2014 IL App (3d) 130734-U

Order filed October 21, 2014

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0734 Circuit No. 09-CF-350
AARON COOK,	)	Honorable Stephen A. Kouri,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed the defendant's petition at the first stage of postconviction proceedings.

¶ 2 The defendant, Aaron Cook, was convicted of aggravated battery of a child (720 ILCS 5/12-4.3(a) (West 2008)) following an incident on March 27, 2009. The defendant pled guilty and was sentenced to 17½ years' imprisonment and 3 years of mandatory supervised release (MSR). The defendant filed a motion to withdraw his guilty plea, which was denied by the trial court. On appeal, this court reversed a deoxyribonucleic acid (DNA) analysis fee assessed on the

defendant, but otherwise affirmed his conviction. *People v. Cook*, 2012 IL App (3d) 100735-U. Thereafter, the defendant filed a postconviction petition. The trial court dismissed the petition as frivolous and patently without merit. The defendant appeals, contending that the petition stated the gist of a constitutional claim for ineffective assistance of counsel. We affirm.

¶ 3 FACTS

¶ 4 The defendant was charged with aggravated battery of a child following an incident involving three-year-old A.W. on March 27, 2009. The court assigned a public defender to the defendant's case. While awaiting trial on that charge, the defendant escaped from the Peoria County jail on November 17, 2009. The defendant was apprehended on the same day that he escaped. On December 14, 2009, the defendant entered a negotiated guilty plea to aggravated battery of a child. At the plea hearing, the defense counsel stated that he believed the State could produce the following evidence:

> "On or about the date listed in the indictment [A.W.], along with her mother and her fiancé lived at 521 West Kellar Parkway in Peoria ***. At some point in the evening, [A.W.'s] mother, along with [her fiancé], gave [A.W.] a bath. The only bruises that were observed were bruises on [A.W.'s] side and her shins.
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> [At some time after her bath, A.W.] was put to bed. Approximately 9:30, the defendant returned to 521 West Kellar Parkway while [A.W.'s] mother and her fiancé were in the shower. The defendant, along with Kari McMillan, were in the kitchen at the house.
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> Kari McMillan went in the garage. Kari McMillan heard the following: [A.W.] asked the defendant for some milk. She then heard [A.W.] say, sorry, sorry. Kari McMillan went in the house. [A.W.] and the defendant were in the bedroom. Kari

looked at [A.W.'s] arm and asked the defendant if he did this. [A.W.] said [the defendant] hurt her, and it was then demonstrated to Kari that the defendant covered her mouth.

Kari then got [A.W.'s] mother *** out of the shower. [A.W.] then told her mother that the defendant squeezed her arm. Later that evening the defendant left running from the house.

Approximately 10:00 that night[, the] Peoria Police Department was dispatched to 521 West Kellar Parkway. Peoria police *** caught the defendant at 805 West Pine Hill. Defendant told police officers the following stories: First, he denied hurting [A.W.]. Then he told officers that [A.W.] may have gotten hurt when he shoved the milk cup in her hand and took it away. He then stated [A.W.] may have gotten hurt when he took the remote from her. He then stated [A.W.] ran full force into his knee. He then asked officers what [A.W.'s] story was. The defendant then said he gave [A.W.] a big old bear hug."

¶ 5 Additionally, the State could produce medical experts, including an emergency medical technician, a radiologist, and a doctor of pediatric medicine who would testify that following the incident A.W. had petechiae marks, which are commonly present after suffocation, and a fracture of her left distal radius and ulna. An expert would testify that such a fracture typically occurs from a direct blow and can possibly occur by squeezing. The State's Attorney also stated at the plea hearing that A.W. told numerous people that the defendant covered her mouth, hit her on the back, scratched her, and then squeezed her arm. Pursuant to the negotiated plea, the defendant was sentenced to imprisonment for a term of 17½ years and 3 years of MSR.

¶ 6 On January 4, 2010, the defendant filed a motion to withdraw his guilty plea on the basis that he did not understand he would not have any appeal rights and that he would have to serve at least 85% of his sentence, and his attorney coerced him into taking the plea. The matter was assigned to Tom Sheets, a different public defender than the defendant's trial counsel. Sheets filed a supplemental motion on April 22, 2010, alleging that the defendant was coerced into pleading guilty and that he was unaware he would serve 85% of his agreed sentence. The trial court denied the defendant's motion on September 23, 2010.

