2014 IL App (1st) 112082-U

No. 1-11-2082

SIXTH DIVISION
February 28, 2014

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 17654
	)	
GEORGE CABOT,	)	The Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

O R D E R

¶1 *HELD*: Defendant's post-conviction petition was properly dismissed where he failed to state a sufficient claim for ineffective assistance of trial and appellate counsel. There was no arguable legal basis to support the ineffective assistance claims where the admission of an autopsy report and the testimony of a substitute medical examiner did not violate his confrontation clause rights.

¶2 Defendant, George Cabot, appeals the first-stage summary dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West

2010)). Defendant contends the trial court erred in summarily dismissing his petition where he stated arguable claims of ineffective assistance of his trial and appellate attorneys for failing to challenge the admission of an autopsy report and testimony by a substitute medical examiner as inadmissible hearsay and violations of the confrontation clause. Based on the following, we affirm.

¶3 FACTS

¶4 This case appears before us a second time. On direct appeal, this court affirmed defendant's convictions for first degree murder, attempted first degree murder, and aggravated battery. *People v. Cabot*, No. 1-07-1170 (2009) (unpublished order under Supreme Court Rule 23). We, however, instructed the trial court to modify defendant's sentence so that the attempted murder and aggravated battery sentences ran concurrently, ultimately resulting in an aggregate sentence of 55 years' imprisonment. *Id*. Defendant later filed a *pro se* post-conviction petition, presenting 10 claims for relief. The trial court summarily dismissed the petition in a 33-page written order.

¶5 We recite only those facts necessary for the disposition of this appeal.

> "On July 8, 2005, Ricky Raya and Victor Chavez left Raya's house and walked to Chavez's parked car near the intersection of Barry Avenue and Spaulding Avenue in Chicago, Illinois. Chavez assisted Raya, who is paralyzed from the waist down, into the car. Adrian[1] and Sergio Hernandez then exited Raya's house, accidentally allowing Raya's pit bull to escape. Raya remained in Chavez's car while Chavez, Adrian, and Hernandez looked for the dog. Chavez

[1]The individual's surname does not appear in the record.

and Adrian left the immediate area. Hernandez stood in the middle of the street in front of Chavez's car.

While Chavez was searching for the dog, defendant and codefendant Jeffery Gerhardt approached him, attempting to learn Chavez's gang affiliation. Chavez replied that he was simply looking for a dog and the men pointed him in a specified direction.

Defendant and codefendant then approached Hernandez and asked what gang he belonged to. Defendant shot Hernandez three to four times. The men identified themselves as Latin Kings and shot Hernandez again. Hernandez was fatally wounded. Defendant and codefendant then walked to Chavez's car and opened the doors. Defendant shot his handgun at Raya several times, but the gun did not fire. Defendant repeatedly struck Raya in the head and face with the handgun while codefendant attempted to pull Raya from the car. Raya managed to grab the steering wheel and press the car horn, causing defendant and codefendant to flee.

Chavez and Raya identified defendant and codefendant as the perpetrators of the offenses." *Id*., slip op. at 2-3.

¶6 Dr. Scott Denton, pathologist and interim chief medical examiner, testified regarding the results of the autopsy performed on Hernandez. Dr. Denton did not perform the autopsy; rather, Dr. Aldo Fusaro conducted the autopsy, but he was no longer employed with the Cook County Medical Examiner's office. After reviewing Fusaro's autopsy report, Denton testified that Hernandez died of a gunshot wound to the head. The wound was located two inches beneath the top of the head and one-half inch left of the midline. Denton further testified that there was an

abrasion rim around the wound showing that the bullet scraped Hernandez's skin, but there was no evidence of close-range firing. Using a diagram of the human body, Denton demonstrated that the fatal bullet entered the back of Hernandez's head. Denton identified a photograph of Hernandez's face showing a small tearing of the skin on the forehead where the bullet rested and red or purple discoloration around his eyes due to fractures from the bullet. The autopsy report was entered into evidence. Each page of the three page report contained a stamp indicating it was a certified copy.

¶7 DECISION

¶8 Defendant contends the trial court erred in summarily dismissing his post-conviction petition as frivolous and patently without merit where he presented arguable claims for ineffective assistance of both trial and appellate counsel. Defendant argues his petition presented a sufficient claim of ineffective assistance of trial counsel for failing to object to the admission of the autopsy report as a violation of the confrontation clause because the report did not fall within a hearsay exception and it was testimonial. Defendant additionally argues his petition presented a sufficient claim of ineffective assistance of trial counsel for failing to object to the testimony of the substitute medical examiner as a violation of his confrontation clause rights. Defendant further argues his petition presented a sufficient claim of ineffective assistance of appellate counsel for failing to raise a claim of ineffective assistance of trial counsel on appeal.

