2012 IL App (3d) 100210-U

Order filed July 20, 2012

IN THE APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	for the 14th Judicial Circuit,
Plaintiff-Appellee,	)	Rock Island County, Illinois
	)	
v.	)	Appeal No. 3-10-0210
	)	Circuit No. 08-CF-368
	)	
ELIJAH REID,	)	Honorable
	)	Walter D. Braud
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Lytton and Wright concurred in the judgment.

ORDER

¶ 1 *Held*: A defendant's waiver of his right to appeal or file a postconviction petition was invalid because the defendant was not properly admonished of his appeal rights after he entered into the agreement in exchange for a life sentence upon two murder convictions. However, since the death penalty was no longer available, the parties agreed that the merits of remainder of the issues should be addressed by the reviewing court. The court declined to remand for admonishments and affirmed the defendant's conviction and sentence. The defendant was not denied a fair trial even though the State filed its notice of intent to seek the death penalty more than 120 days after arraignment because there was good cause for the delay. The court also included the trial court did not abuse its discretion in admitting a witness's previous statements for impeachment purposes only when they were not

clearly against the witness's penal interest.

¶ 2 The defendant, Elijah Reid, was found guilty by a jury of two counts of first degree murder. In exchange for the State dropping its pursuit of the death penalty, the defendant agreed to a life sentence and to waive his right to appeal or to file a postconviction petition. Motions to withdraw that agreement were denied, and the defendant appealed.

¶ 3 **FACTS**

¶ 4 The defendant was charged with the first degree murder of two individuals, Ryan Ferry and Jermaine Robinson. The defendant was arrested on April 16, 2008, five days after the murders. Counsel from the Capital Litigation Trial Bar was appointed, and the defendant was afforded other capital procedures. He was arraigned on May 6, 2008. On June 19, 2008, the State informed the trial court that it had not yet decided whether to seek the death penalty because it was waiting for the results of the forensic testing. On October 23, 2008, the defense filed a motion to preclude the State from seeking the death penalty because it had not filed a notice of intent to seek the death penalty within 120 days of arraignment, as required by Supreme Court Rule 416(c). At a case management conference on October 29, 2008, the State informed the trial court that it still had not decided whether to seek the death penalty because it was still waiting on the results of the forensic testing. The trial court ordered the State to make its election within 45 days. The State filed its intent to seek the death penalty on December 1, 2008. The trial court denied the defense motion to preclude the State from seeking the death penalty.

¶ 5 At *voir dire*, based on the jury questionnaires, 18 jurors were excluded because their answers indicated that they would not be able to impose the death penalty and 5 jurors were excluded because their answers indicated that they would impose the death penalty for all

murders. After *voir dire*, five more jurors were excluded for cause because they either would not be able to impose the death penalty or were not sure if they could impose the death penalty.

¶ 6 The State's evidence at trial showed that the two victims were shot in a maroon Oldsmobile Intrigue at an intersection. Witnesses placed the defendant's black van at the scene after the shootings. Terrell Aaron testified that he had seen several drug transactions between the defendant and Robinson. On the night of the shooting, the defendant, Aaron, Carter McCray, and Jamil Steward were driving around in the black van. According to Aaron, the defendant planned to rob Robinson. The defendant then asked Aaron to get a gun that Aaron had been storing for the defendant. Aaron identified the same gun found in a Rock Island sewer in August 2009 as the one he gave to the defendant that night.

¶ 7 Aaron testified that he and the three other men were parked in the black van when a maroon Oldsmobile Intrigue pulled up. The defendant got out of the van and got in the rear passenger door of the maroon car. Aaron could not see who was in the maroon car, which then drove away with the defendant in the back seat. A few minutes later, the defendant came walking back to the parked van. According to Aaron, the defendant told Aaron that the defendant had just shot the men in the maroon car, and the defendant pulled money out of his pocked that had blood on it. There was also blood on his clothing. The defendant then drove his van to where the maroon car was, and Aaron got out of the van, purportedly to retrieve Aaron's cell phone, which the defendant had left in the maroon car. Aaron testified that he did not get the phone because there were people already at the scene.

