2013 IL App (1st) 120057-U

Third Division
September 25, 2013

No. 1-12-0057

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.	)	07 CR 22861
	)	
ROBERT BARNES,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

¶ 1 *Held*: Appellate counsel provides objectively unreasonable assistance when counsel argues on appeal an issue not raised in the trial court without arguing either ineffective assistance of trial counsel or plain error. A postconviction petition in which the defendant alleges such ineffective assistance of appellate counsel, where the record supports a finding that appellate counsel's failure to argue ineffective assistance of trial counsel or plain error could, arguably, have affected the result of the appeal, sufficiently states the gist of a claim for a violation of the defendant's constitutional right to effective assistance of appellate counsel.

¶ 2 This case comes before us on an appeal from the dismissal of Robert Barnes's postconviction

petition at the first stage of postconviction proceedings. A jury found Robert guilty of the murder of a man in Robert's apartment building. The appellate court affirmed the trial court's judgment. *People v. Barnes*, No. 1-09-1535 (2010) (unpublished order under Supreme Court Rule 23). In his postconviction petition, Robert alleged that appellate counsel provided ineffective assistance when counsel failed to obtain review of an issue concerning jury instructions. We find that Robert has stated the gist of a claim that the affirmance of his conviction resulted from a violation of his constitutional rights. We reverse the dismissal of his postconviction petition and remand for the appointment of counsel to assist Robert at the second stage of postconviction proceedings.

¶ 3 BACKGROUND

¶ 4 We repeat the relevant facts stated in the order on the direct appeal. Robert lived with his girlfriend, Kenisha Meeks, and their two children on the upper floor of a two-flat on the west side of Chicago. Regis McWright, who lived in another apartment in the building, worked as a maintenance man for the building. On September 25, 2007, around 8:30 p.m., Robert shot McWright. McWright died that night from the gunshot wound. A grand jury charged Robert with first degree murder.

¶ 5 At trial, Kenisha testified that during the summer of 2007, she noticed several times that things had been moved in the apartment when no one was home. She asked the landlord to change the locks. When the landlord failed to change the locks, Kenisha's brother, Bernard Meeks, changed the locks for her.

¶ 6 Ronisha Barnes, the daughter of Robert and Kenisha, testified that on September 25, 2007, Robert picked up her and her brother at her grandmother's house. When they got home, they entered

the apartment through the back door. Ronisha heard the front door creak. She told Robert, who told her to go with her brother into the boy's bedroom. She heard a gunshot very soon after she came into her brother's bedroom.

¶ 7 Robert testified that he acquired a gun because of break-ins. When Ronisha told him about the creak of the front door, he got his gun from the bedroom. He went to the front door and found it ajar. He became frightened. When he reached the door, he saw a large man standing right outside the door. He saw something in the man's hand. Robert immediately shot the man at the door. The man ran down the stairs to the building's front door, and Robert followed him. Once they reached the front porch, Robert saw that the man was his neighbor, McWright. McWright said, "You shot me," and ran across the street. Robert took his children to their grandmother's home. He did not call 911. He turned himself in to police five days later.

¶ 8 The prosecution relied mostly on evidence that the shooting took place on the front porch of the apartment building, and not at the front door of Robert's apartment. Lee Johnson, who lived across the street from Robert and McWright, testified that on September 25, 2007, Johnson and his friends, James Mitchell and Reginald Brown, decided to go to the grocery store with their children. As he left his home, Johnson saw Robert and McWright on the porch across the street, then he heard a gunshot and saw a flash. Mitchell and Brown corroborated Johnson's testimony. Defense counsel adduced evidence that Johnson, Mitchell and Brown had all had several beers before they heard the gunshot.

¶ 9 A firefighter testified that he spoke to McWright at the scene shortly after the shooting, and McWright said he "went to the door and Barnes came out and shot him." McWright added that

Robert "came down and said, 'I'm tired of this shit,' " before shooting him.

¶ 10 Police officers testified that at the scene they found blood on the front porch but no blood in the hallway or on the second floor of the two-flat.

