2014 IL App (1st) 121311-U

SIXTH DIVISION
May 9, 2014

No. 1-12-1311

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 11 CR 19333
JACQUELIN STEWART,	)	
	)	The Honorable
Defendant-Appellant.	)	Frank Zelezinski,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: In a prosecution for resisting arrest and aggravated battery of a peace officer, defense counsel's failure to present a closing argument and his decision to defend the charge of resisting arrest by raising the issue of reasonable doubt rather than self-defense, did not amount to ineffective assistance of counsel.

¶ 2 Following a bench trial, defendant Jacquelin Stewart was acquitted of aggravated battery of a peace officer, but was convicted of resisting arrest and was sentenced to one year of probation. On appeal, defendant contends that she received ineffective assistance of counsel because trial counsel failed to present a closing argument and failed to present self-defense as a defense to the charge of resisting arrest.[1]

¶ 3 Police officers Ray Murray and Jill Flores testified on behalf of the State. Defendant and her father testified on behalf of the defense. On the night of October 1 or just after midnight on October 2, 2011, a group of teenagers attended their high school homecoming and then went to Applebee's Restaurant in Matteson, Illinois. The group of teenagers included defendant, who was 17 years old and pregnant, and her friend and next-door neighbor, Brianna Nunn. The teenagers purportedly left the restaurant without paying the bill. (Defendant testified that she thought her friends would pay the bill, and she was not charged with any offense related to the failure to pay the bill.) At Cicero Avenue and Sauk Trail, Officer Murray curbed a white sedan that matched the description provided by the manager at Applebee's. Defendant was the driver, and Brianna Nunn was in the front passenger seat. Officer Murray's video camera recorded the events after the traffic stop and the video footage was introduced at trial. Officer Murray initially requested identification from defendant, but she did not immediately comply. Instead, she picked up a cell phone and engaged in a telephone conversation with her father. Officer Murray requested numerous times that she put the phone down, but she did not comply.

[1] This appeal was dismissed twice for want of prosecution, but was reinstated based on a supreme court supervisory order.

¶ 4 Officer Flores came to the driver's side of the vehicle to assist Officer Murray, and ordered defendant to hang up the phone, but defendant did not comply. Officer Flores then reached into the car window to take the phone from defendant, but Officer Flores was not successful because defendant leaned back in her seat or moved toward Brianna Nunn and away from the window where the officers stood. Defendant kept the phone to her ear with her right hand while she swung her left arm. Officer Murray continued to speak with defendant to try to convince her to hang up the phone and to cooperate by answering questions related to the investigation of the incident at Applebee's. He was not successful in getting defendant off the phone or in getting her to cooperate.

¶ 5 Defendant's left arm or a portion of her body protruded from the car window. For a very brief period of time, probably less than two seconds, Officer Flores's head or face was inside that window. Officer Murray testified that he did not see any part of defendant's body strike Officer Flores while defendant was seated in the car, but Officer Flores testified that defendant "balled up" her (defendant's) left hand and struck her (Officer Flores) on the abdominal area of her vest and the jaw and chin area of the right side of her face. Defendant testified, however, that she was holding her driver's license in her left hand and that Officer Flores struck her in the abdomen. As the trial court observed, the video footage did not clearly show whether defendant struck Officer Flores while the latter reached inside the car window.

¶ 6 Officer Murray ordered defendant to get out of the vehicle. He opened the car door, and she voluntarily complied, but she was still on the phone, and he tried to grab the phone from her hand while Officer Flores was to his right. He again told defendant to get off the phone and that

she was going to be placed into custody, but she continued to talk on the telephone. He reached for the phone, and defendant started to swing her arms and struck Officer Flores in the arm. Officer Murray then grabbed defendant around her arms to prevent her from swinging them. Defendant continued to pull away, struggle, and kick her feet. Officer Flores maintained that defendant kicked her and caused a bruise on her leg, but defendant did not kick Officer Murray and he did not see if she kicked Officer Flores. The record contains a photograph of the bruise on Officer Flores's leg.

