

NOTICE

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2015 IL App (4th) 130526-U

NO. 4-13-0526

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 4, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ANDREW URDIALES,)	No. 98CF19
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Pope and Justice Holder White concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant failed to make a substantial showing his appellate counsel was ineffective for declining to challenge his jury waiver on direct appeal.

(2) Defendant failed to make a substantial showing his trial counsel was ineffective for failing to investigate Anthony Thomas as an alternate suspect.

¶ 2 In 2004, defendant was found guilty of murdering Cassandra Corum. A jury ultimately determined death was the appropriate sentence. His conviction and sentence were upheld in *People v. Urdiales*, 225 Ill. 2d 354, 452, 871 N.E.2d 669, 726 (2007). In April 2008, defendant filed a *pro se* postconviction petition. In March 2011, defendant's sentence was commuted to natural life in prison. On June 30, 2011, defendant's counsel filed a superseding, amended postconviction petition raising three claims: (1) defendant's jury waiver was not knowing and voluntary; (2) defendant's trial lawyers failed to interview witnesses concerning

alternate suspect Anthony Thomas; and (3) admission of defendant's confession and its use by testifying experts violated his due-process rights. In December 2011, the State filed a motion to dismiss the amended petition. Following argument, on February 7, 2013, the trial court dismissed the amended petition and denied defendant's ensuing motion to reconsider on June 5, 2013.

¶ 3 This appeal followed.

¶ 4 I. BACKGROUND

¶ 5 On July 14, 1996, police found the nude body of an unidentified woman floating in the Vermilion River in Livingston County. The body was identified as that of Cassandra Corum. Corum's murder was later linked to the murders of two young women in Cook County. Each of the women was killed by bullets fired from the same gun. In November 1996, defendant was arrested for unlawful possession of a firearm and his gun was seized. Testing confirmed defendant's gun fired the bullets that killed Corum and the women in Cook County.

¶ 6 On April 22, 1997, Chicago police officers approached defendant, who voluntarily agreed to talk with them. Defendant provided detailed confessions to all three Illinois murders. On March 10, 1998, a Livingston County grand jury returned a four-count indictment, charging defendant with first degree murder for the killing of Corum. In March 2001, the State filed notice of its intent to seek the death penalty.

¶ 7 Defendant was convicted of the Cook County murders and sentenced to death on September 3, 2002. On January 10, 2003, then governor George Ryan commuted defendant's death sentence to one of natural life in prison without the possibility of parole.

¶ 8 Jury *voir dire* began in Livingston County on April 19, 2004. When *voir dire*

resumed on April 22, defense counsel notified the trial court defendant raised the possibility of pleading guilty to the murder charges against him. After further consultation with defense counsel, defendant decided to plead guilty but mentally ill. The State advised the court it would dispute whether defendant was in fact "mentally ill" as that term is defined in the statute. Defense counsel told the court defendant would waive a jury trial on the issue of mental illness but would demand a jury on the issues of eligibility for the death penalty and the aggravation-mitigation phase of the death-penalty determination. It was decided the court would admonish defendant the next morning as to waiver of the jury.

¶ 9 On April 23, 2004, defendant tendered his plea of guilty but mentally ill. The trial court admonished defendant thoroughly concerning the nature of the charge, the possible penalties, the three separate stages of a capital trial, and the variety of verdicts possible in the event defendant retained his right to trial. The court further explained by pleading guilty but mentally ill, defendant would be giving up his previously tendered defense of insanity and a finding of guilty but mentally ill would not insulate him from a possible death sentence. Defendant indicated he understood the admonitions. The court then determined defendant had not been subject to threats or coercion and his plea of guilty but mentally ill was voluntary. Defendant then signed a plea of guilty but mentally ill, which specified he retained his right to a jury trial on all issues if the plea was rejected and his right to a jury for sentencing if the plea was accepted.

¶ 10 The State then presented a factual basis for the murder of Corum. Defendant did not dispute the factual basis presented and the trial court concluded a sufficient factual basis was shown "with respect to the murder elements themselves." Jury selection resumed and all jurors

were chosen over the next several days.

