2015 IL App (3d) 130202-U

Order filed March 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-13-0202
v.	)	Circuit No. 09-CF-1058
	)	
C.T. BUCKLEY III,	)	Honorable
	)	F. Michael Meersman,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justice Carter concurred in the judgment.
Justice Schmidt, dissented.

ORDER

¶ 1 *Held*: Postconviction petition presented gist of a claim that trial counsel provided ineffective assistance of counsel, where the petition alleged that counsel pursued an insanity defense without moving the court to order a mental health examination of defendant.

¶ 2 Defendant, C.T. Buckley III, was charged with two counts of aggravated battery (720 ILCS 5/12-4(b)(8), (10) (West 2008)) and one count of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(1) (West 2008)). At a bench trial, the alleged victim testified that defendant

forced his way into her car in a Walgreens parking lot and drove away with the victim wedged into the passenger floorboard area. Defendant testified that at the time of the alleged offense, he was suffering from a seizure disorder, which caused him to become confused. As a result, defendant thought the victim was his former roommate who had granted defendant permission to drive her car. Defendant argued that because of his seizure disorder, he was incapable of manifesting the intent necessary to commit the offenses in question. The court rejected defendant's argument, finding him guilty on all three counts and sentencing him to an aggregate of 15 years in prison.

¶ 3 Defendant's conviction and sentence were upheld on direct appeal. *People v. Buckley*, 2012 IL App (3d) 100944-UB. Defendant filed a timely petition for postconviction relief, arguing that trial counsel was ineffective for failing to properly pursue an insanity defense by requesting a mental health evaluation of defendant. The circuit court summarily dismissed the petition as frivolous and patently without merit. Defendant appeals, arguing the petition should advance to the second stage of postconviction proceedings. We reverse and remand.

¶ 4 FACTS

¶ 5 Defendant was charged with two counts of aggravated battery (720 ILCS 5/12-4(b)(8), (10) (West 2008)) and one count of aggravated vehicular hijacking (720 ILCS 5/18-4(a)(1) (West 2008)).

¶ 6 At a pretrial hearing, defense counsel stated that she was attempting to secure defendant's medical records:

> "I'm trying to go back into his medical history. He has a history of seizures I have been alerted to by his family. It is a potential defense available, whether or not he was able to have the mental capacity to commit the crime."

Counsel acquired the records and moved to appoint an expert "to conduct an evaluation of the Defendant's medical records and the discovery in this case." The motion did not mention whether the expert would conduct a mental health evaluation of defendant. The court granted the motion and appointed an expert "to investigate and examine all records."

¶ 7 The cause proceeded to a bench trial. The alleged victim, Geraldine Swift, testified that she was shopping at Walgreens one Sunday morning after church. As she was getting in her car to leave the parking lot, a man—later identified by Swift as defendant—approached her asking if she needed help. She did not recognize the man and declined his offer. Swift got in her car and started it. As she began to back out of her parking spot, she noticed the man standing close behind her car, blocking her path. She rolled down her driver's side window and asked him to move.

¶ 8 The man approached her open window. He reached inside the car and removed her keys from the ignition. He opened the driver's side door and forced his way in the vehicle, pushing Swift into the passenger seat. Swift started screaming. The man put his hands around her neck and choked her, then used one hand to cover her nose and mouth so she could not breathe. Swift tried to exit out the passenger door, but defendant held the door closed. He threw Swift's purse in the backseat and ordered her to get in the backseat with it. Swift refused and "held on for dear life." When defendant failed to force Swift into the backseat, he instead shoved her down into the floorboard area of the front passenger seat. Swift became stuck in the floorboard area, facing the rear of the car. Defendant said he wanted money and told Swift, "I don't want to hurt you, but I will if I have to."

¶ 9 Defendant drove the car out of the parking lot. Swift was able to open the passenger door while they were driving, but defendant closed it. Swift was "screaming my head off as loud as I

could." She noticed a truck driving behind them and waved her arms to signal its driver. The truck seemed to be following them. Defendant pulled into an alley, unsuccessfully attempting to evade the truck. The truck continued to follow. Eventually defendant parked the car, and the truck stopped behind them. Defendant turned off the car and gave Swift her keys. He exited the car. The man driving the truck confronted him. Defendant told the other driver, about Swift, "She's a crazy bitch. She's my neighbor." Defendant walked away, and the other driver helped Swift out of her car.