¶ 8 Much of Aaron's testimony was in conflict with his police statements; he testified that the discrepancies were because he did not want to be charged as the defendant's accomplice. Aaron

also testified that he overheard the defendant say that he had shot Robinson. On cross-examination, Aaron testified that the defendant did not tell him any details of the shooting, and he denied telling his brother, Tanard Threatt, any details of the shooting.

¶ 9 The police found several pieces of evidence in the maroon car, which was Ferry's car, including the cell phone registered to Aaron, a key to the apartment where the defendant lived with his girlfriend, and a cigarette butt that contained the defendant's DNA. At the defendant's apartment, police found eight $20 bills in one of the defendant's pockets, three with blood on them. The blood on one bill was matched to Robinson's DNA. The bullets that killed both men were fired from the same gun, a .38 caliber, the same type as the gun later found in the sewer.

¶ 10 The defendant testified, acknowledging that he was a drug dealer and sold cocaine by the ounce to Aaron and had previously sold to Robinson. The defendant testified that it was Aaron who got in the maroon car, Aaron who dropped his cell phone in the car, and Aaron who killed the two men. Threatt also testified for the defense, saying that he did not remember Aaron telling him any details about the shootings. The detective who interrogated Threatt testified that Threatt had said that Aaron had told Threatt that someone had been shot after a demand for money and that a second person screamed and was shot. The transcript of Threatt's police interview indicated that "one other person" told the sequence of events to Aaron. The trial court instructed the jury that Threatt's statements to the police were admissible only to impeach Aaron. During closing argument, the trial court sustained a State objection to defense counsel's statement that Threatt had details of the shooting.

¶ 11 After a jury found the defendant guilty of both murders, the defendant and the State entered into an agreement whereby the State agreed to drop its pursuit of the death penalty in

exchange for the defendant's agreement to waive his right to appeal and to file a postconviction petition. The defendant was asked if he voluntarily decided to waive his rights to a presentence investigation report and a sentencing hearing, and if he understood that he would be sentenced to the legal minimum, natural life, not death, and would not be allowed to file an appeal or postconviction petition. The defendant responded affirmatively to all the questions. The defendant agreed that he was giving up the right to take any further legal action, specifically his right to appeal and any right to seek postconviction relief, other than the right to seek clemency. The trial court agreed with the State that, since the defendant was giving up his right to appeal, there was no need to admonish the defendant as to his appeal rights.

¶ 12 The trial court accepted the agreement and sentenced the defendant to life in prison. Motions to withdraw the agreement, on the ground that the defendant did not understand the consequences, were denied, and the defendant appealed.

¶ 13 **ANALYSIS**

¶ 14 The defendant argues that his agreement to waive his right to appeal and to file a postconviction petition was void because it violated a public policy to not accept postplea appeal waivers. The defendant alternatively argues that his appeal waiver was invalid because he did not enter into it knowingly.

¶ 15 Under the state constitution, a defendant has the right to appeal. Ill. Const. 1970 Art. VI, sec. 6); *People v. Fearing*, 110 Ill. App. 3d 643 (1982). Like other constitutional rights, however, the right to appeal can be waived. *Fearing*, 110 Ill. App. 3d at 644. Generally, an appeal waiver is valid as long as it is knowing and voluntary. *People v. Edgeston*, 396 Ill. App. 3d 514 (2009). Even if the waiver is found to be knowing and voluntary, a plea agreement

containing an appeal waiver can be voidable for lack of consideration. *Edgeston,* 396 Ill. App. 3d at 523. An appeal waiver can also be set aside if it resulted from ineffective assistance of trial counsel. *Edgeston*, 396 Ill. App. 3d at 523. Subject to the same constraints, agreements to waive postconviction relief are also enforceable. *Edgeston*, 396 Ill. App. 3d at 522.

¶ 16 Whether an appeal waiver is void as against public policy is a question of law that we review *de novo*. See *People v. Hall,* 198 Ill. 2d 173 (2001). Generally, a trial court's decision to grant or deny a motion to withdraw a plea is reviewed for abuse of discretion. *People v. Manning*, 227 Ill. 2d 403 (2008) (in the context of a pretrial guilty plea).

