2013 IL App (3d) 110521-U

Order filed July 24, 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 14th Judicial Circuit,) Whiteside County, Illinois,
Plaintiff-Appellee,	)
	) Appeal No. 3-11-0521
v.	) Circuit No. 07-CF-3
	)
IVAN JOHNSON,	) Honorable) Stanley B. Steines,
Defendant-Appellant.	) Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in dismissing defendant's first-stage postconviction petition.

¶ 2 Defendant, Ivan Johnson, appeals the first-stage dismissal of his postconviction petition. Defendant contends that he presented the gist of a claim where his appellate attorney failed to argue on direct appeal that trial counsel rendered ineffective assistance for failing to request a jury instruction for second degree murder. We affirm.

¶ 3 FACTS

¶ 4 On January 18, 2007, defendant was charged by indictment with four counts of first degree murder. The case proceeded to a jury trial.

¶ 5 Marie Schlosser testified that on November 26, 2006, she was at the victim's home when defendant arrived. Defendant and the victim began arguing about money when defendant "told [the victim] that we don't play about our money." Shortly thereafter, defendant started beating the victim. Schlosser recalled that the victim might have hit defendant once or twice. Eventually, the victim got away from defendant and ran behind a car. Defendant pursued and caught the victim as he approached the house. Defendant struck the victim, and he fell to the ground. Defendant stood over the victim and repeatedly punched the victim in the face. Eventually, defendant stopped punching the victim and walked away.

¶ 6 Dr. Larry Blum testified that he performed an autopsy on the victim. Blum opined that the victim died from neurogenic shock, which caused his body to shut down. The neurogenic shock was brought on by an intracranial hemorrhage, which resulted from blunt force trauma to the head and neck. Blum stated that the jaw injuries likely occurred when the victim's head was on the ground because the head could not move to absorb the impact.

¶ 7 Defendant testified the victim was arguing with his uncle when defendant approached and told the victim to calm down. The victim started arguing with defendant and said "if anybody gonna take a whippin [*sic*] it's gonna be [defendant]" and "threw up his guards." The victim did not swing at defendant or his uncle, but defendant punched the victim because "throwing up his guards" was a sign to fight. Defendant admitted he lied in his statement to the police when he said the victim swung at him or his uncle. Thereafter, defendant wrestled the victim to the

ground, and hit the victim two or three additional times. Once the victim was on the ground, defendant stood over him and hit him in the face twice. Defendant stopped striking the victim and walked away, noting that the victim could no longer hurt him since he was on the ground. Defendant did not remember if the victim ran after the fight began.

¶ 8 The jury found defendant guilty of first degree murder (720 ILCS 5/9-1(a)(2) (West 2006)), and the trial court sentenced defendant to 35 years of imprisonment.

¶ 9 On direct appeal, defendant argued the trial court erred when it barred him from introducing a hearsay statement. We affirmed defendant's conviction and sentence. *People v. Johnson*, No. 3-08-0520 (2010) (unpublished order under Supreme Court Rule 23).

¶ 10 On May 26, 2011, defendant filed a *pro se* postconviction petition. In his petition, defendant argued, in part, that his appellate counsel rendered ineffective assistance. Specifically, appellate counsel failed to raise the issue of trial counsel's ineffectiveness for failing to request a second degree murder jury instruction. In support, defendant claimed he presented evidence that justified a second degree murder instruction at trial.

¶ 11 The trial court dismissed the petition, noting "[t]he fact that the victim argued with [d]efendant and raised his fist[s] first does not rise to the level of mitigating evidence to support the submitting of a jury instruction for second-degree murder." The court stated "[m]ere words or gestures were not enough to give rise to the mitigating factor of serious provocation required for reducing first-degree murder to second-degree murder." The court also noted an instruction was provided to the jury on the offense of involuntary manslaughter. Defendant appeals.

¶ 12 ANALYSIS

¶ 13 Defendant argues the trial court erred in dismissing his first-stage postconviction petition.

Defendant contends his petition presented the gist of a claim for ineffective assistance of appellate counsel because appellate counsel failed to argue trial counsel was ineffective when he did not request a jury instruction for second degree murder.

¶ 14 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a three-stage process for the adjudication of postconviction petitions. *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." 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). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 15 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that: (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced. *People v. Tate*, 2012 IL 112214.

¶ 16 A defendant is entitled to a jury instruction on any defense theory that finds at least slight support in the record. *People v. Campbell*, 2012 IL App (1st) 101249. However, the decision to give an instruction is within the trial court's discretion. *People v. Garcia*, 165 Ill. 2d 409 (1995).

¶ 17 A person is guilty of second degree murder when he acts under a sudden and intense passion resulting from serious provocation while committing first degree murder. 720 ILCS 5/9-2(a)(1) (West 2006). Our supreme court has recognized that "serious provocation" results from mutual quarrel or combat. *People v. Chevalier*, 131 Ill. 2d 66 (1989). However, mere words or gestures do not constitute serious provocation. *People v. Blackwell*, 171 Ill. 2d 338 (1996).

¶ 18 In the instant case, defendant argues that counsel's performance was deficient because evidence was presented at trial to support a second degree murder instruction. However, the record does not support defendant's contention. First, defendant cannot rely on the victim's response as evidence of mutual combat because he admitted that he initiated the combat. See *People v. Austin*, 133 Ill. 2d 118 (1989) (one who instigates the combat cannot rely on the victim's response as evidence of mutual combat). Second, defendant's testimony that the victim provoked the fight with his words and gestures does not support a second degree murder instruction. The victim's statement, "if anybody gonna take a whippin [*sic*] it's gonna be [defendant]," and his putting up his guard was not the type of serious provocation that would excuse defendant's violent conduct. See *Id.* Finally, defendant's retaliation was disproportionate to the victim's provocation. See *Id.* (to justify a second degree murder instruction, the victim's provocation must be proportionate to the manner in which the accused retaliated). Defendant initiated the fight in response to the victim's words and gestures, and he continued the fight until the victim fell to the ground and was no longer moving. As a result, defendant's petition did not establish that appellate and trial counsel were ineffective. The trial court did not err in dismissing defendant's first-stage postconviction petition.

¶ 19 CONCLUSION

¶ 20 For the foregoing reasons, the judgment of the circuit court of Whiteside County is affirmed.

¶ 21 Affirmed.