2014 IL App (4th) 120115-U

NO. 4-12-0115

FILED
January 21, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Sangamon County
BARRY K. SANDERS,	)	No. 05CF660
Defendant-Appellant.	)	
	)	Honorable
	)	Leslie J. Graves,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed defendant's postconviction petition alleging ineffective assistance of counsel, as defendant made no substantial showing to overcome the presumption trial counsel's failure to seek a mistrial, after two jurors exited the jury room and were told by court personnel to return, was a matter of strategy.

(2) Because the underlying issue lacked merit, defendant was unable to prove appellate counsel provided ineffective assistance by not raising the issue on direct appeal.

¶ 2 In November 2008, defendant, Barry K. Sanders, filed a *pro* se petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-7 (West 2012)). Defendant alleged he was denied the effective assistance of counsel during trial when his counsel failed to seek a mistrial or an inquiry after two agitated jurors exited the jury room during deliberations and were told by court personnel to return to the jury room. Defendant further alleged appellate

counsel was ineffective for not raising the issue on direct appeal. In January 2012, the trial court granted the State's motion to dismiss defendant's petition. Defendant appeals. We affirm.

¶ 3 I. BACKGROUND

¶ 4 After a May 2006 jury trial, defendant was convicted of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2004)). In July 2006, the trial court sentenced him to 28 years in prison.

¶ 5 During his trial, the jury retired to deliberate at 1:35 p.m. on Friday, May 19, 2006. At 6:25 p.m., the trial court reported an incident involving two jurors. Sergeant Christine Maynard of the Sangamon County sheriff's department reported to the court that, at approximately 6:15 p.m., she was in the bailiff's room preparing the menus to make an order for the jury's supper when two jurors entered the room. Both jurors stated they did not care and she could take them to jail. One said he no longer wanted to be the foreman. Bob Kaylor, the head bailiff, then escorted the jurors to the jury room and told them they must return. Kaylor also told the jurors to write a note and it would be given to the trial judge.

¶ 6 The trial court read a note received from the jurors before the court: "[T]he jury wants to vote on a new lead person. I do not want to have anything to do with this jury. Dave Loebach." The court further reported the note indicated Ed Cropp wished to be dismissed from the jury.

¶ 7 The State suggested the trial court address the jury according to the standards set forth in *People v. Prim*, 53 Ill. 2d 62, 74-76, 289 N.E.2d 601, 608-09 (1972), and "see where it goes from there." Defense counsel, Brian Otwell, disagreed, stating he believed it was too early for *Prim*. Defense counsel argued the court should just "say please continue * * * your

deliberations."

¶ 8 The trial court suggested it could respond by saying the jury could choose a new foreperson, but please continue the deliberations. The court stated it would not let the jurors "go just because they are mad and want to take their bat and ball and go home." The court asked defense counsel if he had an objection to its approach. Defense counsel stated he did not.

¶ 9 The transcript shows the jury sent out a note at 6:25 p.m. stating they had reached a verdict. The jury found defendant guilty of aggravated discharge of a firearm.

¶ 10 On July 5, 2006, defendant moved for a new trial. Defendant argued the trial court erroneously allowed "the jury to continue its deliberations after two jurors separated themselves from the rest of the jury during deliberations and had discussions concerning the trial outside the presence of the remaining jurors."

¶ 11 At the July 26, 2006, hearing on defendant's motion, Tom Goacher, a court security officer with Sangamon County, testified he was in the bailiff's room during the late afternoon of May 19, 2006. Officer Goacher was on his lunch break. Upon hearing a loud voice, Officer Goacher stepped into the hallway and saw a juror exit the jury room. The juror was approaching the bailiff's room. Officer Goacher asked the juror what he was doing and told him he needed to return to the jury room. The juror stated something like he "couldn't take it anymore" and he wanted to quit. The juror stated he did not care if he was arrested and he would not return to the jury room. Right after Officer Goacher spoke to the first juror, a second juror exited the room and stated the same. The two jurors did not speak to each other or discuss the case.

¶ 12 Officer Goacher testified his sergeant approached them. Officer Goacher and his

sergeant escorted the jurors to the jury room and told them to work out their problems in the jury room. The two immediately reported the incident to the trial court. Officer Goacher estimated the interaction lasted "[p]robably no more than a minute and [a] half, two minutes."