¶9 The Act provides a method by which individuals serving criminal sentences can assert that their convictions were the result of a substantial denial of their constitutional rights. 725 ILCS 5/122-1 *et seq*. (West 2010). To survive first stage summary dismissal, a *pro se* petition seeking post-conviction relief under the Act must not be frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Pursuant to section 122-2.1(a)(2) of the Act, a

petition is frivolous or patently without merit only if the petition has no arguable basis either in law or fact. *Id.* "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful allegation." *Id.* We review the dismissal of a post-conviction petition *de novo*. *Id.* at 9.

¶10 In his *pro se* post-conviction petition, defendant alleged his trial and appellate attorneys were ineffective. To present a successful claim of ineffective assistance of trial counsel, a defendant must allege facts demonstrating that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine one's confidence in the outcome of the trial, *i.e.*, that the defense counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* at 694. A defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984). If a defendant cannot demonstrate sufficient prejudice, a court need not decide whether counsel's performance was deficient. *People v. Evans*, 186 Ill. 2d 83, 94 (1999).

¶11 Defendant's claims for ineffective assistance hinge on his contentions that trial counsel failed to object to the admission of Hernandez's autopsy report and the substitute medical examiner's testimony in violation of his confrontation clause rights. The sixth amendment of the United States Constitution, applicable to the states via the fourteenth amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." U.S. Const., amends. VI, XIV; see also Ill. Const. 1970, art. I, § 8. In *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004), the United States Supreme Court held that

testimonial hearsay statements made by a witness who is unavailable at trial may not be admitted unless the defendant had a prior opportunity for cross-examination. Our supreme court recently advised that *Crawford* claims require the resolution of four questions:

> "(1)Was the out-of-court statement hearsay because it was offered by [*sic*] for the truth of the matters asserted therein? (2) If hearsay, was the statement admissible under an exception to the hearsay rule? (3) If admissible hearsay, was the statement testimonial in nature? and (4) If testimonial, was admission of the statement reversible error." *People v. Leach*, 2012 IL 111534, ¶ 63.

Whether a defendant's confrontation clause rights were violated is a question of law that we review *de novo*. *Id*. at ¶ 64.

¶12 I. Admission of Autopsy Report as Hearsay Exception

¶13 In denying defendant's post-conviction claim, the trial court found the autopsy report was not hearsay because it was admitted as a basis for Denton's opinion and not for the truth of the matter asserted. Defendant disagrees where the autopsy report was admitted to the jury without a limiting instruction and the State referenced "two medical opinions," *i.e.*, the examiner, Fusaro, and the substitute examiner, Denton, in closing statements. We are reminded that our review is *de novo* (*id*.) and will consider whether the autopsy report was inadmissible hearsay.

¶14 Defendant acknowledges that the supreme court recently considered the "same issues regarding the admission of an autopsy report and substitute medical examiner's testimony" in *Leach*. Defendant, however, asserts that the supreme court erred in holding that an autopsy report is admissible under a hearsay exception. Defendant maintains that it was improper for the supreme court in *Leach* to rely on the business records exception codified by Illinois Rule of Evidence 803(6) and the public agency exception codified by Illinois Rule of Evidence 803(8)

because those rules post-dated defendant's trial. Defendant further argues that the supreme court erred in relying on section 115-5.1 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-5.1 (West 2004)) because that hearsay exception contains nearly identical language to a business records exception that was found unconstitutional in *People v. McClanahan*, 191 Ill. 2d 127 (2000). Defendant finally argues that the autopsy report is inadmissible as a business records exception to the hearsay rule pursuant to section 115-5(c) of the Code (725 ILCS 5/115-5(c) (West 2004)).

