2014 IL App (2d) 130266-U
No. 2-13-0266
Order filed December 31, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DERRICK C. ROBINSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 03-CF-3044 Honorable George J. Bakalis, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Schostok and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion for leave to file a successive postconviction petition asserting ineffective assistance of counsel in the entry of his guilty plea: even if defendant showed cause, he showed no prejudice, as counsel's alleged failure to discuss with him the prospect of a conviction at trial of a lesser offense than first-degree murder did not support an ineffectiveness claim where that prospect would have been completely unsupported by the evidence.

¶ 2 Defendant, Derrick C. Robinson, entered an open plea of guilty to first-degree murder (720 ILCS 5/9-1(a)(1) (West 2002)) and was sentenced to 32 years' imprisonment. On appeal, this court affirmed. See *People v. Robinson*, No. 2-05-1228 (2007) (unpublished order under

Supreme Court Rule 23). In 2007, defendant petitioned for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), alleging in part that his trial attorney had been ineffective, rendering his guilty plea involuntary. The trial court summarily dismissed the petition. This court affirmed. See *People v. Robinson*, No. 2-08-0187 (2009) (unpublished order under Supreme Court Rule 23).

¶ 3 In 2013, defendant moved under section 122-1(f) of the Act (725 ILCS 5/122-1(f) (West 2012)) for leave to file a successive petition, which alleged in part that his trial attorney had been ineffective, rendering his guilty plea involuntary. The trial court denied defendant's motion. He appealed. We affirm.

¶ 4 Defendant was indicted on six alternative counts of the first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2002)) of Julie McCloud, his former girlfriend. The charges alleged that, on October 27, 2003, defendant choked McCloud and taped her mouth and nose, thereby causing her death. On November 24, 2003, Daniel Hinich entered his appearance as defendant's attorney. On May 4, 2005, defendant signed a waiver of his right to a jury trial.

¶ 5 On June 14, 2005, Hinich, Assistant State's Attorney Kevin Halverson, and the trial judge held a conference in accordance with Illinois Supreme Court Rule 402(d) (eff. July 1, 1997) to discuss a possible plea agreement. According to the report of proceedings, "402 conference was held in chambers, after which the following proceedings were had at the 402 conference." We set out these "following proceedings" in detail, as they are crucial to both defendant's initial postconviction petition and his proposed successive petition.

¶ 6 Hinich stated that he had discussed the case with defendant "numerous times." Hinich continued, "And he's indicated to me that he wants to plead. So I explained to him that this is a blind plea, and he knows that there is no offer from the State. At some point I suggested perhaps

doing a jury or bench instead." The judge noted that defendant had already waived a jury trial. The colloquy continued:

"MR. HINICH: That's what I'm referring to. Apparently, he wants to plead. So I don't know how the Court feels about that.

I know it's his decision, but I don't know why he wants to do that, I can see some positive things in this, but I also don't know if that's going to be the best thing for him. And I don't know where to stand on the issue.

THE COURT: Well, I assume you've met with him and said what you feel are the strengths or weaknesses of the case, and he understands what they are?

MR. HINICH: Yes.

THE COURT: It's his choice to make, obviously, of what he wants to do. Do you have hesitancy in his decision for any reason?

MR. HALVERSON [*sic*]: *The only reason, your Honor, would be and one of my complaints was during trial that certain evidence might come out during the case when they play the video [tape of defendant's oral confession] or introduce into evidence the written confession.*

That might allow me to make an argument at some point for a second degree or even voluntary manslaughter.

I'm just hesitant if the defendant gets up there and says I didn't mean to do this.

MR. HINICH: Your Honor, that puts us in a bind here." (Emphasis added.)