¶ 11 Defense counsel asked the trial court to instruct the jury about the justified use of force in defense of one's dwelling based on violent and tumultuous entry. The court found no evidence of violent or tumultuous entry, so the court did not instruct the jury on defense of one's dwelling as a justification for the use of deadly force. Counsel did not offer an instruction about the justified use of force to prevent the commission of a felony in one's dwelling.

¶ 12 The jury found that Robert committed first degree murder and that he personally discharged a firearm in the commission of the offense. The trial court denied the motion for a new trial and sentenced Robert to 45 years in the custody of the Department of Corrections.

¶ 13 On the direct appeal, appellate counsel argued that the trial court committed reversible error when it refused to instruct the jury on defense of one's dwelling as a justification for the use of deadly force. In the course of affirming the trial court's judgment, the appellate court said:

> "With no evidence of any entry, we find no basis for the trial court to give an instruction concerning violent entry. The record supports the trial court's decision to disallow the defense of dwelling instruction.
>
> Now, on appeal, defendant suggests that the court should have given the defense of dwelling instruction because defendant believed that deadly force was necessary to prevent the commission of a felony – against himself or his children – in his dwelling. Defendant failed

> to raise this argument at trial. [Citation.] We note that defendant does not ask this court to address this argument as plain error. [Citation.] Neither does defendant suggest that his counsel provided ineffective assistance when counsel failed to argue for the instruction based on defendant's belief that he needed to protect against commission of a felony. Accordingly, defendant has forfeited this argument." *Barnes*, No. 1-09-1535 at 9.

¶ 14 Robert filed his postconviction petition in August 2011. He relied primarily on the argument that appellate counsel provided ineffective assistance by failing to argue ineffective assistance of trial counsel due to trial counsel's failure to proffer an instruction on the use of deadly force to prevent the commission of a felony in one's dwelling. The trial court said,

> "Although petitioner claimed that he had unreasonably acted in self-defense, the trier of fact disbelieved petitioner's version of events. Based on the testimony of Johnson, Brown, Mitchell, Scates, and the police officers, the jury could have reasonably believed that petitioner intentionally shot and killed McWright on the front porch. Because the jury believed the State's version of events, petitioner is unable to show prejudice."

The trial court dismissed the petition as patently without merit. Robert now appeals.

¶ 15 ANALYSIS

¶ 16 We review *de novo* the dismissal of a postconviction petition at the first stage of

postconviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998). At this stage of proceedings, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 17 We find first that Robert has alleged facts that can support a finding that his appellate counsel's performance fell below an objective standard of reasonableness. Appellate counsel argued that the trial court should have given the instruction Robert now seeks concerning defense of one's dwelling, but appellate counsel did not present the issue under the rubric needed for the appellate court to have jurisdiction to review the merits of the issue. Because trial counsel failed to proffer the instruction to the trial court, trial counsel waived the issue and the appellate court did not have jurisdiction to address the issue except as plain error or as evidence of ineffective assistance of trial counsel. See *People v. Enoch*, 122 Ill. 2d 176, 190 (1988). But appellate counsel argued neither plain error nor ineffective assistance of trial counsel, and therefore, as the appellate court noted, Robert, on the direct appeal, forfeited the argument concerning the instruction. We find that appellate counsel provided objectively unreasonable assistance by failing to make either of the arguments needed to preserve the issue for review. See *People v. Serrano*, 286 Ill. App. 3d 485, 492 (1997) (where counsel argues a theory but then fails to take the steps needed to present the theory for decision, counsel provides objectively unreasonable assistance).

¶ 18 The State contends that Robert suffered no prejudice due to appellate counsel's error because it is not even arguable that the appellate court could have reversed the conviction due to the lack of an instruction on defense of dwelling even if appellate counsel had preserved the issue for review.

¶ 19 The trial court has discretion to decide how to instruct the jury and we will not reverse its decision unless the court abused its discretion. *People v. Edmondson*, 328 Ill. App. 3d 661, 664 (2002). The trial court must instruct the jury on the defendant's theory of the case, as long as some evidence supports the instruction. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997).

