2012 IL App (4th) 110685-U

NO. 4-11-0685

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
November 29, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Edgar County
TROY FOWLER,	)	No. 96CF121
Defendant-Appellant.	)	
	)	Honorable
	)	Mitchell K. Shick,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: It was error for the trial judge, instead of the jury, to decide the question of whether the murder "was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty," but this error was not *plain error*, given the overwhelming evidence of exceptional brutality and wanton cruelty; therefore, the dismissal of the postconviction petition was not manifestly erroneous. 730 ILCS 5/5-8-1(a)(1)(b) (West 1996).

¶ 2 Defendant, Troy Fowler, filed a postconviction petition, which the trial court dismissed after an evidentiary hearing. He appeals. The office of the State Appellate Defender (OSAD) has moved to withdraw from representing him, because OSAD does not believe that any reasonable argument could be made in support of this appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. Lee*, 251 Ill. App. 3d 63 (1993). Defendant has responded with points and authorities, and the State also has filed a brief. After carefully reviewing the record and the arguments, we are convinced that OSAD is correct in its evaluation of the merits of this appeal.

Therefore, we grant OSAD's motion to withdraw, and we affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In July 1997, a jury found defendant guilty of one count of first degree murder (720 ILCS 5/9-1(a)(1) (West 1996)) and two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 1996)). The victim in all three counts was 14-month-old Brandy S.

¶ 5 Under section 5-8-1(a)(1)(c)(ii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(c)(ii) (West 1996)), if the death penalty was not imposed, the trial court was to sentence the defendant to life imprisonment for first degree murder if, at the time of the murder, the defendant "had attained the age of 17 or more and [was] found guilty of murdering an individual under 12 years of age." Also, in the sentencing hearing, the trial court stated an additional, alternative reason for life imprisonment: the court found that "the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty." 730 ILCS 5/5-8-1(a)(1)(b) (West 1996).

¶ 6 For those reasons, in August 1997, the trial court sentenced defendant to life imprisonment for the first degree murder of Brandy S. The court also sentenced him to two 30-year terms of imprisonment on the two convictions of predatory criminal sexual assault of a child, announcing that, under the "truth-in-sentencing" provisions of section 3-6-3(a)(2)(ii) of the Unified Code of Corrections (730 ILCS 5/3-6-3(a)(2)(ii) (West 1996)), defendant would "receive no more than 4.5 days of good conduct credit for each month" of those 30-year prison terms instead of the normal day-for-day credit for good conduct. See *People v. Watford*, 294 Ill. App. 3d 462, 464 (1997).

¶ 7 On direct appeal, we affirmed all the convictions as well as the sentence of life imprisonment for first degree murder. However, in accordance with *People v. Reedy*, 186 Ill. 2d 1,

11-12 (1999), we vacated the trial court's finding that the truth-in-sentencing provisions—void on single-subject grounds—applied to the convictions of predatory criminal sexual assault of a child, and we amended those sentences to reflect that defendant would receive day-for-day credit for good conduct in prison. *People v. Fowler*, No. 4-97-0722 (April 27, 1999) (unpublished order under Supreme Court Rule 23).

¶ 8 Defendant petitioned to the supreme court for leave to appeal. In February 2000, the supreme court denied his petition but entered a supervisory order directing us to vacate our judgment and to reconsider the case in the light of *People v. Wooters*, 188 Ill. 2d 500 (1999). *People v. Fowler*, 187 Ill. 2d 578 (2000). Accordingly, we vacated our judgment and, upon reconsideration, issued a decision vacating the mandatory sentence of life imprisonment premised on defendant's age and the victim's age and substituting therefor a discretionary sentence of life imprisonment, premised on the trial court's finding that life imprisonment was warranted for the additional reason that "the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" (730 ILCS 5/5-8-1(a)(1)(b) (West 1996)). *People v. Fowler*, No. 4-97-0722, slip order at 59-60 (June 21, 2000). In this connection, we will quote from OSAD's *Finley* motion:

> "[T]he trial court noted several of the victim's injuries, including cigarette burns to her face; blunt trauma to her head of such force to crack her skull, cause her left eye to bulge from its socket, and sever the optic nerve; tears to her rectum; lacerations consistent with the insertion of a large object into her anus; bruising of her back and tailbone; vaginal tears and contusions; a torn hymen; internal burns to her vagina and anus consistent with the insertion of a hot curling

iron; and injuries to her tongue."