¶ 7 The transcript attributes the italicized remarks to Halverson, but it is clear that Hinich was the speaker. The judge asked Hinich whether defendant was "still indicating that he want[ed] to plead"; Hinich responded, "Yes." Halverson said that the State could potentially

request an extended-term sentence, based on a finding of exceptionally brutal or heinous behavior indicative of wanton cruelty (see 730 ILCS 5/5-5-3.2(b)(2) (West 2002)), *i.e.*, that defendant choked McCloud and then wound duct tape around her face and nose seven times. However, as part of an agreement, the State would seek only a sentence within the nonextended range of 20 to 60 years (see 730 ILCS 5/5-8-1(a)(1)(a) (West 2002)).

¶ 8 Hinich said that he would tell defendant of the State's decision not to seek an extended-term sentence. Returning to defendant's decision to plead guilty, he stated, "You know, I don't know if I would go as far as [that] I advised him against it, because in the end it may be the better thing to do." He requested a short recess to "go over these things" with defendant. The transcript at this point states, "Whereupon the in[-]chambers conference has concluded, after which the following proceedings were had herein." We turn to these proceedings.

¶ 9 With defendant present, Hinich stated that he had "had the chance to talk with [him] extensively about the issue which is now before the Court" and that defendant had decided to plead guilty. The judge admonished defendant, who acknowledged that he had discussed his options with Hinich; that it was his choice to plead guilty; and that he was doing so freely. The judge finished the admonitions. There is no dispute that they were full and accurate.

¶ 10 The State then presented the factual basis for the plea, as follows. On October 26, 2003, at about 10 p.m., McCloud's ex-husband, Brian Zollicofer, arrived at her apartment. He spent the night there. Shortly before midnight, defendant came over, rang McCloud's bell, and started shouting at her. McCloud called the police, but defendant drove off. He returned an hour later and rang again; McCloud again called the police, and he again drove away. At about 1:30 a.m. on October 27, 2003, defendant was taken into police custody for urinating in public near

McCloud's building. He was soon released. Meanwhile, Zollicofer and McCloud had gone to bed. At about 6:45 a.m. on October 27, 2003, they ate breakfast, and he drove off to work.

¶ 11 On the evening of October 27, 2003, in response to an emergency call from McCloud's daughter, two police officers entered McCloud's apartment. In her bedroom, they saw McCloud lying on her back. She was dead. McCloud was naked from the waist down, and her shorts had been placed over her pelvic region. Duct tape was wrapped around her face, completely covering her nose and mouth.

¶ 12 On the morning of October 28, 2003, police officers spoke to defendant at his home. They noticed that there was blood on his clothing and that his cuticles were bleeding. Later that day, defendant told Julio Calabrese, a police detective, the following. After leaving the police station early on the morning of October 27, he returned to McCloud's building. She let him into her apartment. They spoke for a while and hugged. She told him to leave and went to her bedroom. He followed her in and asked for one last hug. She consented, but, when she said that the hug was over, he squeezed her more tightly; she protested, but he ignored her. Defendant could not bear the thought of leaving McCloud. He squeezed her neck very tightly; she went limp and they fell to the ground. Defendant arose. He did not want McCloud to cry out, so he got some duct tape from the kitchen and covered her mouth. He then left, but first took some of her jewelry, along with some money from her wallet. He walked a short distance and called a cab. He waited for more than an hour. He thought about calling an ambulance or returning to check on McCloud but did neither. Defendant took the cab to a garage and used McCloud's money to pay for the return of his car, which had been towed after his arrest for urinating in public.

¶ 13 Defendant's written confession, about half of a page in length, stated in part that, while hugging McCloud for the last time, he "did not want to let her go." He also wrote, "I was drunk & didn't mean to hurt her." After she collapsed, "[he] listened to her heart & it was still beating, so [he] put the tape over her mouth." He took the money from her purse so that he could get his car back and "go drink and get high until [he] passed out hoping to kill [him]self also."

¶ 14 Photographs showed that the duct tape not only covered McCloud's mouth but circled her head seven times, going from the bridge of her nose to her chin. Dr. Jeff Harkey, who performed the autopsy on McCloud, concluded that she died of "asphyxia due to the exclusion of oxygen by duct tape over the nose and mouth" and that her death was facilitated by "incapacitation due to strangulation."