¶ 7 The defendant filed a direct appeal, arguing the trial court should have ordered a fitness hearing and his DNA analysis fee was improper because his DNA was already on file at the time of sentencing. In an order filed April 10, 2012, this court reversed the defendant's DNA analysis fee, but otherwise affirmed his conviction. See *Cook*, 2012 IL App (3d) 100735-U.

¶ 8 On February 28, 2013, following the decision by this court, the defendant filed a *pro se* postconviction petition alleging he was denied effective assistance of counsel during his pretrial proceedings, guilty plea proceedings, and motion to withdraw his guilty plea. The defendant first argued that his trial counsel was ineffective in that trial counsel failed to conduct a factual investigation into his case, and erroneously advised the defendant that he had no legal defense and his only option was to plead guilty. In his petition, the defendant stated that he had informed his trial counsel that he had inflicted A.W.'s injuries accidentally due to drug intoxication. The defendant claimed that he injured A.W. unintentionally when he "passed out" on top of her as a result of the intoxication. Citing section 4-8 of the Criminal Code of 1961 (Code) (720 ILCS 5/4-8 (West 2008)) the defendant stated that he had an affirmative defense since he did not injure A.W. intentionally. The defendant claimed that had he known about this defense, he would not have pled guilty and would have insisted on going to trial. The defendant told his trial counsel

that he was taken to Methodist Medical Center in Peoria, Illinois, on the night of his arrest due to his intoxication and that medical records from that evening would corroborate his claims of intoxication. The defendant also told his trial counsel about witnesses, including his sister, Brandy Cook, who would testify as to his intoxication on the date of the incident.

¶ 9 The defendant also stated that he had asked his trial counsel to file a motion to suppress the oral statements he made to the police, as the defendant had been extremely intoxicated at the time he was questioned by police. The defendant's trial counsel had informed him of a written statement that the defendant had made to the police, stating he would never hurt a child and asking for a lawyer. The defendant could not recall writing the statement. Defense counsel told him that it was apparent from the handwriting that the defendant was intoxicated when he wrote the statement.

¶ 10 The defendant raised two other claims of ineffective assistance of counsel in his postconviction petition, arguing that (1) his trial counsel was ineffective in failing to request a fitness hearing prior to his guilty plea; and (2) Sheets was ineffective in failing to conduct a factual and legal investigation into his case and to raise meritorious issues concerning his claim that his guilty plea was involuntary. The defendant further claimed that any claim or issue presented in his postconviction petition that was not raised in a posttrial motion or on appeal was due to the ineffective assistance of trial or appellate counsel or was outside the record.

¶ 11 An affidavit from Brandy was attached to his petition, stating that she brought ten 10-milligram methadone pills and ten #2 Klonapin pills to the defendant at approximately 1 p.m. on the day of the defendant's arrest. Brandy further stated in her affidavit that the defendant took all 20 pills. Also attached to the defendant's petition were affidavits from the defendant stating that he had tried to contact various other witnesses but was not able to attain affidavits from them

because he was incarcerated and indigent. Additionally, the defendant attached an affidavit stating that he had requested various medical records but that he was unable to obtain them due to his incarceration and lack of resources. Release forms and letters requesting records from the Robert J. Criss Reclamation Center methadone clinic, Methodist Medical Center, and the Peoria County jail were also attached to the petition.

¶ 12 After reviewing the defendant's petition, the trial court found that its allegations were frivolous and patently without merit. Therefore, the court entered an order dismissing the petition. The defendant appeals.

¶ 13 ANALYSIS

¶ 14 On appeal, the defendant argues that the trial court erred in summarily dismissing his postconviction petition because it stated the arguable basis for a constitutional claim that his trial counsel ineffectively failed to suppress implicating statements that the defendant made while he was severely intoxicated on the day of his arrest. Our review of the trial court's summary dismissal of the defendant's petition is *de novo. People v. Hodges*, 234 Ill. 2d 1 (2009).

¶ 15 Under the Post-Conviction Hearing Act (Act), a person subject to a criminal conviction can assert that his or her conviction resulted from proceedings in which "there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). The Act provides for a three-stage process for the adjudication of postconviction petitions. *Id.* At the first stage, a circuit court may dismiss a postconviction petition if the court determines that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel cannot be

summarily dismissed by the circuit court if "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id*. at 17. In reviewing the defendant's petition, we also recognize that the threshold for survival at the first stage of postconviction proceedings is low (*id.* at 9-10), as well as the requirement that *pro se* petitions are to be construed liberally (*id.* at 21).