¶ 10 Swift testified that after the incident she did not immediately contact police. Instead, she went home and lay down. The next day, she called police, who took her statement.

¶ 11 James Bleuer testified that he was the man driving the truck that followed Swift's car. He observed the vehicle driving slowly and erratically and noticed that the driver looked upset and fearful. He also observed Swift sitting backward in the passenger seat, looking fearful. Bleuer followed the car until it pulled over and defendant exited. Defendant said, "She's a crazy bitch. She's my neighbor. I'm trying to help her out." Swift said that she had been assaulted at Walgreens. Defendant ran away. Bleuer helped Swift out of the car. Swift insisted that she was okay to drive home. Bleuer did not call the authorities.

¶ 12 Defendant testified that on the morning in question he was walking from his home to Walgreens, to refill his seizure medication. When he doesn't take his seizure medication, he suffers "blank outs" and "my brain stops functioning or I go into seizures to where I fall out on the floor." Other times, he retains some level of consciousness: "Sometime I go into blank outs to where I can mistake places I am at and where I am going and what I am doing or where I have been."

¶ 13 When defendant arrived at the Walgreens parking lot, he saw Swift getting into her car. Defendant testified that he thought Swift was his former roommate and girlfriend, Barb Scoville. Defendant approached Swift to ask her for a ride to the fire station because defendant was feeling dizzy from his seizures and needed help. Defendant testified he often went to the fire station for help when he was having a seizure episode because the fire station had an ambulance. Swift—who defendant still thought was Scoville—said "Come on" or "okay."

¶ 14 Swift moved over to the passenger seat, and defendant got in the driver's seat. He sat there for a while. Swift told him that he could not drive her car and that her name was not Barb. Defendant said, "Come on, Barb. I just need to get to the fire station. Look at me, I'm blanking out." Swift continued protesting, but defendant drove off anyway. Defendant told Swift he was not going to take her purse. Defendant placed her purse in the backseat to assure Swift that he was not going to steal it.

¶ 15 Swift was hitting defendant and telling him to pull over, so defendant pulled over and decided to walk the rest of the way to the fire station. He apologized to Swift for mistaking her for Scoville. He exited the car and walked to the fire station. When he arrived at the fire station, he talked to a firefighter who told him that the ambulances were all out on calls. Defendant decided to walk back to Walgreens to get help for his seizures. Bleuer then pulled up and said it looked like defendant was having a bad heart attack. Defendant walked back to Walgreens. He testified that he could not get any help there. He then returned home. When he regained consciousness the next day, he was in the hospital.

¶ 16 During closing arguments, the State argued that defendant's story was completely implausible. The defense argued that the State failed to prove intent because defendant was in "some sort of duress state of mind" that prevented him from manifesting the required *mens rea*.

¶ 17 The court found defendant guilty on all three counts. It stated that it would have found defendant guilty even if the court believed his account of the events. Defendant filed a posttrial motion, arguing that he had a seizure disorder, which caused him to hallucinate during the offenses; as a result, he argued he did not have the necessary *mens rea* to commit the offenses. The court denied the motion. It sentenced defendant to concurrent sentences of 15 years for aggravated vehicular hijacking and 5 years each for the two aggravated battery counts.

¶ 18 On direct appeal, this court vacated one of the fees imposed against defendant, but otherwise affirmed his convictions. *Buckley*, 2012 IL App (3d) 100944-UB.

¶ 19 Defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). In it, defendant alleged that trial counsel was ineffective for failing to order a mental health evaluation of defendant. The petition claimed that such an evaluation would have established that defendant was mentally ill at the time of the offenses and did not have the state of mind to commit a criminal offense.

¶ 20 The court summarily dismissed the petition as frivolous and patently without merit. The court found that, based on the testimony at trial, there was no evidence to suggest that defendant could establish an insanity defense or a finding of guilty but mentally ill. Defendant appeals.

¶ 21 ANALYSIS

¶ 22 On appeal, defendant argues that the circuit court erred by summarily dismissing his petition. Defendant argues that his petition established the gist of a constitutional claim that trial counsel was ineffective for failing to request an expert to evaluate his mental health in support of a plea of insanity.