Given the court's finding of brutal and heinous behavior, which had ample support in the evidence, we concluded it would be unnecessary to remand the case for resentencing. *Id.* Instead, we exercised our authority under Illinois Supreme Court Rule 615(b)(4) (eff. August 27, 1999) to modify the sentence for first degree murder to a sentence of life imprisonment pursuant to section 5-8-1(a)(1)(b) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(b) (West 1996) ("the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty")).

¶ 9 Five days later, on June 26, 2000, the Supreme Court of the United States issued its decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), holding that, "[o]ther than the fact of a prior conviction, any fact that increase[d] the penalty for a crime beyond the prescribed statutory maximum [had to] be submitted to a jury, and proved beyond a reasonable doubt" (*id.* at 490). Nevertheless, counsel on direct appeal did not file with us a petition for rehearing or supplemental briefing on the basis of *Apprendi*. And although counsel petitioned the supreme court for leave to appeal, the petition did not raise *Apprendi*. The supreme court denied the petition on October 4, 2000. *People v. Fowler*, 191 Ill. 2d 543 (2000). We issued our mandate on October 27, 2000.

¶ 10 On November 6, 2000, defendant filed a *pro se* postconviction petition raising *Apprendi*. He alleged violations of *Apprendi* in that (1) the jury had not been asked to determine whether his behavior had been brutal or heinous and (2) the jury had not been asked whether his prison sentences should be consecutive. The trial court appointed counsel and, in July 2002, dismissed the postconviction petition for five reasons: (1) the petition was untimely in that defendant had filed it more than three years after his conviction of first degree murder, (2) defendant

had failed to allege any facts tending to establish that the late filing was due to some factor other than his culpable negligence, (3) *Apprendi* had no retroactive applicability, (4) *Apprendi* did not apply to a sentence of life imprisonment for murder accompanied by brutal or heinous behavior, and (5) *Apprendi* did not apply to consecutive sentences.

¶ 11 Defendant sought reconsideration of the dismissal of his postconviction petition. He argued that appointed counsel had failed to comply with Illinois Supreme Court Rule 651(c) (eff. December 1, 1984) in that counsel never consulted with him regarding his claims and his reasons for the lateness of his petition. The trial court adhered to its decision to dismiss the postconviction petition, and defendant appealed.

¶ 12 On appeal from the dismissal of the postconviction petition, we reversed the trial court's judgment, and remanded the case for further proceedings, because of defense counsel's noncompliance with Rule 651(c). *People v. Fowler*, No. 4-03-0837, slip order at 10-11 (November 2, 2005) (unpublished order under Supreme Court Rule 23). In so doing, we expressed no opinion on the merits of defendant's arguments based on *Apprendi*. *Id.* at 9.

¶ 13 On July 27, 2007, on remand, defendant filed two *pro se* pleadings, even though he was represented by counsel: a "Supplemental Post-Conviction Petition" and a petition pursuant to section 2-1401 (735 ILCS 5/2-1401 (West 2006)) for relief from judgment. Generally, a defendant may not file *pro se* pleadings while the defendant is represented by counsel. *People v. Serio*, 357 Ill. App. 3d 806, 815 (2005). The exception is if the *pro se* pleading alleges a colorable claim of ineffective assistance by the counsel currently representing the defendant, for it would go against human nature for counsel to zealously argue his or her own ineffectiveness. *Id.* In his *pro se* "Supplemental Post-Conviction Petition," defendant accused both his trial counsel and his appellate

counsel of ineffectiveness. It does not appear, however, that the counsel appointed to represent him in the postconviction proceedings in trial court, William D. McGrath of the Law Offices of Bob Dunst, had been either the trial counsel or the appellate counsel. Thus, the exception is inapplicable, and the "Supplemental Post-Conviction Petition" and the section 2-1401 petition were not properly before the trial court, and we will disregard those pleadings.