¶ 7 The officers moved defendant from the driver's side door to the front of her vehicle. Officer Murray did not think that she was intentionally moved to the front of the car; rather, the officers reacted to her resistance in pulling her in that direction. Officer Murray did not think that defendant was necessarily pushed given that she was pulling away. When Officer Flores handcuffed defendant, Officer Murray stood in close proximity, and defendant's chest or torso was in contact with the front or the hood of the car. Officer Murray never saw Officer Flores push defendant down to the hood of the vehicle, but defendant testified that the officers pushed her to the front and down on the hood of the car. Officer Flores testified that when Officer Murray tried to take the phone from defendant, defendant became very combative, pulled the phone away, flailed at the officers and hit them with her hands, and kicked. Officer Flores tried to stop defendant from hitting them, and Officer Steele assisted. Defendant kicked at the officers and hit them. Officer Flores testified that defendant hit her in the right arm and kicked her in the lower left leg which caused a very large bruise on the back of her leg, but that the contact was not visible on the video because Officer Steele obstructed the view. Officer Flores identified a

photograph of the bruise on the left side of her left leg. We have viewed both the photograph and the video footage. The video shows that defendant was combative and not cooperative and that she struggled with the officers and kicked at the officers. The video further showed the officers placed defendant in handcuffs. The photograph shows a leg bruise. Officer Flores, however, was not hospitalized, did not seek any medical care, did not miss any work as a result of this incident, and continued working on that day.

¶ 8 Defendant admitted that she struggled with the officers when they tried to handcuff her, but she did not recall swatting at Officer Flores with her fist and she denied that she resisted arrest. She testified that she went to St. James Hospital after the officers released her because she was pregnant and had noticed vaginal bleeding when she used the bathroom at the police station. Defendant was treated and released at St. James Hospital.

¶ 9 Both sides waived closing argument. (The State reserved rebuttal in case the defense presented closing argument.) The trial court observed that it was not clear from the video what happened between defendant and Officer Flores at the car door, and therefore the trial court acquitted defendant of aggravated battery. The trial court further observed that the video corroborated the officers' account that defendant failed to comply with their commands and that she engaged in "leg kicking" and resisted arrest after she got out of the car, which caused a big bruise to Officer Flores.

¶ 10 On appeal, defendant contends that she received ineffective assistance of counsel because her attorney failed to present a closing argument and the defense of self-defense. Defendant maintains that defense counsel should have argued and asserted the theory that she acted in self-

defense "to the officers' excessive display of force" because her "resistance was established by the video and by her own acknowledgment of the struggle," and therefore self-defense was the only possible basis for her acquittal. She argues that she was only 17 years old, had no prior experience with the police, was pregnant and frantic, and was justified in resisting the officers' excessive use of force against her. She maintains that counsel lacked any strategy for having waived closing argument, and that the court may not have been aware that she was entitled to engage in self-defense against the "excessive and disproportionate force" exercised by the police. She maintains that her claim of excessive police force is supported by the evidence that Officer Flores hit her in the chest and the abdomen, that she was pregnant at the time, and that she went to the hospital with vaginal bleeding. She asks this court to reverse and remand for a new trial.

¶ 11 The State responds that a waiver of a closing argument cannot be ineffective assistance because a closing argument is not evidence and a trial court hears the evidence. The State further responds that defense counsel's decision to use one defense theory (reasonable doubt) instead of another (self-defense) was not ineffective assistance of counsel because it was not incompetent, it was a strategic decision, and it did not affect the trial outcome.