¶ 15 The trial court accepted defendant's guilty plea. On September 22, 2005, the court held a sentencing hearing. Harkey testified that, when he first saw McCloud's body, duct tape was wrapped "multiple times" across her face, from her lower eyelids down to below her mouth, so tightly that it compressed her nose and pushed blood out to the parts of her face that had not been wrapped. Bruises and abrasions on her neck showed strangulation. Her press-on nails were still intact and had left no marks, showing that she had been incapacitated when the duct tape was applied. The application of the duct tape had caused her death; had defendant released the pressure to her neck and done no more, she could have revived. The court admitted photographs showing the duct tape wrapped around McCloud's face. Calabrese testified that, in a videotaped confession, defendant first said that, when he applied the duct tape, he knew that McCloud was still breathing. Later, he said that, at that point, he detected no breathing. The videotaped confession was played at the hearing, and defendant's written confession was admitted.

¶ 16 In allocution, defendant expressed sorrow for his offense. He stated, in part, "I committed the ultimate sin of murder." Noting the brutality of the offense and defendant's apparent lack of contemporaneous remorse, the trial court sentenced him to 32 years in prison. On appeal, defendant did not raise any claim that his guilty plea had been involuntary or that Hinich had been ineffective. As noted, we affirmed the judgment.

¶ 17 On December 27, 2007, defendant filed his petition under the Act. As pertinent here, he contended that Hinich had rendered ineffective assistance for promising or saying things "in private" that he did not communicate to defendant. Defendant alleged as follows. Sometime after he began representing defendant, Hinich assured him that, if he pleaded not guilty and a jury found him guilty, he would surely be "guaranteed" the maximum sentence for first-degree murder. Hinich added that the State was not interested in entering a plea bargain on a lesser charge. Defendant acquiesced in Hinich's recommendation to plead guilty.

¶ 18 The petition continued as follows. At the Rule 402 conference, "of which [defendant] was not privy of the contents [*sic*] until [his] transcripts arrived here at Menard," Hinich stated that, at some point, he suggested to defendant " 'perhaps doing a bench or jury [trial].' " This statement was false. Similarly, Hinich dissembled by saying that he did not know why defendant wanted to plead guilty; Hinich knew that the reason was that he had convinced defendant that, if he went to trial, he would receive the maximum sentence for first-degree murder.

¶ 19 The petition stated that it attached "a copy of the 402 conference transcript pages pertaining to these facts." However, only the first page of the transcript was attached. The transcript of the conference, in the record before us, runs approximately seven pages up to the recess during which Hinich spoke with defendant and seven more pages until it notes, "[T]he in[-]chambers conference has concluded." Thus, the attachment contains Hinich's statements, "At

some point I had suggested perhaps doing a jury or bench instead" and "I know it's his decision [to plead guilty], but I don't know why he wants to do that."

¶ 20 The trial court dismissed the petition as frivolous and patently without merit. This court affirmed, explaining that Hinich was not ineffective merely for giving defendant honest advice about the strength of the State's case. *Robinson*, No. 2-08-0187, slip op. at 7-8.

¶ 21 On January 16, 2013, defendant moved for permission to file a successive postconviction petition. The proposed petition claimed that Hinich had been ineffective, rendering defendant's guilty plea involuntary. Defendant's motion stated that he had been unable to raise this specific claim in his first petition, because it was based on "newly discovered evidence." Specifically, Hinich had been ineffective for failing to inform defendant of what he had told the court at the Rule 402 conference, *viz.*, that (in the motion's words) "there would likely be evidence to support a verdict of Second Degree Murder or Involuntary Manslaughter." The motion (and the proposed petition) cited "RC 637-644." Neither defendant's motion nor his proposed petition attached copies of pages "RC 637-644."