¶ 13 On cross-examination, Officer Goacher testified he was eating lunch in the bailiff's room. Officer Goacher heard a loud voice in the hallway. He then saw a juror. The juror was not addressing anyone in particular, just stating out loud he would not return to the jury room. The juror was very agitated. Officer Goacher was the first to confront him. About 5 to 10 seconds later, another male juror entered the hallway. He made the same statements made by the first juror. Neither mentioned the reason for their statements. Officer Goacher did not want them to elaborate. He only wanted to get the two back into the jury room. Both indicated they did not want to deliberate any further. Goacher's sergeant arrived and told the jurors they needed to return to the jury room and work out their difficulties there. The jurors were escorted to the jury room but not physically forced to return. They "didn't go particularly willingly."

¶ 14 Christine Maynard, a sergeant for court security in the sheriff's department, testified she was on duty on May 19, 2006. Sergeant Maynard was on lunch break in the bailiff's room. Sergeant Maynard was sitting in a chair and Officer Goacher was standing in the doorway, when the two heard a highly agitated male voice in the hallway. The man stated he was not "going to do this anymore." Officer Goacher turned into the hallway. The male approached Officer Goacher.

¶ 15 Sergeant Maynard testified a second man entered the hall, stating he was not "going to do this anymore" and would go to jail. At that point, Sergeant Maynard testified she stood from her chair and recognized the two men as jurors. Sergeant Maynard believed she said,

"stop." She and Officer Goacher then closed the door to the bailiff's room and escorted the jurors down the hall. Sergeant Maynard did not recall discussions between the jurors. The incident lasted "[m]aybe a minute and a half, two minutes."

¶ 16 On cross-examination, Sergeant Maynard testified she did not know where the assigned bailiff was at the time the incident occurred. Neither she nor Officer Goacher were sworn to attend to the jury.

¶ 17 Defendant pursued a direct appeal of his conviction, arguing the trial court abused its discretion in denying his motion *in limine* that requested his prior conviction not be used to impeach him. We found no error and affirmed defendant's conviction. *People v. Sanders*, No. 4-06-0782 (Feb. 8, 2008) (unpublished order under Supreme Court Rule 23).

¶ 18 In November 2008, defendant filed his *pro se* postconviction petition, arguing his trial counsel provided ineffective assistance because he failed to request a mistrial or an investigation regarding the May 19 juror incident. Defendant also argued his counsel on direct appeal provided ineffective assistance in not raising this issue. In January 2009, the trial court ordered defendant's petition docketed and appointed counsel. The State moved to dismiss defendant's postconviction petition. In November 2010, appointed counsel, who accepted a new position, moved to withdraw as counsel. In May 2011, defendant moved to represent himself during postconviction proceedings. Defendant argued new counsel was appointed in March 2011 but had made no contact with him and his case had been in limbo since 2008. The court granted defendant's motion. In October 2011, defendant filed an amended *pro se* postconviction petition.

¶ 19 In January 2012, a hearing was held on the State's motion to dismiss defendant's

postconviction petition. The trial court granted the State's motion to dismiss. The court found defense counsel's decision not objectively unreasonable but strategic. The court further found defendant suffered no prejudice.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 A. Legal Standards

¶ 23 The Act sets forth a three-stage process by which a defendant may acquire postconviction review of a claim his conviction led to a substantial denial of constitutional rights. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 17, 958 N.E.2d 367. In the first stage, the trial court determines whether a postconviction petition is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). If the petition survives the first stage, it advances to the second, where the court may appoint counsel and *pro se* petitions may be amended. *Id*. at 658, 936 N.E.2d at 653. The State may answer the defendant's postconviction petition or move to dismiss. 725 ILCS 5/122-5 (West 2012). If the State moves to dismiss a postconviction petition, the petition will survive and advance to the third-stage evidentiary hearing "only where the allegations of the post[]conviction petition, supported where appropriate by the trial record or accompanying affidavits, make a substantial showing that a defendant's constitutional rights have been violated." *People v. Morgan*, 187 Ill. 2d 500, 528, 719 N.E.2d 681, 697 (1999); see also *Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2012). All well-pled allegations are taken as true and liberally construed in the petitioner's favor. *People v. Coleman*, 183 Ill. 2d 366, 380-82, 701 N.E.2d 1063, 1071-72 (1998).

¶ 24 This case involves a second-stage dismissal of defendant's postconviction petition. Our review is *de novo*. *Id.* at 380, 701 N.E.2d at 1071.

¶ 25 The constitutional deprivation alleged by defendant is he was denied the effective assistance of trial and appellate counsel. A claim of ineffective assistance of counsel is resolved under the framework provided in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court described a two-part test for evaluating whether a defendant was denied the effective assistance of counsel. To establish an ineffectiveness claim under *Strickland*, a defendant must show counsel's performance was deficient and the performance substantially prejudiced defendant. *Id.* at 687. To show this deficiency and subsequent prejudice, a defendant must show (1) counsel's representation fell below an objective standard of reasonableness; and (2) absent counsel's error, a reasonable probability exists the outcome of the proceeding would have been different. *People v. Young*, 341 Ill. App. 3d 379, 383, 792 N.E.2d 468, 472 (2003).