¶ 14 On February 26, 2010, McGrath filed, on defendant's behalf, a "Second Supplemental Petition for Post-Conviction Relief." The only claim in that pleading was that appellate counsel had rendered ineffective assistance by failing to raise *Apprendi* on direct appeal (and, in fact, that is the only claim that defendant discusses in his points and authorities).

¶ 15 After hearing evidence, the trial court decided that, with respect to appellate counsel's failure to raise *Apprendi* on direct appeal or in a petition for leave to appeal to the supreme court, defendant had indeed identified a deficiency in appellate counsel's performance and thus defendant had established the first element of a claim of ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court concluded, however, that defendant had failed to identify any prejudice from this deficient performance and that he therefore had failed to establish the second element of a claim of ineffective assistance. See *id.* Because of the overwhelming evidence that defendant's behavior was brutal, heinous, and indicative of wanton cruelty, the court found no reasonable probability that the outcome would have been different had the question been submitted to a jury. Hence, the court denied the petition for postconviction relief. See *id.* at 694.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 If, as in the present case, the trial court denied a postconviction petition after hearing

evidence, we will reverse the court's decision only if we find it to be manifestly erroneous. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Our standard of review is deferential. An error is "manifest" only if the error is "clearly evident, plain, and indisputable." *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997).

¶ 19 In the present case, the error was this: the trial judge, instead of the jury, decided the question of whether "the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" (730 ILCS 5/5-8-1(a)(1)(b) (West 1996)). See *People v. Kaczmarek*, 207 Ill. 2d 288, 302 (2003). Defendant, however, never objected to the error during trial; hence, we consider whether the *Apprendi* violation was plain error. See *People v. Crespo*, 203 Ill. 2d 335, 347 (2001).

¶ 20 No rational jury could have failed to find that this murder "was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty" (730 ILCS 5/5-8-1(a)(1)(b) (West 1996)). See *People v. McGee*, 121 Ill. App. 3d 1086, 1090-91 (1984) ("[A] single act which causes death or injury may *** be sufficient to demonstrate exceptionally brutal or heinous behavior considering the entire conduct of the defendant.") The lethal act by itself was "hatefully or shockingly evil": slamming a 14-month-old child's head with such force as to crack the skull and dislodge an eye from its socket. (Internal quotation marks omitted.) *People v. Hartzol*, 222 Ill. App. 3d 631, 651 (1991) (quoting *People v. LaPointe*, 88 Ill. 2d 482, 501 (1981)). In addition, before killing the child, defendant subjected her to horrendous physical torture. "In evaluating the brutality and heinousness of the crime, the entire spectrum of facts surrounding the given incident must be analyzed and evaluated." (Internal quotation marks omitted.) *Id.* (quoting *McGee*, 121 Ill. App. 3d at 1089).

¶ 21 In sum, the *Apprendi* violation does not qualify as plain error (see *Crespo*, 203 Ill. 2d at 348-49); there is no reasonable probability that, had trial counsel insisted that the question be presented to the jury, the jury would have found in defendant's favor (see *Strickland*, 466 U.S. at 694); and therefore the dismissal of the postconviction petition was not manifestly erroneous (see *Coleman*, 183 Ill. 2d at 385).

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we grant OSAD's motion to withdraw from representing defendant in this appeal, and we affirm the trial court's judgment. We award the State $50 in costs.

¶ 24 Affirmed.