¶ 17 The defendant argues that the appeal waiver was obtained due to the coercive bargaining power of the State. The defendant asks this court to hold that a defendant is not permitted to waive his right to appeal after trial in exchange for sentencing leniency, on the grounds that it is against public policy. The defendant seeks to distinguish Illinois cases that uphold appeal waivers on the grounds that they were not done posttrial and did not involve the death penalty, so the defendants in those case were not in the same coercive position.

¶ 18 The defendant also argues that the waiver violated public policy because he also waived his right to file a postconviction petition. Arguably, the defendant would not know at the time of the waiver whether he would be waiving a claim he did not yet know existed. Since the death penalty has been abolished in Illinois, the defendant requests that this court reinstate his right to appeal and to file a postconviction petition and consider the other arguments on appeal.

¶ 19 We find that the defendant’s agreement was not void as against public policy. In addition, we find that the defendant got the benefit of his bargain, and the appeal waiver was not invalid because of any coercive bargaining power of the State. After the defendant was found

guilty of both murders, natural life was the minimum sentence that the defendant could receive. He received that sentence, and, in exchange, the State did not have to prepare for a lengthy death penalty hearing.

¶ 20 The defendant also contends that, even if we find that appeal waivers are generally permitted, we should find that the defendant's was invalid because he was not properly admonished. Despite the questions from the trial court, and the dependant's affirmative responses, the defendant argues that the admonishments were insufficient because the trial court never defined what an appeal was and never told the defendant what rights a defendant had on appeal. Also, the trial court's description of claims that could be raised in a postconviction petition was vague and confusing. The trial court also did not define clemency.

¶ 21 The Fourth District of the Illinois Appellate Court has held that when the defendant enters into an agreement to waive his right to appeal, he should be admonished regarding the rights he is giving up, including: the right to appeal, the right to a transcript at no cost (if indigent), and the right to have counsel appointed on appeal (Ill. Sup. Ct. R. 605). *People v. Fearing*, 110 Ill. App. 3d 643. (1982). It decided that, although an agreement not to appeal is not technically a guilty plea, it operates much like one, so the trial court should explain the appellate rights that are being waived by the agreement. *Fearing*, 110 Ill. App. 3d at 646.

¶ 22 In this case, the defendant was admonished that he was giving up the right to appeal, but the trial court chose not to give the other admonishments required by Rule 605. Defense counsel did not object when the prosecution and the trial court discussed whether the defendant should receive the admonishments for appeal when he was waiving that right. We agree that a defendant's waiver of his right to appeal operates much like a plea agreement, so the defendant

should have been given the other admonishments. Absent the proper admonishments, the defendant's waiver was not knowing and voluntary. Thus, we find that the appeal waiver was invalid.

¶ 23 Normally, we would remand for proper admonishments. In this case, however, the defendant was already sentenced to life in prison, the only available sentencing option now that the death penalty has been abolished. The defendant presented his issues on appeal, and both sides confirmed at oral argument that this court should decide the substantive issues if it found the waiver to be invalid. Thus, we will address the substance of the defendant's appeal.

¶ 24 First, the defendant argues that the State should have been precluded from seeking the death penalty because it did not file its notice of intent under Supreme Court Rule 416(c), nor seek an extension for good cause, until after the 120-day deadline, so it was error for the defendant to be tried by a death-qualified jury. The State argues that the defendant's challenge is moot because the defendant did not receive the death penalty. Even if not moot, the State argues that it complied with Rule 416(c). The State also argues that, even if the State did not comply with the rule, the trial court properly denied the defendant's motion to bar the State from seeking the death penalty because the rule is directory. Lastly, the State argues that, even if the State should have been precluded from seeking the death penalty, a death-qualified jury did not deny the defendant a fair trial. We review *de novo* the interpretation of a supreme court rule. *People v. Drum*, 194 Ill. 2d 485 (2000).

¶ 25 Rule 416 provides that the State must file a notice of the State's intention to seek or reject the imposition of the death penalty within 120 days of arraignment, unless the trial court directs otherwise upon good cause shown. Ill. Sup. Ct., R 416. Although Rule 416 imposes a

mandatory duty on the State to file its notice of intent within 120 days, the failure to timely file the notice does not require that the trial court automatically strike the notice. *People v. Hill*, 402 Ill. App. 3d 903 (2010). It is one factor to be considered upon a defendant's claim that he was prejudiced by the State's failure to timely file. *Hill*, 402 Ill. App. 3d at 919.