¶ 26 When a defendant argues appellate counsel was ineffective for failing to argue an issue on appeal, he must allege facts demonstrating the failure was objectively unreasonable and the failure prejudiced defendant. *People v. Rogers*, 197 Ill. 2d 216, 223, 756 N.E.2d 831, 835 (2001). "If the underlying issue is nonmeritorious, the defendant has suffered no prejudice." *Id.*

¶ 27 B. Trial Counsel's Performance

¶ 28 Defendant argues he made a substantial showing his right to the effective assistance of counsel was violated when trial counsel did not seek a mistrial or an inquiry after the May 19 juror incident. Defendant does not, however, begin his argument by specifically addressing the *Strickland* factors. Instead, defendant relies on *Remmer v. United States*, 347 U.S. 227 (1954), and contends the trial court erred because outside communication with a juror is

presumptively prejudicial and the State bears the burden of proving the error harmless.

¶ 29 In *Remmer*, an outsider appeared to offer a bribe to a juror and the Federal Bureau of Investigation (FBI) investigated the incident during the trial. *Id.* at 228. The FBI issued a report to the judge and prosecutors alone, and defendant and his counsel did not learn of the issue until after the verdict. *Id.* at 228. The Supreme Court held "any private communication, contact, or tampering, directly or indirectly, with a juror during a [criminal] trial about the matter pending before the jury is *** deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties." *Id.* at 229. The *Remmer* Court, however, noted the presumption of prejudice was not alone conclusive, finding the State carried the burden of establishing the outside contact was harmless to the defendant. *Id.* at 229.

¶ 30 *Remmer* is not, however, a case in which the defendant made an ineffective-assistance-of-counsel claim. *Remmer* was heard on direct appeal. Defendant cites no decision establishing the presumption of prejudice applied in *Remmer* should be applied to claims of ineffectiveness. In fact, the case law shows *Remmer*'s presumption does not extend to all circumstances in which prejudice is a factor, such as in plain-error cases. For example, in *United States v. Olano*, 507 U.S. 725, 741 (1993), the Supreme Court concluded the *Remmer* presumption did not apply in its case because it was a plain-error case and the respondents had the burden of proving the jury intrusion—the presence of alternate jurors during deliberations—was prejudicial. In *People v. McLaurin*, 235 Ill. 2d 478, 497-98, 922 N.E.2d 344, 356 (2009), also a plain-error case, the Illinois Supreme Court recognized the distinction and followed *Olano*. The *McLaurin* court noted the key question in jury-room intrusion cases was whether the

defendant was prejudiced by the intrusion. *Id.* at 497, 922 N.E.2d at 356. While in *Remmer*, where the matter was properly preserved, prejudice is presumed and the State carries the burden of proving harmless error, in plain-error cases the burden rests on the defendant. *Id.* at 497-98, 922 N.E.2d at 356.

¶ 31 To support his claim *Remmer*, in light of *Olano*, remains good law and establishes a presumption of prejudice, defendant relies on the *habeas* case of *Hall v. Zenk*, 692 F.3d 793, 795 (7th Cir. 2012). In *Hall*, a defendant learned a juror in his case had a son who was a fellow inmate of defendant. *Id.* Before defendant's trial, that son informed his juror father he believed defendant was innocent of the charges. During trial, however, that same son informed his juror father he and other inmates believed defendant was guilty. *Id.* Defendant, pointing to this jury intrusion, challenged his conviction in the state courts before filing his *habeas* petition, which was dismissed. In deciding his appeal, the Seventh Circuit analyzed *Remmer* and concluded the Indiana standard in determining prejudice was inconsistent with *Remmer* and subsequent cases. *Id.* at 803.

¶ 32 However, although the *Hall* decision shows *Remmer* remains good law, the decision is not favorable to defendant. First, the *Hall* court, in its analysis of *Remmer* and *Olano*, found *Remmer* is not universally applied: "federal constitutional law maintains a presumption of prejudice in *at least some* intrusion cases." (Emphasis added.) *Id.* at 803. In addition, the *Hall* court refused to hold the *Remmer* presumption of prejudice satisfied the prerequisite prejudice element of his *habeas* claim. To recover on his *habeas* claim, the court found defendant must prove the state court's failure to apply the *Remmer* presumption during his state appeals resulted in actual prejudice, *i.e.*, the jury's verdict was tainted. *Id.* at 803.