¶15 To the extent the autopsy report was hearsay, we conclude it was admissible pursuant to the statutory hearsay exception codified in section 155-5.1 of the Code. Section 155-5.1 provides:

> "In any civil or criminal action the records of the coroner's medical or laboratory examiner in summarizing and detailing the performance of his or her official duties in performing medical examinations upon deceased persons or autopsies, or both, and kept in the ordinary course of business of the coroner's office, duly certified by the county coroner or chief supervisory coroner's pathologist or medical examiner, shall be received as competent evidence in any court of this State, to the extent permitted by this Section. These reports, specifically including but not limited to the pathologist's protocol, autopsy reports and toxicological reports, shall be public documents and thereby may be admissible as prima facie evidence of the facts, findings, opinions, diagnoses and conditions stated therein.
>
> A duly certified coroner's protocol or autopsy report, or both, complying with the requirements of this Section may be duly admitted into evidence as an

> exception to the hearsay rule as prima facie proof of the cause of death of the person to whom it relates. ***.
>
> Persons who prepare reports or records offered in evidence hereunder may be subpoenaed as witnesses in civil or criminal cases upon the request of either party to the cause. However, if such person is dead, the county coroner or duly authorized official of the coroner's office may testify to the fact that the examining pathologist, toxicologist or other medical or laboratory examiner is deceased and that the offered report or record was prepared by such deceased person. The witness must further attest that the medical report or record was prepared in the ordinary and usual course of the deceased person's duty or employment in conformity with the provisions of this Section." 725 ILCS 5/115-5.1 (West 2004).

There is no dispute that the autopsy report in this case satisfied the requirements of the statute.

¶16 Nevertheless, defendant cites to *McClanahan* where section 155-15 was found unconstitutional and avers that section 155-5.1 of the Code similarly should be deemed unconstitutional because it mimics section 155-15. *McClanahan*, 191 Ill. 2d at 140. Initially, we note that statutes are presumed constitutional, and this court has a duty to construe a statute in a manner that upholds its validity if reasonably possible. *People v. Sharpe*, 216 Ill. 2d 481, 487. The party challenging the statute has the burden of clearly establishing that it is unconstitutional. *Id*. Moreover, *McClanahan* was decided in 2000. Since that time, the legislature has not amended section 155-5.1 of the Code. Rather, in *People v. Moore*, 378 Ill. App. 3d 41 (2007), this court affirmed the application of section 155-5.1, such that:

> "a plain reading of the statute governing the admissibility of the medical examiner's report as evidence leads us to conclude that an autopsy report should be treated as a business record. In addition, Illinois courts have held that autopsy reports are public records and business records. [Citations.] Consequently, the autopsy report in the instant case did not implicate *Crawford* and defendant was not denied his sixth Amendment right to confrontation." *Id*. at 50-51.

In addition, although defendant argues the supreme court erred in finding that an autopsy report qualified as a hearsay exception pursuant to section 115-5.1, we are bound by the decisions made by our supreme court. *People v. Fish*, 381 Ill. App. 3d 911, 917 (2008). Furthermore, *McClanahan* is distinguishable from the case at bar.

¶17 In *McClanahan*, the supreme court determined that section 115-15 was unconstitutional because it impermissibly required "a defendant to take a procedural step to secure his confrontation rights or be deemed to have waived them, and [did] not require that the waiver of this fundamental constitutional right be a knowing, intelligent, and voluntary act." *McClanahan*, 191 Ill. 2d at 140. Section 115-15 provided that the State could use laboratory reports in lieu of actual testimony as *prima facie* evidence of the contents of the substance at issue. The statute, however, barred the State from using the reports as *prima facie* evidence if the defendant filed, within 7 days, a demand for testimony from the individual who prepared the report. 725 ILCS 5/115-15(c) (West 1998). The *McClanahan* court found section 115-15 was unconstitutional because the laboratory-report evidence did not fall within a firmly rooted hearsay exception. In relevant part, the supreme court held that the lab report was not within the business records hearsay exception where it was prepared during the course of a criminal investigation and was

requested by the State in anticipation of prosecution. *McClanahan*, 191 Ill. 2d at 133; 725 ILCS 5/115-5(c) (West 1998); see *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

¶18 Here, in contrast, the autopsy report squarely falls within the business records exception. *Moore*, 378 Ill. App. 3d at 50-51. We disagree with defendant's assertion that the report falls within the exception to the business records hearsay exception because it was made during the regular course of "any form of hospital or medical business" and by "anyone during an investigation of an alleged offense or during any investigation relating to pending or anticipated litigation of any kind." 725 ILCS 5/11-5(c) (West 2008). There is nothing to suggest that the performance of an autopsy by a medical examiner qualifies as "medical business" within the meaning of the statute where the medical examiner is not the decedent's doctor. In addition, an autopsy is performed under the law (55 ILCS 5/3-3013 (West 2008)) and not in investigation of an alleged offense or during an investigation. Moreover, unlike section 115-15, section 115-5.1 does not impose a time-sensitive procedural step upon a defendant in order to secure his confrontation rights or risk waiver of that fundamental constitutional right. We, therefore, conclude defendant failed to sustain his burden of demonstrating section 115-5.1 violates the constitution. Because we have found the autopsy report was admissible pursuant to section 155-5.1 of the Code, we need not consider whether it was proper for the supreme court to rely on sections 803(6) and 803(8) of the Illinois Rules of Evidence as bases for admitting the report in *Leach*.

