2015 IL App (3d) 140050-U

Order filed December 4, 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 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-14-0050 Circuit No. 07-CF-1580
MICHAEL L. BERRY,	)	Honorable Daniel J. Rozak,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE McDADE delivered the judgment of the court.
Justices Lytton and Schmidt concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it summarily dismissed defendant's first stage postconviction petition.

¶ 2 Defendant, Michael L. Berry, appeals from the first stage dismissal of his *pro se* postconviction petition. Defendant argues that the court erred in dismissing his petition because he presented the gist of a claim of ineffective assistance of appellate counsel. We affirm.

¶ 3 FACTS

¶ 4 The facts of this case are adequately set forth in defendant's direct appeal, therefore, we recite here only those facts necessary to the disposition of defendant's postconviction appeal. *People v. Berry*, 2011 IL App (3d) 091048-U.

¶ 5 Defendant was charged by indictment with attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2006)); aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)); and unlawful use of a weapon by a felon (UUW) (720 ILCS 5/24-1.1(a) (West 2006)). Prior to trial, defense counsel agreed to stipulate that defendant had a prior felony conviction. The case proceeded to a jury trial.

¶ 6 At trial, the State's evidence established that the victim, Earlzell Lewis, was shot in the face while in the 1005 building of the Larkin Village apartment complex in Joliet. The victim identified defendant as the person who shot him.

¶ 7 Jamar Julien testified that on the day of the shooting he was socializing with defendant. Julien and defendant had smoked marijuana together on prior occasions, but Julien said that he and defendant did not smoke before the shooting. Prior to the shooting, Julien thought that defendant and another individual went to a third-floor apartment. Julien did not see defendant with a gun. Julien testified that his statement to the police, that defendant had asked him to get rid of a gun, was untrue.

¶ 8 The State also introduced the video-recorded interview that the police conducted with defendant after the shooting. In the interview, defendant told the police that after he heard the gunshots, he walked to 901 Lois Place to buy marijuana from a man named "Bud." After the transaction, defendant walked back to the 1005 building.

¶ 9 The State read the prior-arranged stipulation to the jury. The stipulation read:

"[t]he parties agree and stipulate that the defendant, Michael L. Berry, has been previously convicted of the felony offense of unlawful distribution of a controlled substance.

You may consider the convicted felon's status, elements of the crime of unlawful use of weapon by felon as proved by the stipulation."

¶ 10 Defendant did not testify and defense counsel presented no evidence. The case proceeded to closing arguments, and defense counsel argued, in part, that defendant's video-recorded interview established that defendant left the building after he heard the shots and went to buy marijuana. Defense counsel contended that defendant would not have admitted to the police that he participated in an illegal drug sale if the deal had not occurred.

¶ 11 The jury found defendant guilty of attempted first degree murder, aggravated battery with a firearm, and UUW. At the conclusion of the sentencing hearing, the trial court merged the aggravated battery with a firearm charge into the attempted first degree murder charge. The court sentenced defendant to 50 years' imprisonment for attempted first degree murder and a consecutive term of 10 years' imprisonment for UUW. On direct appeal, we affirmed defendant's convictions and sentences. *Berry*, 2011 IL App (3d) 091048-U.

¶ 12 On October 28, 2013, defendant filed a *pro se* postconviction petition. In the petition, defendant argued, in relevant part, that his right to due process of law was violated where the trial court allowed the State to present the name and nature of his prior conviction to the jury. In the argument section for this claim, defendant contended that appellate and trial counsel provided ineffective assistance for failing to raise this issue.

¶ 13 On December 23, 2013, the trial court summarily dismissed defendant's petition finding that defendant's claims were frivolous and patently without merit. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues that the trial court erred in dismissing his postconviction petition at the first stage of proceedings because his petition presented the gist of a claim that appellate counsel was ineffective for not raising trial counsel's ineffectiveness. Specifically, trial counsel allowed the jury to learn the name and nature of defendant's prior conviction. We find that trial counsel's actions were strategic, and therefore, the summary dismissal was proper.

¶ 16 A postconviction petition alleging ineffective assistance of appellate counsel may not be dismissed at the first stage of proceedings if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76. Appellate counsel is not required to raise every conceivable issue on appeal, and counsel is not incompetent for refraining from raising meritless issues. *Id.* ¶ 77. Generally, matters of trial strategy are immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶ 17 We begin our analysis by determining whether defendant made an arguable claim that appellate counsel's performance fell below an objective standard of reasonableness. Defendant contends that appellate counsel's failure to argue that trial counsel provided ineffective assistance was objectively unreasonable. Defendant argues that trial counsel was ineffective because he allowed the jury to learn the name and nature of his prior conviction.

¶ 18 In this case, the charged offenses of attempted first degree murder, aggravated battery with a firearm, and UUW proceeded to a jury trial. To convict defendant of UUW, the State needed to prove that defendant possessed on his person a firearm or firearm ammunition and

defendant had been convicted of a prior felony. 720 ILCS 5/24-1.1(a) (West 2006). Our supreme court has held that the least prejudicial means of proving the prior felony element of a UUW charge is by stipulation. *People v. Walker*, 211 Ill. 2d 317, 338 (2004). However, "the most a jury needs to know about the prior-conviction element is that the conviction admitted by the defendant falls within the class of crimes enumerated in the statute." *People v. Peete*, 318 Ill. App. 3d 961, 967 (2001). The *Peete* court specifically suggested that a trial court approve a stipulation requested by the defendant whereby the parties acknowledge that defendant has a prior felony conviction, without further elaboration. *Id*. at 969.

¶ 19 The stipulation at issue notified the jury that defendant had been convicted of a prior felony and named the offense—unlawful distribution of a controlled substance. While providing the name of the offense to the jury contradicts the *Peete* court's suggestion, in this case, the decision to disclose the name was strategic and limited the resultant prejudice. Specifically, trial counsel argued that defendant did not commit the attempted first degree murder and aggravated battery with a firearm charges, in part, because defendant told the police that he heard the gunshots and then went to purchase marijuana. Trial counsel argued that defendant's statement was a true account of defendant's whereabouts because he would not have told the police that he committed a criminal offense. This alibi defense was supported by Julien's testimony that he had smoked marijuana with defendant on prior occasions and the stipulation that defendant had a prior drug-related conviction. The introduction of the name of defendant's prior offense thus bolstered trial counsel's alibi argument.

¶ 20 Alternatively, we find that trial counsel's decision to allow the jury to learn the name of defendant's prior felony prevented the jury from speculating that defendant had committed a prior violent offense. Instead, this evidence established that defendant had committed a prior

nonviolent felony, and therefore, this evidence posed little prejudice to defendant who stood charged with violent offenses. If the stipulation did not name defendant's prior offense, the jury could have readily speculated that defendant committed a prior violent offense, and then relied on this as impermissible propensity evidence. See *People v. Bracey*, 52 Ill. App. 3d 266, 273 (1977). We conclude that the trial court did not err in summarily dismissing defendant's first-stage postconviction petition.

¶ 21 CONCLUSION

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

¶ 23 Affirmed.