¶ 11 On May 4, 2004, the parties and the trial court agreed to conduct two hearings simultaneously. The court would consider whether the evidence of mental illness was sufficient to support defendant's plea of guilty but mentally ill pursuant to statute (720 ILCS 5/6-2(d) (West 2004)). If the court rejected the guilty but mentally ill plea, the judge would also consider whether defendant had established the defense of insanity. The defense stipulated the prosecutor's previously recited factual basis was sufficient to establish the basic elements of the murder charge. Defendant was admonished regarding the proposed procedure and consented to it, waiving his right to a jury trial on the guilt/innocence phase.

¶ 12 On May 10, 2004, the trial court announced its rulings. First, the court stated it was not satisfied a factual basis to support defendant's plea of guilty but mentally ill was proved. Further, the court ruled defendant had not established he was insane at the time of Corum's murder. Finally, the court found the State proved, beyond a reasonable doubt, defendant was guilty of first degree murder as charged in the indictment.

¶ 13 The trial court then advanced the proceeding to the eligibility phase of sentencing. Defendant then waived a jury for the purpose of determining whether he was eligible for the death penalty. The State presented evidence and the court found he was eligible for a death sentence.

¶ 14 A jury listened to the evidence in aggravation and mitigation. Defendant elected not to testify on his own behalf. The jury determined death was the appropriate sentence.

¶ 15 Defendant filed a direct appeal to the Illinois Supreme Court and that court affirmed defendant's conviction and death sentence. *Urdiales*, 225 Ill. 2d at 452, 871 N.E.2d at

726. The United States Supreme Court denied defendant's petition for a writ of *certiorari* on October 29, 2007 (*Urdiales v. Illinois*, 552 U.S. 995 (2007)).

¶ 16 In April 2008, defendant filed a *pro se* postconviction petition. In March 2011, then governor Quinn commuted defendant's sentence (and that of every other inmate sentenced to death) to natural life in prison. On June 30, 2011, defendant's counsel filed a superseding, amended postconviction petition raising three claims: (1) defendant's jury waiver was not knowing and voluntary because the trial court incorrectly admonished him if he elected a bench trial, he could be found not guilty by reason of insanity even if the judge had already determined he had failed to prove he was guilty but mentally ill, and appellate counsel was ineffective for failing to raise this issue on direct appeal; (2) defendant's trial lawyers rendered ineffective assistance because they failed to interview witnesses concerning alternate suspect Anthony Thomas; and (3) admission of defendant's confession and its use by testifying experts violated his due-process rights.

¶ 17 On December 5, 2011, the State filed a motion to dismiss the amended petition. On June 18, 2012, defendant filed a response to the State's motion to dismiss. On August 15, 2012, the State filed a reply. On August 24, 2012, arguments were heard on the State's motion. On February 7, 2013, the trial court dismissed defendant's amended petition and on February 25, 2013, defendant filed a motion to reconsider. On June 5, 2013, the court denied his motion to reconsider. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process by which a petitioner may establish a constitutional violation

occurred at the proceedings, resulting in his conviction. At the second stage of postconviction proceedings the State may move to dismiss or answer the petition. 725 ILCS 5/122-5 (West 2010). Where, as here, the State moves to dismiss the petition rather than file an answer, its motion "assumes the truth of the allegations to which it is directed and questions only their legal sufficiency." *People v. Miller*, 203 Ill. 2d 433, 437, 786 N.E.2d 989, 992 (2002). However, allegations contradicted by the trial record are rejected. See *People v. Rogers*, 197 Ill. 2d 216, 222, 756 N.E.2d 831, 834 (2001). This court reviews *de novo* the trial court's second-stage dismissal. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 20 On appeal, defendant has abandoned his challenge to the voluntariness of his confession, challenging only the performance of his trial and appellate attorneys. Those claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate counsel's performance was deficient and the deficiency prejudiced the defendant. More specifically, a defendant must show counsel's performance was objectively unreasonable under professional norms and there is a reasonable probability, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767. Claims of ineffective assistance of appellate counsel are judged by this same standard. *People v. Easley*, 192 Ill. 2d 307, 328, 736 N.E.2d 975, 991(2000).