¶ 22 Defendant's motion attached his affidavit, in which he stated that he "never would have pleaded guilty" had he known of Hinich's reference at the Rule 402 conference to the likely evidence to support a verdict of second-degree murder or involuntary manslaughter. Also, he had not been aware of Hinich's remarks until attorney Mark Fisher informed him that he had filed a petition for leave to appeal (PLA) this court's judgment affirming the summary dismissal of defendant's postconviction petition. According to defendant, "the transcript of the 402 conference was missing from the original court record and [defendant] *never* knew of or discovered the 402 conference file until after his Direct Appeal and First Post-Conviction

Petition were filed." (Emphasis added.) The "missing or suppressed 402 conference transcripts" had not been available during his initial postconviction proceedings.

¶ 23 The motion also attached two documents that Fisher had mailed to defendant. One was a letter, dated August 14, 2012, in which Fisher stated that he was enclosing a complete copy of the PLA. The letter also stated, "I do not know why you did not receive from DuPage County the transcript of the hearing in which your trial attorney talked about second degree murder or involuntary manslaughter." The second document was a copy of page 10 of the PLA stating in part, "It is also important to point out that the appellate court's 'honest assessment' analysis appears rather dubious in light of *** *counsel's remark at the 402 conference that, if the case proceeded to trial, there likely would be evidence supporting a verdict of second[-]degree murder or involuntary manslaughter (C637-644).*" (Emphasis in original.)

¶ 24 We note that pages "C637-644" in the record on appeal are the final seven pages of the Rule 402 conference, from the start of the recess until the conclusion of the conference. These pages contain the passage, which we quoted and italicized earlier, that the court reporter incorrectly attributed to Halverson. We also note that, in these seven pages, Hinich made no other reference to the possibility of a guilty verdict on second-degree murder, voluntary manslaughter, or any other offense besides first-degree murder.

¶ 25 The trial court denied defendant's motion for leave to file the proposed petition, holding that he had not satisfied section 122-1(f) of the Act. Section 122-1(f) reads:

> "Only one petition may be filed by a petitioner under this Article without leave of the court. Leave of the court may be granted only if a petitioner demonstrates cause for his or her failure to bring the claim in his or her initial post-conviction proceedings and prejudice results from that failure. For purposes of this subsection (f): (1) a prisoner

shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2012).

¶ 26 The trial court noted that the motion and proposed petition did not attach a copy of the transcript on which defendant relied for his assertions about Hinich's statements at the Rule 402 conference. Moreover, even if the transcript had been attached, nothing in either the record or defendant's motion/proposed petition disclosed any evidence to support a verdict of second-degree murder or involuntary manslaughter. At the guilty-plea hearing, the factual basis supported a conviction only of first-degree murder. Finally, defendant had not shown cause, as he could have raised the claim in his first petition. That petition had stated that defendant had already received a transcript of the Rule 402 conference, and it had attached a page of that transcript. The court denied defendant leave to file the proposed petition. He timely appealed.

¶ 27 On appeal, defendant contends that he demonstrated both cause and prejudice and thus that the trial court erred in denying him leave to file his proposed successive petition. Defendant argues first that, as to cause, he could not have raised the specific claim of ineffective assistance here in his first postconviction petition, because it was based on a specific portion of the transcript of the Rule 402 conference that he was unable to obtain until 2012. As to prejudice, defendant argues that the record of the Rule 402 conference, along with his affidavit, raises an issue that requires an evidentiary hearing: whether Hinich's silence to defendant about the possibility of raising a lesser offense—second-degree murder or involuntary manslaughter—misled defendant into pleading guilty when he otherwise would have gone to trial. On our *de*

novo review (see *People v. Gillespie*, 407 Ill. App. 3d 113, 124 (2010)), we affirm on the ground that defendant did not satisfy the "prejudice" prong of section 122-1(f).

¶ 28 A trial court should deny a petitioner leave to file a successive petition under the Act when it is clear, from a review of the successive petition and the accompanying documentation, that the claims the petitioner seeks to raise fail as a matter of law, or when the successive petition is insufficient to justify further proceedings. *People v. Smith*, 2014 IL 115946, ¶ 35.