¶ 12 The standards set forth in *Strickland v. Washington*, 466 U.S. 668, 690, 694 (1984), govern claims of ineffective assistance of counsel. Pursuant to *Strickland*, the defendant must establish both deficient representation by his attorney, and resulting prejudice. See *People v. Manning*, 227 Ill. 2d 403, 412 (2008); *People v. Hall*, 217 Ill. 2d 324, 335 (2005); *People v. Graham*, 206 Ill. 2d 465, 476 (2003). A showing of prejudice sufficient to support a claim of ineffective assistance of counsel consists of a reasonable probability that, but for the attorney's

errors, the outcome would have been different. *Hall*, 217 Ill. 2d at 336; *Graham*, 206 Ill. 2d at 476. A reasonable probability undermines confidence in the outcome. *Graham*, 206 Ill. 2d at 476; *People v. Irvine*, 379 Ill. App. 3d 116, 129 (2008). "[P]rejudice is not presumed for purposes of an ineffective assistance of counsel claim." *People v. Peterson*, 311 Ill. App. 3d 38, 52 (1999). If a claim of ineffective assistance can be disposed of because the defendant suffered no prejudice, it is not necessary to consider whether counsel's performance was deficient. *Graham*, 206 Ill. 2d at 476. Moreover, strategic decisions are generally not reviewable. *Irvine*, 379 Ill. App. 3d at 129.

¶ 13 In this case, the alleged errors involve nonreviewable trial strategy. Additionally, defendant cannot demonstrate prejudice from the alleged errors because there was overwhelming evidence of her guilt in resisting arrest and therefore no reasonable probability that the trial court would have acquitted her or given her a more lenient disposition if counsel had acted differently.

¶ 14 "Under many circumstances, the waiver of closing argument is a matter of trial strategy. *** [C]ounsel's strategic choices are virtually unchallengeable." *People v. Wilson*, 392 Ill. App. 3d 189, 198 (2009) (the failure to present a closing argument constituted ineffective assistance of counsel in a *jury* trial). The court observed that "[i]t would be a rare case in which choosing not to make a closing argument in a jury trial would be sound trial strategy." *Id*. at 200. Even if defense counsel had presented a closing argument in the present case, there is no reasonable probability that the trial outcome would have changed. This case involved a bench trial, not a jury trial, and the video showed that defendant forcefully resisted arrest and that the officers did

not use excessive force to subdue her. Therefore, defense counsel's failure to present a closing argument did not prejudice defendant and did not constitute ineffective assistance of counsel.

¶ 15 Defense counsel's failure to present self-defense as a defense in the present case also cannot constitute ineffective assistance. "[T]he use of excessive force by a police officer invokes the right of self-defense." *People v. Haynes*, 408 Ill. App. 3d 684, 689 (2011). Defendant acknowledges that the camera in the police car captured only "portions" of the encounter. From the portions that are visible, it is clear that defendant did not peacefully submit to the officers' attempts to handcuff her. Instead of cooperating, she was combative, struggled, kicked, and forcefully resisted their efforts. Under the circumstances, the officers' efforts were not an excessive use of force. The photograph showed that Officer Flores was bruised. The officers' reaction to defendant's out of control behavior was not excessive, and therefore defendant's combative behavior was not justified. Under those circumstances, defense counsel was not incompetent for presenting only a reasonable doubt defense given that self-defense was not a viable defense. Moreover, there was evidence to support a reasonable doubt defense. Officer Murray testified that he did not see defendant strike or kick Officer Flores. Officer Flores admitted that she did not seek medical attention, was not hospitalized, did not miss work as a result of her injuries in this case, and was not interviewed about her injuries by the detective who investigated this case. Officer Steele obscured the view on the video of defendant kicking Officer Flores. Based on this evidence, defense counsel's decision to present a reasonable doubt defense instead of self-defense did not amount to ineffective assistance of counsel.

¶ 16 We have considered, and rejected, each of defendant's claims of ineffective assistance of counsel on appeal. We are unpersuaded by defendant's claims of ineffective assistance of counsel, even considering her arguments cumulatively. *Strickland*, 466 U.S. at 690, 694.

¶ 17 The judgment of the circuit court is affirmed.

¶ 18 Affirmed.