2013 IL App (3d) 110334-U

Order filed January 11, 2013

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-11-0334
	)	Circuit No. 06-CF-904
KERWIN DOSS,	)	
	)	Honorable
Defendant-Appellant.	)	Carla Alessio-Policandriotes,
	)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Schmidt and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition that alleged ineffective assistance of trial and appellate counsel.

¶ 2 Defendant, Kerwin Doss, was convicted of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(2) (West 2006)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2006)), and sentenced to consecutive terms of 28 and 17 years' imprisonment, respectively. Defendant appeals the summary dismissal of his postconviction petition, arguing that he presented the gist of a constitutional claim

for ineffective assistance of trial and appellate counsel. We affirm.

¶ 3 FACTS

¶ 4 Defendant was charged by information with aggravated vehicular hijacking and two counts of armed robbery. 720 ILCS 5/18-4(a)(2), 18-2(a)(2) (West 2006). The charges alleged that on March 29, 2006, defendant knowingly took a motor vehicle from Thomas Jones and also took property from both Jones and Dennishia Moore by threatening the imminent use of force.

¶ 5 At trial, Jones testified that on March 29, 2006, at approximately 1 p.m., he was driving his niece, Moore, to a hair salon in his vehicle. While driving, one of the speaker wires in Jones' car came loose, so he pulled over to fix it. Jones stood outside the vehicle and fixed the speaker wire while Moore sat in the passenger seat. Defendant appeared and put a gun to Jones' side. Defendant ordered Jones to get into the vehicle. Defendant then ordered Jones and Moore to empty their pockets and exit the vehicle. Jones had approximately $100 in his pockets and two cellular telephones in the vehicle, but he did not see Moore turn over any property to defendant. Defendant then drove away in Jones' vehicle. Jones made an in-court identification of defendant as his assailant. Moore also made an in-court identification of defendant, and her testimony corroborated Jones' description of the incident. Moore also testified that she had never seen defendant before the incident.

¶ 6 Jones further testified that following the incident, he immediately called the police and then went to the police department for an interview. Jones was informed that his vehicle had been recovered, but that the stereo was missing. Jones testified that he had never met or spoken with defendant before. Jones also denied selling drugs to defendant or anyone else on the date of the offense.

¶ 7 During cross-examination, defense counsel asked Jones if he knew Kenchie Edwards, if Edwards worked at the barbershop where Jones had his hair cut, and if he had ever discussed the case with Edwards or anyone else at the barbershop. Jones answered that he did not know Edwards and had not discussed the case with anyone at the barbershop.

¶ 8 The defense called Edwards to testify, and he stated that in March and April of 2006, he was employed at a barbershop where Jones was a customer. Edwards heard Jones discuss the instant case at least once at the barbershop. When defense counsel asked Edwards for the content of Jones' discussion, the State objected on the basis of hearsay. Defense counsel asserted he was perfecting an impeachment. The jury was excused, and the court heard arguments from counsel. Defense counsel explained that Edwards overheard Jones talking about the case at the barbershop. Counsel claimed that Edwards would testify that he overheard Jones say he had been robbed while making a marijuana delivery. The court sustained the State's objection, finding that a proper foundation had not been laid because Jones had not been asked to admit or deny that he made this statement.

¶ 9 Defendant testified that he knew Jones and had purchased drugs from Jones in the two months preceding the instant offense. Defendant arranged a deal for Jones to sell drugs to two individuals on March 29, 2006. On that date, defendant received a telephone call from Jones and later went with his cousin, Carzell Scott, to meet with Jones. When defendant and Scott arrived, Jones removed a shoebox, containing marijuana, from the trunk of his vehicle. When the two individuals arrived to buy drugs from Jones, defendant left with Scott.

¶ 10 Later defendant received a telephone call from Jones, threatening to kill him for setting Jones up to be robbed. Defendant also received a telephone call from Jeris Morgan, who asked if defendant set Jones up to be robbed. Morgan then asked defendant to help find Jones' vehicle.

Defendant drove around looking for Jones' vehicle with Scott and Morgan, but was unable to find it.

¶ 11 Defendant also testified that he did not know Mary Lenz.

¶ 12 In rebuttal, the State called Lenz, who testified that she knew defendant and Jones, whom she had previously dated. On the evening of the offense, Lenz saw defendant with a cellular telephone that looked like the one she had previously purchased for Jones. A defense investigator and a police officer testified that in a prior interview, Lenz stated that on the day of the incident defendant called her and asked where he could find someone to rob. Later that night, Lenz saw defendant with a gun and Jones' cellular telephone, and defendant was wearing Jones' jacket.

¶ 13 Morgan testified that he had met defendant in prison. Morgan also stated that defendant and Jones knew each other. On March 29, 2006, he received a telephone call from Jones and later went to look for Jones' vehicle with defendant. While looking for the vehicle, Jones called both him and defendant. Morgan testified that he, Jones and defendant were all involved in selling drugs.