¶ 33 Given the decisions of *Olano*, *Hall*, and *McLaurin*, we find *Remmer* does not alleviate defendant of the burden of establishing both prongs of the *Strickland* test for his ineffective-assistance-of-counsel claims. Defendant, to survive a second-stage motion to dismiss his petition, must provide allegations supported by the record or accompanying affidavits that make a substantial showing (1) his counsel's failure to seek a mistrial or request an investigation amounts to unreasonable representation; and (2) absent that error, there exists a reasonable probability the outcome of his trial would have been different. *Young*, 341 Ill. App. 3d at 383, 792 N.E.2d at 472 (setting forth the *Strickland* test); *Morgan*, 187 Ill. 2d at 528, 719 N.E.2d at 697 (providing the requisite standard to survive a second-stage motion to dismiss under the Act).

¶ 34 Before we turn to these *Strickland* factors, we note defendant argues counsel provided ineffective assistance by not seeking a mistrial or requesting an inquiry during deliberations and relies, in part, on testimony from the hearing on the posttrial motion in proving such claim. However, the law establishes allegations of ineffective assistance of counsel must be examined based on the time the act or omission occurred, not with the benefit of hindsight. See *People v. Manning*, 241 Ill. 2d 319, 334, 948 N.E.2d 542, 551 (2011) (quoting *Strickland*, 466 U.S. at 689 ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.")). We thus examine defense counsel's failure to seek a mistrial or inquiry *before* the verdict was entered without considering the discrepancies between Sergeant Maynard's statement to the court and her testimony on the posttrial motion. The content of the testimony during the posttrial motion is irrelevant to whether defense counsel provided ineffective assistance by not seeking a mistrial or

an investigation, the conduct challenged by defendant.

¶ 35 Turning to the first *Strickland* prong, defendant does not directly argue counsel's conduct was objectively unreasonable. Instead, defendant argues the trial court improperly concluded counsel's failure to request an inquiry or mistrial was a result of trial strategy. Defendant contends an evidentiary hearing is necessary to ascertain whether defense counsel made a strategic decision or acted incompetently.

¶ 36 Motions for a mistrial should be granted "where an error of such gravity has occurred that it has infected the fundamental fairness of the trial, such that continuation of the proceeding would defeat the ends of justice." *People v. Bishop*, 218 Ill. 2d 232, 251, 843 N.E.2d 365, 376 (2006). According to our supreme court, "the decision whether to seek a mistrial is a matter of trial strategy." *People v. Segoviano*, 189 Ill. 2d 228, 248, 725 N.E.2d 1275, 1285 (2000).

¶ 37 When considering the first *Strickland* factor, a court begins with the strong presumption counsel's conduct is objectively reasonable. *Manning*, 241 Ill. 2d at 334, 948 N.E.2d at 551. Thus, to prove defense counsel's conduct did not fall within the range of reasonable professional assistance, defendant must overcome the presumption counsel's conduct may be sound trial strategy. *Id.* Applying these *Strickland* principles and the requirements of the Act, defendant, to survive a second-stage dismissal under the Act, must set forth allegations, factually supported and taken as true, that make a substantial showing overcoming the presumption defense counsel's failure to seek a mistrial or an investigation was sound trial strategy. See *Morgan*, 187 Ill. 2d at 528, 719 N.E.2d at 697; *Coleman*, 183 Ill. 2d at 380-82, 701 N.E.2d at 1071-72.

¶ 38 Defendant's allegations do not make such a showing. At the time counsel did not seek a mistrial or ask for an investigation, counsel knew the jurors had been deliberating for some time and, importantly, at least part of the jury remained unconvinced of defendant's guilt. Counsel had no indication the jurors engaged in contact other than what Sergeant Maynard reported. The option for an investigation and a later posttrial motion for a new trial remained available, and defendant had a chance for acquittal.