¶ 21 A. Jury Waiver

¶ 22 The trial court correctly concluded defendant failed to make a substantial showing his appellate counsel was ineffective for declining to raise his jury-waiver claim on direct appeal. A defendant who argues appellate counsel was ineffective for failing to raise an issue must show

failure to raise that issue was objectively unreasonable. *Easley*, 192 Ill. 2d at 328-29, 736 N.E.2d at 991.

¶ 23 Defendant waived his right to a jury trial as to his guilty but mentally ill plea and, ultimately, his plea of not guilty by reason of insanity and his guilt as to the murder. Defendant contends his jury waiver was not knowing, intelligent, or voluntary because the trial court informed him if it rejected his guilty but mentally ill plea it could find him not guilty by reason of insanity or simply not guilty. Defendant argues, on the facts of this case, the court would never find him not guilty by reason of insanity or simply not guilty if it rejected his guilty but mentally ill plea. He then argues counsel's failure to raise this issue on direct appeal rose to the level of constitutionally ineffective assistance.

¶ 24 Before accepting defendant's jury waiver, the trial court admonished him thoroughly. The court advised defendant he was only waiving his right to a jury trial as to phase one of the trial, whether he committed the acts constituting murder and whether a mental-health incapacity was established, and he would retain his right to a jury trial as to his eligibility for the death penalty and as to the sentencing phase. The court then went on to ascertain whether defendant was feeling well and was alert and whether he had enough time to confer with his attorneys before deciding to waive a jury trial on the issue of guilty but mentally ill. The court further inquired whether defendant was executing his jury waiver because he was forced by anyone or anyone had promised him anything. Defendant admitted he was executing the waiver freely and voluntarily.

¶ 25 The trial court pointed out to defendant, if he was found guilty but mentally ill, he was still eligible for the death penalty and the jury would make that decision. The court further

pointed out if it rejected the plea of guilty but mentally ill, it would then have to make a decision on the first phase of the trial, *i.e.*, it would decide whether the State had proved guilt beyond a reasonable doubt of first degree murder and whether defendant had established by a preponderance of the evidence he was insane.

¶ 26 The record rebuts defendant's claim his jury waiver was not knowing and voluntary. Defendant knew he was waiving his right to a jury and electing to have a judge decide these issues instead. Contrary to defendant's contention, the trial court did not advise defendant he could prevail on his insanity defense if it rejected his guilty but mentally ill plea. The judge stated only if he were to reject defendant's guilty but mentally ill plea would the matter proceed to a bench trial on guilt or innocence and insanity. The affidavit defendant supplied with his postconviction petition did not even mention the admonishments given him, much less claim he was misled by them. The court explained to defendant how the combined guilty but mentally ill plea/bench trial on guilt or innocence and insanity defense would work. He did not tell defendant of the likelihood he would be found not guilty by reason of insanity or not guilty.

¶ 27 Viewing the process now, we question whether the simultaneous hearings on two major issues while reserving for later consideration the question of eligibility for the death penalty and the aggravation and mitigation phase was wise, because that process made some confusion possible. However, the process was adopted by the trial court in consultation with the prosecution and defense.

¶ 28 It appears there was discussion between the prosecution and defense and both conferred with the court before the process began. Defendant was thoroughly admonished and

had the opportunity to consult with counsel at every stage of the process. Defendant not only elected to waive a jury for a determination of his guilt and his mental-health issues, but he later did so again on the question of his eligibility for the death penalty. There is nothing in the record to suggest anything that was done misled or prejudiced defendant. It was defendant's decision to enter a plea and to waive a jury trial. Those are decisions that reside only with defendant.

People v. Ramey, 152 Ill. 2d 41, 54, 604 N.E.2d 275, 281 (1992). Defendant consulted with counsel and his family, had numerous opportunities to consider and reconsider his decisions, and was thoroughly admonished by the trial court.