¶ 14 Scott testified that on the day of the offense, defendant received a telephone call from Jones around 1 p.m. He and defendant met with Jones, where he observed Jones doing something in the trunk of his vehicle. Thereafter, two individuals arrived, and he and defendant left. A little later, defendant received a few telephone calls. Scott then accompanied defendant to meet with the two individuals who had met with Jones.

¶ 15 The defense also submitted billing records from a cellular telephone that Jones was using, which indicated that in February and March of 2006, at least 10 calls were made to defendant's cellular telephone, including one made at 1 p.m. on March 29, 2006.

¶ 16 The jury found defendant guilty of aggravated vehicular hijacking and the armed robbery of

Jones. Defendant was sentenced to consecutive terms of 28 and 17 years' imprisonment. This court affirmed that judgment on direct appeal, finding, among other things, that defendant was proven guilty beyond a reasonable doubt. *People v. Doss*, No. 3-08-0140 (2010) (unpublished order under Supreme Court Rule 23).

¶ 17 On March 23, 2011, defendant filed a *pro se* postconviction petition, alleging, *inter alia*, that trial counsel was ineffective in failing to lay a proper foundation for Edwards' impeachment of Jones. Defendant also claimed that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. On April 20, 2011, the trial court summarily dismissed defendant's petition as frivolous and patently without merit.

¶ 18 ANALYSIS

¶ 19 Defendant argues that his postconviction petition should not have been dismissed at the first stage, because he stated the gist of a constitutional claim. Defendant claims that: (1) his trial counsel was ineffective for failing to lay a proper foundation for admission of impeachment evidence against Jones; and (2) appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal.

¶ 20 The Post-Conviction Hearing Act provides for a three-stage review process in noncapital cases. 725 ILCS 5/122-1 *et seq*. (West 2010); *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit," and based on that finding, either summarily dismiss the petition or docket it for further review. 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). To state the gist of a constitutional claim, the defendant must plead some

facts from which a valid claim can be discerned. *People v. Edwards*, 197 Ill. 2d 239 (2001). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 21 A postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage if it is at least arguable that: (1) counsel's performance was so deficient that it fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Petrenko*, 237 Ill. 2d 490 (2010). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Haynes*, 192 Ill. 2d 437 (2000). Defendant's failure to satisfy either prong defeats a claim of ineffective assistance. *People v. Graham*, 206 Ill. 2d 465 (2003). Thus, if the claim can be disposed of on the ground that defendant suffered no prejudice, the reviewing court need not determine whether counsel's performance was deficient. *Id.* A defendant cannot show prejudice merely by speculating that the results would have been different if counsel had performed differently. *People v. Love*, 285 Ill. App. 3d 784 (1996).

¶ 22 Here, even assuming counsel's failure to impeach Jones was objectively unreasonable, we find that defendant's claim must fail because he cannot show prejudice. Defendant argues that prejudice exists because Edwards' impeachment testimony was critical to the defense, because Edwards was an impartial witness and Jones was the most critical witness for the State. Defendant also claims that evidence of Jones' alleged statement in the barbershop would have supported defendant's theory that Jones accused defendant of the offenses in retaliation for defendant setting up a drug deal where Jones was robbed.

¶ 23 At trial, the jury heard substantial evidence supporting defendant's contentions. Billing records showed telephone calls between defendant and Jones; the jury heard Edwards testify that Jones discussed the instant case on at least one occasion at the barbershop; Morgan and Scott's testimony indicated that Jones and defendant knew each other and were involved in selling drugs; Scott's testimony also suggested that defendant may have set up a drug deal for Jones on the day in question. Thus, the jury was aware of defendant's claims. Further impeachment of Jones would not have added significantly to their knowledge.

¶ 24 Furthermore, the jury heard both Jones and Moore identify defendant as their assailant. Lenz's statement that she saw defendant on the night of the incident with a gun, Jones' cellular telephone, and Jones' jacket supported Jones and Moore's claims that defendant was the assailant. In light of this evidence supporting the conviction, defendant cannot show a reasonable probability that the outcome of the trial would have been different had the impeachment been allowed. See, for example, *People v. Rincon*, 387 Ill. App. 3d 708 (2008).

¶ 25 Defendant also claims that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. Appellate counsel, however, is not ineffective for failing to raise every conceivable issue on direct appeal. Unless the underlying issue is meritorious, a defendant is not prejudiced from counsel's failure to raise it. *People v. Edwards*, 195 Ill. 2d 142 (2001). Since we have found that trial counsel was not ineffective, defendant cannot show that appellate counsel was ineffective for failing to raise this issue. See *Edwards*, 195 Ill. 2d 142.

¶ 26 CONCLUSION

¶ 27 The judgment of the circuit court of Will County is affirmed.

¶ 28 Affirmed.