2014 IL App (1st) 121874-U

THIRD DIVISION
OCTOBER 22, 2014

No. 1-12-1874

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. 01 CR 2948
	)	
MANUEL METLOCK,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE PUCINSKI delivered the judgment of the court.
Justices Lavin and Hyman concurred in the judgment.

O R D E R

¶ 1 *Held*: Second-stage dismissal of defendant's postconviction petition was proper where defendant failed to make a substantial showing that he received ineffective assistance of counsel.

¶ 2 Defendant Manuel Metlock appeals from the dismissal, on motion of the State, of his petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq*. (West 2010). In the petition, defendant, who had been convicted of felony murder based on the forcible felony of attempted armed robbery and sentenced to 50 years in prison, claimed that his trial counsel

was ineffective for failing to request a jury instruction for the lesser-included offense of attempted theft. On appeal, defendant contends that his petition should have advanced to an evidentiary hearing because it made a substantial showing of ineffective assistance of counsel. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the events of September 1, 2000. On that date, Relando Clark was shot and Loroxon Brown was shot and killed. Defendant was charged with intentional murder, knowing murder, and felony murder predicated on attempted armed robbery. After jury selection, the State opted to *nolle prosequi* all of the charges except felony murder.

¶ 4 The underlying facts of the case are set forth in our order on direct appeal and need not be repeated at length here. In short, the evidence presented at trial showed that on September 1, 2000, Brown drove defendant, Clark, and Yakeeta Little to the south side of Chicago. That evening, gunshots in the car injured Clark and killed Brown.

¶ 5 At trial, Clark testified that Brown followed defendant's directions as to where to drive. In a u-shaped alley, Little jumped out of the car. Clark, who was in the front seat, turned around and saw defendant pointing a gun at Brown. Clark heard two shots before the car lurched forward into a pole and Brown started running. Clark testified that he slumped in the car seat, playing dead. He felt defendant drag him out of the car and lay him on the ground. Defendant searched Clark's clothes, but found nothing to take. After defendant fled the scene, Clark ran to find help.

¶ 6 Little corroborated much of Clark's testimony. She testified that defendant showed her that he had a gun, and later gave Brown directions to drive into the alley. A few seconds after Little got out of the car, she heard gunshots. As she ran from the area, she saw Brown on the

ground at the end of the alley. Little testified that she and defendant later met up at his mother's home. There, she told defendant she thought Brown was dead, and defendant told her he was sorry about what happened and had gotten rid of the gun. On cross-examination, the State impeached Little with the testimony of three assistant State's Attorneys. One of the attorneys testified that Little had testified to the grand jury that defendant told her he shot Brown twice, Clark threw his hands up before defendant shot him, and defendant pulled Clark from the car and searched him to rob him. Another of the attorneys testified that a few days before trial, Little said that she remembered that defendant said he shot Brown and Clark, pulled Clark from the car, and searched him to rob him.

¶ 7 Defendant testified that it was Little who gave Brown directions to drive into the alley. He stated that when Little got out of the car, she left a gun on the armrest between Brown and Clark, who sat in the two front seats. When Clark started to reach for the gun, defendant, fearing for his life, reached for the other end. The gun discharged several times while they struggled for it. Defendant testified that his finger may have hit the trigger, but stated that he did not intend to shoot the gun at all. He denied pulling Clark out of the car and denied searching him.

¶ 8 The jury found defendant guilty of felony murder based on the underlying offense of attempted armed robbery. The trial court denied defendant's motion for a new trial and sentenced him to 50 years in prison.

¶ 9 On direct appeal, we affirmed defendant's conviction and sentence. *People v. Metlock*, No. 1-04-3268 (2007) (unpublished order under Supreme Court Rule 23). In that order, we noted that defendant was contending, among other things, that trial counsel was ineffective for failing to seek a jury instruction on attempted theft as a lesser included offense of felony murder based

on attempted armed robbery. However, we observed that the record included no evidence of whether defendant ever discussed with defense counsel the possibility of offering such an instruction and, therefore, declined to address defendant's contention. Instead, we stated that we would "leave that claim for a postconviction proceeding for which defendant will have the opportunity to prepare a record concerning his role in the decision to offer instructions on certain offenses." *Id.* at 13-14.