¶ 23 At the first stage of proceedings under the Act (725 ILCS 5/122-1 *et seq.* (West 2012)), the circuit court independently reviews the petition, taking the allegations as true, and determines

whether the petition is frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9. A petition is frivolous or patently without merit if it has no arguable basis in either law or fact. *Id.* The petition need only present the "gist" of a constitutional claim to survive summary dismissal at the first stage of postconviction proceedings. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The circuit court's decision to summarily dismiss a petition at the first stage is reviewed *de novo*. *Id.*

¶ 24 Here, defendant's petition alleged that he was denied his constitutional right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. Specifically, the petition alleged that trial counsel failed to investigate a viable insanity defense by failing to request a mental health examination to determine whether defendant was insane or mentally ill (720 ILCS 5/6-2 (West 2008)) at the time of the offenses. In addressing the petition, the circuit court found that the evidence presented at trial did not suggest a viable insanity defense or a finding of guilty but mentally ill.

¶ 25 The United States and Illinois Constitutions guarantee criminal defendants the right to counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. The right to counsel embodies the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). To establish a claim of ineffective assistance of counsel, a criminal defendant must establish: (1) that counsel's performance was deficient, *i.e.*, unreasonable under prevailing professional norms; and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.

¶ 26 A. Deficient Performance

¶ 27 Defendant's petition alleges that trial counsel's representation was deficient because counsel failed to reasonably investigate an insanity defense by not ordering a pretrial

examination. Defendant is correct that "counsel has a professional obligation, both legal and ethical, to explore and investigate a client's potential defense." *People v. Clark*, 2011 IL App (2d) 100188, ¶ 25. Counsel's decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. The decision not to investigate must be the product of an informed judgment. *People v. Madej*, 177 Ill. 2d 116, 136 (1997).

¶ 28 Section 6-2(a) of the Illinois Criminal Code of 1961 provides:

> "A person is not criminally responsible for conduct if at the time of such conduct, as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2008).

All defendants are presumed sane. *People v. Houseworth*, 388 Ill. App. 3d 37, 50 (2008). Insanity is an affirmative defense, but unlike other affirmative defenses, it is the defendant's burden to prove by clear and convincing evidence that he or she was insane at the time of the offense and therefore not guilty. 720 ILCS 5/6-2(e) (West 2008). The State does not have the burden of proving beyond a reasonable doubt that defendant was sane at the time of the offense. *Houseworth*, 388 Ill. App. 3d at 50.

¶ 29 The key to the present case is that counsel raised the insanity defense at trial. During counsel's direct examination of defendant, she questioned him about his mental state. During closing argument, counsel argued that defendant was "confused" and "going through an illness." In the posttrial motion, counsel argued that defendant was "suffering from hallucinations at the time of the alleged crime." These actions show that counsel was attempting to raise an insanity defense.

¶ 30 Because counsel chose to raise the insanity defense, she had a duty to thoroughly investigate that defense. A thorough investigation of an insanity defense includes a mental health examination. Here, counsel failed to move for an examination, despite moving for an expert to evaluate defendant's mental health records. Had counsel given up on the insanity defense after the results of the evaluation of defendant's records, her decision not to move for an examination most likely would have been reasonable, or at least entitled to great deference. See *People v. Whitehead*, 169 Ill. 2d 355, 389-90 (1996) (overruled on other grounds by *People v. Coleman*, 183 Ill. 2d 366 (1998)). However, where counsel presented an insanity defense at trial, she arguably had a duty to move for an examination to support that defense.

¶ 31 The case of *People v. Ford*, 368 Ill. App. 3d 562 (2006) is enlightening. In *Ford*, defendant claimed trial counsel was ineffective for, among other things, raising an insanity defense while failing to properly prepare it. In rejecting that claim, the *Ford* decision implicitly supports defendant's argument in the present case. The *Ford* court, in holding that counsel was not deficient, relied primarily on the fact that counsel had defendant examined by a mental health expert. In the cases cited by the *Ford* defendant—*People v. Saunders*, 54 A.D. 2d 938 (1976); *People v. Bryant*, 258 N.W.2d 162 (1977); and *People v. Nyberg*, 362 N.W.2d 748 (1984)—the courts found deficient performance where defense counsel had failed to have the defendant examined by a mental health expert. The *Ford* court distinguished those cases on the ground that *Ford*'s counsel had him examined. *Ford* therefore highlights the necessity of a mental health examination to bringing an insanity defense.