¶ 29 The trial court held, and the State now contends, that defendant did not show cause for his failure to raise his present claim in his original postconviction petition. The trial court noted that, in his original petition, defendant stated that he was not "privy" to the "contents" of the Rule 402 conference "until [his] *transcripts* arrived here at Menard" (emphasis added), implying that, as early as when he filed the original petition, defendant had already received the entire record of the conference. The court noted that one page of the transcript was attached to the petition. Thus, the court held, defendant could have raised the present claim in his original petition.

¶ 30 Defendant, however, observes that, although the original petition referred generally to "transcripts," his section 122-1(f) motion alleged that, until 2012, he had not received the pages that contained Hinich's remarks about the possibility of arguing for a conviction of a lesser offense than first-degree murder. Defendant now argues that the record shows no more than that he had received only the first page of the transcript by the time that he filed his original petition.

¶ 31 While defendant's argument strains credulity, at this stage we must construe the well-pleaded factual allegations in his motion liberally and accept them as true unless they are rebutted by the record. See *People v. Edwards*, 197 Ill. 2d 239, 244 (2001); *People v. Edwards*,

2012 IL App (1st) 091651, ¶ 25. Thus, we do not affirm on the basis of the "cause" prong of section 122-1(f) of the Act.

¶ 32 Nonetheless, we affirm on the ground that defendant failed to show prejudice, *i.e.*, that the error that he asserts so infected his trial that he was denied due process. See 725 ILCS 5/122-1(f) (West 2012). Defendant's motion and proposed petition, even construed liberally in his favor, raised no more than rank speculation that he was denied due process or, indeed, that there was error at all.

¶ 33 The claim that defendant seeks to raise is that, had Hinich communicated to him certain information that he conveyed at the Rule 402 conference, defendant would not have pleaded guilty. The information, in total, consists of the remarks we noted and emphasized earlier. Hinich stated that the "only reason" that he had any hesitancy about defendant's intention to plead guilty to first-degree murder was that, when the State introduced defendant's videotaped and written confessions, evidence "might come out" that "might allow" Hinich to argue for a conviction of second-degree murder or involuntary manslaughter. Hinich added that he was "hesitant if the defendant gets up there and says [he] didn't mean to do this." Hinich did not allude to any evidence other than defendant's confessions and his trial testimony as providing grounds to argue for a conviction of second-degree murder or involuntary manslaughter. He referred only to the confessions and hypothetical testimony as sources from which mitigating evidence "*might* come out" that "*might* allow" a conviction on a lesser charge. His references were nonspecific, necessarily so in the matter of what defendant might say on the stand.

¶ 34 To show ineffective assistance of trial counsel, a defendant must establish that counsel's performance was objectively unreasonable and that the defendant was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *People v. Hall*, 217 Ill. 2d 324, 335

(2005). In the context of a conviction based on a guilty plea, to show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the defendant would have pleaded not guilty and insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Hall*, 217 Ill. 2d at 335. A bare allegation to this effect is insufficient. *Hall*, 217 Ill. 2d at 335. Rather, the defendant must provide either a claim of innocence or a plausible defense that could have been raised at trial. *Id.* at 335-36. Whether counsel's allegedly deficient representation caused the defendant to plead guilty depends largely on whether the defendant likely would have succeeded at trial. *Hill*, 474 U.S. at 59; *Hall*, 217 Ill. 2d at 336.

¶ 35 Defendant's motion and proposed petition do not satisfy this test. The hypothetical possibility of a verdict of second-degree murder or involuntary manslaughter is remote speculation on this record. The evidence presented concerns first-degree murder. There is, of course, no doubt that defendant caused McCloud's death. There is little to no doubt that he did so with the mental state to which he admitted by pleading guilty to first-degree murder. Choking McCloud into helplessness, combined with methodically cutting off her breathing, hardly allows any conclusion other than that either he intended to kill or do great bodily harm to her or he knew that his acts would cause her death. See 720 ILCS 5/9-1(a)(1) (West 2002).

