction, the supreme court held that the error required reversal of defendant's conviction. *Id*. at 229-230. Implicit in the court's ruling was that the violation of defendant's right to decide whether to tender such an instruction can support a claim that defendant's counsel was ineffective. *DuPree*, 397 Ill. App. 3d at 734.

¶ 23 In the instant case, the State argues that defendant's postconviction petition contended only that his trial counsel failed to heed his request for a lesser-included instruction on theft but did not contend that defendant demanded the instruction over his counsel's advice. The State contends that "[b]ecause the trial record is silent about whether defendant exerted ultimate decision-making control, the lack of tendered instruction reflects his decision after due consultation with trial counsel." We acknowledge our supreme court's ruling in *Medina* that "where *** no lesser-included offense instruction is tendered, *** it may be assumed that the decision not to tender was defendant's, after due consultation with counsel." *Medina*, 221 Ill. 2d at 409-10. We also acknowledge that an accused typically speaks and acts through his attorney (*People v. Frey*, 103 Ill. 2d 327, 332 (1984)) and we note that defendant was present in open court when his trial counsel advised the court that the defense had no additional instructions to offer.

¶ 24 However, the record is not silent and contradicts the State's contention that defendant's claim "is manufactured in retrospect." The transcript of the sentencing hearing shows that defendant advised the trial court he told his counsel he wanted a lesser-included offense to be considered but that his counsel told him it was a "bad idea." Both the trial transcript and the postconviction petition demonstrate that defendant strongly wanted that instruction tendered. In his postconviction petition, defendant stated that, after his counsel advised him a theft instruction would be a "bad idea," "I stood on my request." The petition alleged defendant had not been informed that the right to make the ultimate decision was exclusively his, and that allegation was repeated in defendant's response to the State's motion to suppress. The response further stated: "[H]ad he been informed by his counsel that the decision to request the lesser offense instruction was solely his to make he would've had the jury instructed. Only at sentencing *** was Petitioner informed by the court what decisions were his to make." Liberally construing the facts alleged in defendant's petition, we believe his claim is not merely that his counsel was ineffective in failing to tender a lesser-offense instruction, but that, in refusing to tender such an instruction, trial counsel defied defendant's expressed direction on a matter for which only defendant could make the final decision. Contrary to the typical instance, noted in *Medina,* when no lesser-included offense instruction is tendered, it cannot be assumed in the instant case that the decision not to tender the instruction was defendant's.

¶ 25 Although a defendant is not entitled to an evidentiary hearing as a matter of right, the dismissal of a postconviction petition is warranted only when its allegations of fact--liberally construed in favor of the petitioner and in light of the original trial record--fail to make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381. We believe such a showing has been made here. Defendant's allegations in his postconviction petition and supporting documentation sufficiently alleged facts that, if proved, would show that

his trial counsel's performance was deficient where counsel violated defendant's right to decide personally whether to tender a lesser-included offense instruction. Moreover, defendant established prejudice by showing a reasonable probability that, if a theft instruction had been given, the jury would have convicted defendant of theft and not burglary. As we noted above, defendant was entitled to the theft instruction where there was no direct evidence that he actually entered the garage. We conclude that defendant has made a sufficient showing of the denial of his constitutional right to effective assistance of counsel so as to require a third-stage evidentiary hearing on whether his trial counsel infringed on his choice of having the jury instructed on theft.

¶ 26 Defendant also challenges the imposition a $105 assessment under section 22-105 of the Code of Civil Procedure (735 ILCS 5/22-105 (West 2008)), which allows for such assessment of filing fees and court costs against prisoners who file frivolous pleadings. As defendant's petition made a substantial showing of a constitutional violation, it was error to have characterized his *pro se* petition as frivolous and patently without merit. Consequently, under our authority pursuant to Illinois Supreme Court Rule 615(b) (eff. Aug. 27, 1999), we reverse the trial court's order imposing the $105 assessment pursuant to section 22-105.

¶ 27 For the reasons set forth above, we reverse the trial court orders (1) dismissing defendant's *pro se* postconviction petition and (2) imposing a section 22-105 assessment of $105, and remand with directions that the trial court hold an evidentiary hearing on defendant's claim of ineffective assistance of counsel.

¶ 28 Reversed and remanded.