¶ 16 On appeal, the defendant argues that his trial counsel was deficient for failing to move to suppress statements that the defendant made to the police when the defendant was intoxicated. The defendant argues on appeal that had the statements been suppressed, he would not have pled guilty. Generally, the decision to file a motion to suppress is a matter of trial strategy and is entitled to great deference. *People v. Bew*, 228 Ill. 2d 122 (2008). Errors in trial strategy do not establish incompetence. *People v. Albanese*, 125 Ill. 2d 100 (1988). "The effectiveness of counsel is determined by considering the totality of his conduct, not isolated incidents[.]" *People v. Gapski*, 283 Ill. App. 3d 937, 942 (1996). Furthermore, "[a] statement will be suppressed on the ground of intoxication or drug use only if, when the statement was made, the person was so grossly intoxicated as to be incapacitated. Lesser degrees of intoxication or drug use go merely to the weight to be given to the [statement]." *People v. Glass*, 232 Ill. App. 3d 136, 149 (1992).

¶ 17 In support of his argument that his trial counsel was deficient in failing to move to suppress statements he made to the police, the defendant points to evidence that could corroborate his claim that he was intoxicated on the day of his arrest. This evidence included medical records and testimony of certain witnesses. The defendant attached only one witness affidavit to his petition. In that affidavit, Brandy stated that the defendant had taken 10 methadone pills and 10 Klonapin pills approximately nine hours before his arrest.

¶ 18 Whether a motion to suppress the defendant's statements to police would have been successful is highly speculative. Even if the defendant is able to establish that he was intoxicated at the time the statements were made, he may not be able to prove that he was so grossly intoxicated as to be incapacitated. Under such circumstances, defense counsel's decision not to file a motion to suppress would likely be considered trial strategy.

¶ 19 Assuming, however, that the defendant would be able to prove that he was so intoxicated as to be incapacitated at the time of his statements and that his trial counsel's performance in failing to move to suppress the statements was arguably deficient, the defendant has not pled sufficient facts to demonstrate that he was arguably prejudiced by the admission of the statements. A defendant is prejudiced if there is a reasonable probability that absent trial counsel's deficient performance, the defendant would have pled not guilty and insisted on going to trial. *People v. Hall*, 217 Ill. 2d 324 (2005). "[T]he defendant's claim [that he would have insisted on going to trial] must be accompanied by either a claim of innocence or the articulation of a plausible defense that could have been raised at trial." *Id.* at 335-36.

¶ 20 First, even if the defendant's statements to the police had been suppressed, the other evidence against him was overwhelming. Defense counsel agreed during his plea hearing that the State would be able to produce evidence that: (1) a witness heard the defendant with A.W. at or near the time she was injured; (2) a witness saw the defendant alone in a bedroom with A.W. right after she was injured; and (3) A.W. stated almost immediately after she was injured that the defendant had hurt her. The State would have also been able to produce the testimony of medical experts who would testify that A.W. had bruising, petechiae marks consistent with suffocation, and a fracture of her left distal radius and ulna, consistent with A.W. receiving a direct blow or possibly being squeezed. Furthermore, suppression of the statements would have

had little effect, as the defendant did not actually admit to hurting A.W. in any of his statements to police. He initially denied hurting A.W. He then stated that A.W. ran into his knee and that she might "have gotten hurt" when he took a cup of milk or a remote control away from her or when he gave her a "big old bear hug." Because of the strong additional evidence implicating the defendant, we do not find it arguable that the defendant would have pled not guilty and insisted on going to trial had these statements been excluded.

¶ 21 Additionally, the defendant has not asserted any viable defense that would have been available to him had he gone to trial. In his petition, the defendant cited section 4-8 of the Code, which provides an affirmative defense of mistake of fact or law if said mistake negates the existence of the mental state prescribed by statute as an element of the offense. See 720 ILCS 5/4-8 (West 2008). The defendant went on to argue in his petition that he had a defense because he passed out on top of A.W. due to voluntary drug intoxication, thereby causing her injuries accidentally rather than intentionally. However, under section 6-3 of the Code, a person who is voluntarily intoxicated or in a drugged condition is criminally responsible for his conduct and has no affirmative defense. 720 ILCS 5/6-3 (West 2008). In the absence of a viable trial defense, we do not find it arguable that the defendant would have refused the State's plea offer and insisted on proceeding to trial.

¶ 22 CONCLUSION

¶ 23 The judgment of the circuit court of Peoria County is affirmed.

¶ 24 Affirmed.