¶ 36 In his motion and proposed petition, defendant neither identified specific evidence in the trial record that could support a lesser charge nor attached affidavits or other evidence that would have such an effect. The omission is understandable; such evidence is difficult to imagine.

¶ 37 We start with second-degree murder. To convince the trier of fact to convict him only of this offense, defendant would have had to prove by a preponderance of the evidence (see 720 ILCS 5/9-2(c) (West 2002)) that, at the time of the killing, (1) he was acting under a sudden and intense passion resulting from serious provocation by McCloud; or (2) he believed in the

existence of circumstances that exonerated or justified the killing, but his belief was unreasonable (see 720 ILCS 5/9-2(a) (West 2002)). Under the undisputed facts, neither theory is realistic.

¶ 38 First, defendant cannot (and does not try) to explain how a rational trier of fact could have found that he acted under a sudden and intense provocation when, after choking McCloud into helplessness, he retrieved a roll of duct tape and methodically taped her nose and mouth so tightly that, according to Harkey, he caused her death by asphyxiation. (Defendant's confessions suggested otherwise, but they were manifestly inconsistent with both Harkey's conclusions and the photographs of McCloud.) McCloud did not provoke him in any way. Also, a provoked killing is inconsistent with defendant's act of removing her underwear afterward, his theft of her jewelry and money, and his failure to seek help for McCloud.

¶ 39 Second, defendant cannot (and does not try) to explain how a rational trier of fact could have found that he believed, even unreasonably, in circumstances that would have exonerated or justified his killing of McCloud. The record reflects none. Self-defense obviously does not apply: defendant attacked McCloud when she was doing no more than indulging him in a last hug, and she was unconscious when he duct-taped her nose and mouth and asphyxiated her.

¶ 40 Defendant cannot identify evidence to make second-degree murder a remotely rational verdict, much less a plausible defense that he could have raised at trial (see *Hall*, 217 Ill. 2d at 335-36). Insofar as whether Hinich's alleged deficiencies caused defendant to plead guilty depends on whether defendant likely would have succeeded at trial (*Hill*, 474 U.S. at 59; *Hall*, 217 Ill. 2d at 336), the second-degree-murder theory was so implausible as to negate any arguable claim of prejudice.

¶ 41 Not much more can be said for the possible involuntary-manslaughter theory. A conviction of this charge instead of first-degree murder would have required the fact finder to reject the mental state required for first-degree murder in favor of recklessness (720 ILCS 5/9-3(a) (West 2002)), *i.e.*, that defendant consciously disregarded a substantial and unjustifiable risk and, in so doing, grossly deviated from the standard of care that a reasonable person would exercise in the situation (720 ILCS 5/4-6 (West 2002)). Defendant did not, and does not now, point to any evidence that might convince a reasonable fact finder to reject the overwhelming evidence of murderous intent in favor of a mere gross deviation from the standard of care.

¶ 42 At the Rule 402 conference, upon which defendant wholly relied for his ineffectiveness claim, Hinich did suggest that, at a hypothetical trial, he might be able to raise the involuntary-manslaughter theory, based in part on passages in defendant's confessions, which "might allow" Hinich to argue the theory to the fact finder, and in part on defendant's possible testimony at trial that "[he] didn't do it." The confessions and defendant's hypothetical testimony might raise a bare claim that defendant acted only recklessly in causing McCloud's death, but against defendant's conclusional protestations there would be the overwhelming evidence to the contrary, which we have already discussed. Defendant's motion and proposed petition were insufficient to justify further proceedings on his claim that Hinich's alleged failure to discuss either theory with him amounted to ineffective assistance. See *Smith*, 2014 IL 115946, ¶ 35.

¶ 43 Because defendant did not satisfy section 122-1(f) of the Act, the trial court properly denied him leave to file his proposed successive postconviction petition. Therefore, we affirm the judgment of the circuit court of Du Page County.

¶ 44 Affirmed.