¶ 10 In 2007, defendant filed a *pro se* petition for postconviction relief, alleging, in relevant part, that trial counsel was ineffective for failing to request a jury instruction on attempted theft. The trial court appointed counsel, who filed a Rule 651(c) certificate and a supplemental petition. The supplemental petition included an affidavit executed by defendant wherein he stated as follows:

> "I asked [trial counsel] if there was 'any other' instruction that could be requested for a lesser charge at trial and counsel specifically told me, there was 'no other' instruction that I could get. I was told by [trial counsel] that it was a 'hitter or quitter.' I ask him what do that mean and he stated all or nothing situation, either guilty or not guilty 'period.' "

¶ 11 The State filed a motion to dismiss, which was granted by the trial court.

¶ 12 Defendant filed a motion to reconsider the dismissal, focusing on the claim that trial counsel was ineffective for failing to submit a jury instruction on attempted theft. The trial court denied the motion to reconsider. Defendant appeals.

¶ 13 On appeal, defendant contends that the trial court should not have dismissed his petition prior to an evidentiary hearing. He argues that his petition made a substantial showing, not rebutted by the record, that trial counsel was ineffective for failing to request a jury instruction for the lesser-included offense of attempted theft. Defendant asserts that counsel's actions were objectively unreasonable because defendant wanted the jury to be given an instruction on a "lesser charge" and had the right to decide whether such an instruction should be tendered, but was denied that opportunity. He further asserts that he suffered prejudice because the jurors were deprived the option of finding him guilty of attempted theft if they thought the shooting was justified, but also believed that defendant had searched Clark's pockets in an effort to find something to steal.

¶ 14 In cases not involving the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the second stage of the postconviction process. At this stage, the granting of the State's motion to dismiss is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381. Our review at the second stage is *de novo*. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 15 The standard for determining whether a defendant was denied the effective assistance of counsel is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

To establish ineffective assistance of counsel under *Strickland*, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 687.

¶ 16 In this case, we cannot find that defendant has made a substantial showing either that counsel acted unreasonably or that he was prejudiced by counsel's failure to seek an instruction on attempted theft as a lesser-included offense. This is because attempted theft is not a lesser-included offense of felony murder, and therefore, the instruction defendant argues should have been given was not available to him. Our supreme court has held that when determining whether an offense is a lesser-included offense, it must be compared to the offense of felony murder and not to the underlying felony. *People v. Davis*, 213 Ill. 2d 459, 475-76 (2004); see also *In re Dionte J.*, 2013 IL App (1st) 110700, ¶ 4. To be considered a lesser-included offense, the offense must have an equal or lesser intent. *Davis*, 213 Ill. 2d at 477; *Dionte J.*, 2013 IL App (1st) 110700, ¶ 4. As relevant here, felony murder does not require a particular intent. See 720 ILCS 5/9-1(a)(3) (West 2010). Attempted theft, however, requires that the defendant have the specific intent to commit theft, which in turn requires that the defendant act knowingly. See 720 ILCS 5/8-4(a), 16-1(a) (West 2010). Because felony murder does not require a particular intent, an offense such as attempted theft, which does require a particular intent, cannot be a lesser offense. *Davis*, 213 Ill. 2d at 477; *Dionte J.*, 2013 IL App (1st) 110700, ¶ 4.

¶ 17 We are mindful of defendant's argument that we must find otherwise because, in this court's order on direct appeal, we "implicitly acknowledged" that attempted theft is a lesser-included offense of felony murder when we noted that "counsel did not seek instructions on

attempted theft as a lesser included offense of felony murder" and stated that "a rational jury might have found defendant guilty of attempted theft but not murder." We are not swayed by defendant's argument. It is true that under the law-of-the-case doctrine, we are prohibited from reconsidering issues that have been decided by a reviewing court in a prior appeal. See *In re Christopher K.*, 217 Ill. 2d 348, 363 (2005). However, in our prior appeal we did not actually decide the issue of whether attempted theft is a lesser-included offense of felony murder. Rather, the above quotations from our order on direct appeal appeared in *dicta*. Even defendant does not characterize the statements as a decision of this court – he refers to them merely as an implicit acknowledgement. Having now specifically researched the applicable precedent, we are convinced that attempted theft is not a lesser-included offense of felony murder.

¶ 18 Defendant has failed to make a substantial showing of ineffective assistance of counsel. Accordingly, the trial court's decision to grant the State's motion to dismiss the postconviction petition was proper.

¶ 19 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 20 Affirmed.