¶ 20 According to the applicable pattern instruction,

> "[A] person is justified in the use of force which is intended or likely to cause death or great bodily harm *** if *** he reasonably believes that such force is necessary to prevent the commission of a felony in the dwelling." Illinois Pattern Jury Instructions, Criminal, No. 24 -- 25.07 (2d ed. 1981); see 720 ILCS 5/7-2 (West 2006).

The instruction reflects the long history favoring the right to defend one's home. See *Hayner v. People*, 213 Ill. 142, 150-51 (1904). As our supreme court said in *People v. Eatman*, 405 Ill. 491, 498 (1950), "a man's habitation is one place where he may rest secure in the knowledge that he will not be disturbed by persons, coming within, without proper invitation or warrant, and that he may use all of the force apparently necessary to repel any invasion of his home." The second amendment to the United States Constitution (U.S. Const., amend. II) specially protects the right to use guns to defend "the home, where the need for defense of self, family, and property is most acute." *District of Columbia* v. *Heller*, 554 U.S. 570, 628 (2008). The second amendment "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 554 U.S. at 635.

¶ 21 At trial, defense counsel elicited evidence that Robert had the locks changed because he and

Kenisha saw signs that someone had entered the apartment without their permission. Robert testified that on September 25, 2007, he and Ronisha returned through the back door. Ronisha told Robert she heard the front door creak. Robert retrieved his gun and went to the front door, finding it ajar. When he saw a large man standing right outside the door, he shot the man. According to the firefighter who spoke with McWright, McWright admitted that he went to the door of Robert's apartment, seeking to enter. Particularly in light of the signs of prior entries without notice or permission, the evidence suffices to require an instruction on defense of the dwelling from a felony as justification for the use of deadly force. See *People v. Brachter*, 63 Ill. 2d 534, 540-41 (1976). Trial counsel, arguably, provided ineffective assistance by failing to proffer an instruction on defense of one's dwelling from the commission of a felony as a justification for the use of deadly force, and appellate counsel, arguably, provided ineffective assistance by failing to argue ineffective assistance of trial counsel on this issue.

¶ 22 The trial court for postconviction proceedings held that the appellate court would not have reversed the conviction even if appellate counsel had properly preserved the instruction issue. The trial court said the jury rejected the testimony of defense witnesses and found the State's witnesses credible. On that basis, the trial court concluded that the jury must have found that Robert knew before he shot that he was shooting McWright, and he must have known that McWright did not intend to commit a felony in Robert's apartment when McWright opened the door to enter without notice to Robert and his family. The trial court made "a speculative attempt to reconstruct the jury's deliberations and divine its unexpressed conclusions," the kind of speculation our supreme court expressly disapproved in *People v. Mack*, 167 Ill. 2d 525, 536-37 (1995). Nothing about the simple

verdict, entered without explanation, supports the trial court's speculation. The jury may have found that Robert did not believe that he needed to use deadly force to defend himself against the imminent use of unlawful force by the man outside the door, but never considered whether Robert believed that he needed to use such force to prevent the commission of a felony in the dwelling. We find that Robert has stated facts that arguably show that the appellate court might have reversed the conviction if appellate counsel had preserved for review the issue of whether trial counsel provided ineffective assistance by failing to offer the instruction on defense of one's dwelling from the commission of a felony.

¶ 23 CONCLUSION

¶ 24 Robert's postconviction petition includes an allegation that appellate counsel failed to argue that Robert's trial counsel provided ineffective assistance when he failed to proffer an instruction on the theory that Robert justifiably used deadly force to prevent the commission of a felony in his dwelling. The allegation states the gist of a claim for violation of Robert's constitutional right to the effective assistance of appellate counsel. Accordingly, we reverse the dismissal of Robert's postconviction petition and remand for the appointment of counsel to assist him at the second stage of postconviction proceedings.

¶ 25 Reversed and remanded.