¶ 39 Defendant argues, however, the strategy decision was premature, because, he contends, without an evidentiary hearing, one cannot tell whether counsel's conduct was strategic or incompetent. See, *e.g.*, *People v. Steidl*, 177 Ill. 2d 239, 685 N.E.2d 1335 (1997); *People v. Cabrera*, 326 Ill. App. 3d 555, 764 N.E.2d 532 (2001); *People v. Tate*, 305 Ill. App. 3d 607, 712 N.E.2d 826 (1999); *People v. Gibson*, 244 Ill. App. 3d 700, 612 N.E.2d 1372 (1993). In defendant's cases, however, facts existed on postconviction review that made a substantial showing overcoming the presumption defense counsel's conduct was strategic. In *Steidl*, affidavits by expert witnesses who did not testify at defendant's trial demonstrated had counsel performed an adequate investigation he would have found potentially exculpatory evidence. See *Steidl*, 177 Ill. 2d at 256-57, 685 N.E.2d at 1343. In *Cabrera*, the defendant attached affidavits by two witnesses defense counsel refused to call at trial who would have provided potentially exculpatory evidence. *Cabrera*, 326 Ill. App. 3d at 564, 764 N.E.2d at 538. In *Tate*, the defendant attached affidavits by potential alibi witnesses defense counsel did not call. *Tate*, 305 Ill. App. 3d at 612, 712 N.E.2d at 830. *Gibson*, like *Tate*, involves an alibi witness not called at trial. *Gibson*, 244 Ill. App. 3d at 704, 612 N.E.2d at 1374-75. In this case, the record and allegations do not make a substantial showing to refute the strategy presumption.

¶ 40 Defendant's remaining case law is also distinguishable and does not require a contrary result. In *Owen v. Duckworth*, 727 F.2d 643, 648 (7th Cir. 1984), the Seventh Circuit found the district court improperly denied defendant's writ of *habeas corpus*, finding no juror prejudice after a juror was threatened via telephone and other jurors knew of the threat. *DeGrave v. United States*, 820 F.2d 870 (7th Cir. 1987), predates *Olano* and *Hall*. In *DeGrave*, a *habeas* case, the trial court permitted the court reporter to read the entire testimony of certain witnesses to the jury. *Id.*

¶ 41 We find defendant has not made a substantial showing of the first *Strickland* factor and his ineffective-assistance-of-counsel claim fails on that ground alone. We need not consider the second *Strickland* factor, prejudice. See *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003).

¶ 42 We note, near the end of his opening brief, defendant argues Officer Goacher and Sergeant Maynard essentially and improperly instructed two jurors to continue deliberating outside the presence of the trial judge and counsel and without the safeguards set forth in *Prim*, 53 Ill. 2d at 74-76, 289 N.E.2d at 608-09, for deadlocked juries. It is unclear how this argument ties into the ultimate issue of this case, where trial counsel was ineffective for failing to seek a mistrial or an investigation during jury deliberations. If defendant intends this argument to support his claim trial counsel was ineffective at that time, it fails. Officer Goacher's testimony, upon which defendant relies to make this argument, occurred *after* counsel did not seek a mistrial. If defendant intends this argument to be a separate constitutional deprivation for which he seeks postconviction relief, it is forfeited because defendant has not developed an argument to explain why he is entitled to such relief. See Ill. S. Ct. Rule 341(h)(7) (eff. Feb. 6, 2013); *People*

v. Ward, 215 Ill. 2d 317, 332, 830 N.E.2d 556, 564 (2005) (stating a point raised but not supported by relevant authority does not comply with supreme court rules). While defendant points to potential error, he falls short of showing the error is reversible under the Act. None of his cases establish otherwise. Two of the cases are direct appeals in other states and involve the courts' interpretations of their own state laws. See *State v. Merricks*, 831 So. 2d 156, 158-59 (Fla. 2002); *People v. Lyons*, 416 N.W.2d 422, 423 (Mich. App. 1987). The other two cases involved comments by a court bailiff and deputy indicating their beliefs the defendants were guilty. See *Parker v. Gladden*, 385 U.S. 363, 363-64 (1966) (noting the bailiff stated, " 'Oh that wicked fellow [(petitioner)], he is guilty.' "); *People v. Kawoleski*, 313 Ill. 257, 258, 145 N.E. 203 (1924) (considering the deputy's statement " 'it should not take more than two or three minutes to convict that bird' ").

¶ 43 C. Appellate Counsel's Performance

¶ 44 Defendant's only challenge to appellate counsel's conduct is the "failure to raise an issue about this incident on direct appeal." Defendant does not explain what "issue about this incident" should have been raised. The only potential underlying issue addressed and briefed on appeal is whether trial counsel's failure to seek a mistrial or an investigation during jury deliberations amounts to ineffective assistance of counsel. As we determined, that issue was not resolved in defendant's favor. Because "the underlying issue is nonmeritorious," defendant has made no showing appellate counsel's failure was prejudicial and this argument fails. *Rogers*, 197 Ill. 2d at 223, 756 N.E.2d at 835.

¶ 45 III. CONCLUSION

¶ 46 We affirm the trial court's judgment.

¶ 47 Affirmed.