¶19 In sum, defendant cannot establish his trial counsel was ineffective for failing to object to the admission of the autopsy report. Defendant additionally cannot establish his appellate counsel was ineffective for a failing to raise an ineffective assistance of trial counsel claim on

appeal. Accordingly, defendant's post-conviction petition claim related to the admission of the autopsy report had no arguable basis in law and was properly dismissed.

¶20 II. Autopsy Report as Testimonial Hearsay

¶21 The next question in the *Crawford* analysis is whether the admissible hearsay was testimonial in nature. Defendant contends that his post-conviction petition stated an arguable claim of ineffective assistance of counsel for failing to object to the admission of the autopsy report because the report was testimonial and violated his confrontation clause rights. Defendant further contends that Denton's testimony as a substitute medical examiner violated his confrontation clause rights.

¶22 In *Leach*, our supreme court thoroughly reviewed *Crawford* and its progeny, including *Davis v. Washington*, 547 U.S. 813 (2006), *Melendez-Diaz, Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), and *Williams v. Illinois*, 132 S. Ct. 2221 (2012), before concluding that, no matter which definition of primary purpose is applied, the autopsy report was not testimonial because: (1) it was not prepared for the primary purpose of accusing a targeted individual; and (2) it was not prepared for the primary purpose of providing evidence in a criminal case. *Leach*, 2012 IL 111534, at ¶ 122. The supreme court added that:

> "while we are not prepared to say that the report of an autopsy conducted by the medical examiner's office can never be testimonial in nature, we conclude that under the objective test set out by the plurality in *Williams*, under the test adopted in *Davis*, and under Justice Thomas's 'formality and solemnity' rule, autopsy reports prepared by a medical examiner's office in the normal course of its duties are nontestimonial. Further, an autopsy report prepared in the normal course of business of a medical examiner's office is not rendered testimonial

> merely because the assistant medical examiner performing the autopsy is aware that police suspect homicide and that a specific individual might be responsible." *Id*. at ¶ 136.

¶23 Applying the *Leach* holding, we conclude the autopsy report was not testimonial and its admission did not implicate defendant's confrontation clause rights. The instant autopsy report was not prepared for the primary purpose of accusing defendant of a crime or for the primary purpose of providing evidence at trial. *Cf. Melendez-Diaz*, 557 U.S. at 311. The purpose of the autopsy was to determine how Hernandez died, not who was responsible for his death. Nothing in the autopsy report identified defendant as responsible for Hernandez's death. It is only when the autopsy report is viewed in light of the remaining trial evidence that a connection is established between defendant and Hernandez's death. In addition, the autopsy did not become testimonial simply because, as defendant stated, it was obvious Hernandez's death was a homicide.

¶24 Moreover, we conclude the trial court did not err in permitting Denton to testify regarding Fusaro's findings from the performance of the autopsy. In *Leach*, the supreme court advised, "if the report was properly admitted, the expert witness's testimony cannot have violated the confrontation clause even if it had the effect of offering the report for the truth of the matters asserted therein." *Leach*, 2012 IL 111534, ¶ 57. Because the admission of the autopsy was proper, Denton's testimony did not violate defendant's confrontation clause rights.

¶25 In light of finding the autopsy report was not testimonial and the admission of Denton's testimony was not in error, defendant cannot establish an ineffective assistance of counsel claim based on his trial counsel's failure to object on those bases. Defendant similarly cannot establish an ineffective assistance claim for appellate counsel's failure to raise an ineffective assistance of

trial counsel claim. We, therefore, conclude that defendant failed to present an arguable legal claim in his post-conviction petition and summary dismissal was proper.

¶26 III. Harmless Error

¶27 We have concluded that the admission of the autopsy report and Denton's testimony were not violations of defendant's confrontation clause rights. As a result, we need not engage in a harmless error analysis.

¶28 CONCLUSION

¶29 The first-stage summary dismissal of defendant's post-conviction petition was proper.

¶30 Affirmed.