¶ 32 We hold that it is arguable that, when trial counsel chooses to pursue an insanity defense, it constitutes deficient performance for counsel to fail to move for a mental health examination. The petition therefore established the gist of a claim that counsel provided deficient performance.

¶ 33 B. Prejudice

¶ 34 For defendant's petition to survive summary dismissal, he must also show an arguable basis that, but for counsel's decision not to move for a mental health examination, the result of the proceedings would have been different. See *Strickland*, 466 U.S. 668. That is, defendant must show a reasonable probability that the mental health examiner would have concluded that defendant was insane or mentally ill at the time of the offense and that the trial court would have found defendant not guilty by reason of insanity or guilty but mentally ill.

¶ 35 At the first stage of postconviction proceedings, we take the petition's allegations as true. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Therefore, at this stage we take as true defendant's allegation that, had he received an examination, the examiner would have found that he was insane at the time of the offenses. That assumption is supported by much of defendant's testimony at trial regarding his mental condition at the time of the offenses.

¶ 36 The Act also requires that the petition "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). Defendant's petition was not accompanied by any attachments supporting his claim that an examination would have revealed a mental illness or defect, nor did the petition include an explanation of why such records were not attached. The two exhibits attached to defendant's petition do not address what the examination would have revealed. However, we find that it is impossible to know the outcome of the examination without actually conducting it. Therefore, there were no "affidavits, records, or other evidence" that defendant could have attached to support his claim. *Id.* In such a context, the reason why supporting records were not attached is obvious, and the lack of an explanation does not justify summary dismissal.

¶ 37 The only way to know whether defendant was insane or mentally ill at the time of the offenses was to order a mental health examination. Counsel's failure to do so arguably constituted ineffective assistance of counsel. The petition therefore must proceed to the second stage of postconviction proceedings.

¶ 38 CONCLUSION

¶ 39 The judgment of the circuit court of Rock Island County is reversed, and the cause is remanded for further proceedings.

¶ 40 Reversed and remanded.

¶ 41 JUSTICE SCHMIDT, dissenting.

¶ 42 I respectfully dissent. The record shows that trial counsel was fully aware and fully investigated issues concerning defendant's mental health and any possible defenses that could have been raised. She obtained medical records and retained a medical expert to examine those records. She informed the court and the State that she would notify the prosecution if the expert's review of the medical records produced anything favorable for the defense to use at trial. There were several continuances before trial to allow the defense expert to perform a record review and a comprehensive case review. It seems clear that defense counsel's decision not to request another evaluation of the defendant was trial strategy. The record establishes that counsel had defendant's medical records examined and that her expert indicated that he could find nothing of benefit to the defendant. Additionally, there is a serious question as to whether any medical expert could have testified as to defendant's state of mind when he forced his way into the victim's vehicle. See *People v. Pertz*, 242 Ill. App. 3d 864 (1993).

¶ 43 The majority states that counsel's decision not to investigate "must be directly assessed for reasonableness in all the circumstances" and that the "decision not to investigate must be the

product of informed judgment." *Supra* ¶ 27. The record establishes that trial counsel's decision not to request a direct mental health examination was the product of an informed judgment. It was obviously made after defense counsel's consultation with an expert who had reviewed the defendant's medical records.

¶ 44 Further, the majority states that it was defense counsel's choice to raise an insanity defense at trial that mandates reversal. The majority opines that had defense counsel not raised these issues at trial, her decision not to move for an examination most likely would have been reasonable. *Supra* ¶ 30. I confess to an inability to connect those dots. It seems obvious to me that defense counsel was doing the best she could with what she had. While she did not have an expert to testify that defendant was insane at the time of the crime, she nonetheless threw what she had at the wall in apparent hope of possibly muddying the water or confusing the issues to perhaps create reasonable doubt.

¶ 45 For the foregoing reasons, I believe the record affirmatively established that defendant's ineffective assistance claim is both frivolous and patently without merit. Therefore, I would affirm.