¶ 26 In this case, well within the 120 day period, the State informed the trial court that it was waiting for some forensic evidence before it could determine if it would seek the death penalty. In response to the defendant's motion in October 2008, the State reiterated that it had still not received the forensic evidence. On October 29, 2008, the trial court ordered the State to make its election within 45 days. The State filed its notice on December 1, 2008, within 45 days. The defendant argues that the State had sufficient evidence to make its determination, and DNA evidence from money seized from the defendant with the victim's blood and a cigarette butt in the victim's car with the defendant's DNA were not particularly incriminating.

¶ 27 In denying the defense motion to preclude the State from seeking the death penalty, the trial court stated that it believed that death-possible cases were presumptively death penalty cases under Rule 416(c) if the State took no action. This interpretation was rejected in *People v. Hill*, 402 Ill. App. 3d 903 (2010). However, *Hill* found that noncompliance with Rule 416(c) did not automatically preclude the State from seeking the death penalty; it found that 416(c) was directory, and noncompliance was one factor to consider. 402 Ill. App. 3d at 919. Whether or not the State violated Rule 416, the defendant was afforded capital procedures from the start of the case, and the State had a valid reason for delaying its election. Thus, we find that there was good cause for the State's delay, and no merit in the defendant's claim that he was prejudiced by the delay. We find that the defendant was not denied a fair trial.

¶ 28 The defendant's second argument on appeal is that the trial court erred in admitting statements by Aaron for impeachment purposes only, rather than as substantive evidence. We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *People v. Caffey*, 205 Ill. 2d 52 (2001).

¶ 29 The defendant testified at trial that Aaron committed the murders. The defendant also presented evidence that Aaron told his brother, Threatt, details about the shooting. The trial court ruled that Aaron's statements to Threatt were admissible for impeachment but not as substantive evidence. The defendant argues that since Threatt's testimony permitted the inference that Aaron was present at the shooting, and thus the shooter, the evidence should have been allowed as substantive evidence. The defendant argues that Aaron's statements to Threatt were admissible as substantive evidence as a statements against penal interest under *Chambers v. Mississippi*, 410 U.S. 284 (1973). The State argues that the defendant waived the issue by not raising *Chambers* at trial, but, in any event, the statements were properly admitted for impeachment only.

¶ 30 An unsworn, out-of-court declaration that the declarant committed the crime, and not the defendant on trial, is generally inadmissible, even though the declaration is against the declarant's penal interest. Such a declaration will be admitted, however, where justice requires. *People v. Tenney*, 205 Ill. 2d 411 (2002). Thus, when the hearsay bears persuasive assurances of trustworthiness and is critical to the accused's defense, its exclusion deprives the defendant of a fair trial in accord with due process. *Chambers*, 410 U.S. at 302. Such testimony is admissible under the against penal interest exception to the hearsay rule. *Tenney*, 205 Ill. 2d 411 (2002). Four factors that guide courts in determining if hearsay is reliable are: (1) was the statement

spontaneous, made to a close acquaintance soon after the crime; (2) was the statement corroborated by other evidence; (3) was the statement against the declarant's interest and incriminating; and (4) was the declarant fully cross-examined. *Tenney*, 205 Ill. 2d 411 at 435.

¶ 31 Aaron made the statements to his brother, within four days of the shooting, the statements were corroborated by other evidence, and the defense had a chance to fully cross-examine Aaron and impeach him with his prior testimony. However, the statements were not clearly against Aaron's interest. Aaron told Threatt that the defendant was the shooter; the defendant asks us to infer that Aaron was the shooter because he knew details of the crime, specifically, there was a demand for money, one person was shot, a second person screamed, and then the second person was shot. However, Threatt told the police that "one other person" told the sequence of events to Aaron. Without reaching the issue of waiver, we find no abuse of discretion in the trial court's decision to only allow the statements for impeachment purposes.

¶ 32 Since we find that the defendant cannot prevail on the substantive issues of his appeal, we affirm the defendant's conviction and sentence.

CONCLUSION

¶ 33 The judgment of the circuit court of Rock Island County is affirmed.

¶ 34 Affirmed.