¶ 29 There is no basis upon which this court could conclude defendant's jury waiver was invalid or appellate counsel was ineffective for failing to raise the claim on direct appeal. Defendant's claim is contradicted by the record. The trial court's admonishments were not misleading, and defendant's postconviction affidavit included no allegation he was misled. The court correctly rejected defendant's ineffective assistance of appellate counsel claim.

¶ 30 B. Investigation of an Alternate Suspect

¶ 31 Defendant argues he made a substantial showing his trial lawyers rendered ineffective assistance of counsel because they failed to interview witnesses or request forensic testing of evidence regarding an alternative suspect, Anthony Thomas, where such testimony and evidence could have raised a reasonable doubt of defendant's guilt by demonstrating Thomas, and not defendant, murdered Corum. The trial court correctly dismissed this claim because it is contradicted by both the record and defendant's own postconviction exhibits. These exhibits include police department records from Chicago, where Thomas was suspected in the two murders occurring in Cook County, and an affidavit from Lisa Carlisle, Thomas' former

girlfriend, who stated she saw jewelry belonging to Corum in Thomas' possession.

¶ 32 Chicago police department records included the fact Thomas was a drug dealer who sold drugs to Corum on occasion, and his payments would include both jewelry and services provided by Corum as she was a prostitute. They also reported Thomas went to a Chicago-area emergency room with a neck wound and housekeeping personnel reported the discovery of a large amount of blood in the motel room where Thomas had been staying. However, the blood in the motel room turned out to be that of Thomas. The material taken from beneath one of the Cook County victim's fingernails contained genetic markers inconsistent with that of Thomas, and no connection was developed linking the most recent Cook County victim to Thomas' motel room.

¶ 33 By the time of defendant's Livingston County proceedings, defense counsel knew defendant confessed to all three of the Illinois murders plus several other murders occurring in California, which all had occurred in the same way; defendant's gun had been used to kill all three Illinois women; a surviving victim from California identified defendant; and defendant had been convicted of the two Cook County murders. After his arrest, defendant identified the gun as the one he used to kill the three Illinois victims and admitted it had been in his exclusive control since he purchased it. Physical evidence found after defendant's arrest included bullet holes, handcuffs, duct tape, and a sleeping bag found in defendant's truck, all of which were consistent with defendant's account of the Cook County murders. A roll of duct tape and a bra recovered from an Interstate 55 off-ramp corroborated defendant's statement he had thrown Corum's clothes and duct tape out of his truck window. A search of defendant's home resulted in finding a footlocker containing women's garters, ropes, a pair of rubber gloves, a box of 38-

caliber bullets, a tackle box containing a handcuff key and a gun-cleaning kit, rental-car receipts corresponding to the dates of California murders, a ledger, a bill for defendant's California storage unit, a driver's license taken from one of the California victims, and a key to defendant's California storage unit. Recovered from defendant's California storage unit were a Smith & Wesson .45, ammunition, a knife, a garrote or ligature, one set each of Illinois and California license plates, and documents indicating the locker belonged to defendant. Finally, the testimony of the surviving California victim at the Cook County trials was identical to defendant's account of her kidnapping, rape, and attempted murder.

¶ 34 Trial counsel for defendant was aware defendant had given statements confessing to the murders and a Cook County judge had ruled defendant's statements were "freely, voluntarily and intelligently" given. Defendant's confessions, corroborated by the physical evidence, and his later convictions for the Cook County murders, eliminated Thomas as a potential "suspect" in the Corum murder.

¶ 35 Against this evidence of defendant's guilt, the sole affidavit offered in support of defendant's claim was that of Lisa Carlisle, and it fails to establish Thomas as a viable alternate suspect. Carlisle claims in the summer of 1996, she told police two bracelets and a watch in Thomas' bag belonged to Corum. But this same information was available in the 1996 police reports, which defendant attached as exhibits to his postconviction petition. Thomas' explanation was he accepted jewelry in trade for cocaine and this is entirely consistent with defendant's own evidence showing Corum was an addict and Thomas a dealer.

¶ 36 Thomas was not a viable alternate suspect; therefore, trial counsel's decision to forego further investigation of him was not ineffective assistance. Instead, it was reasonable for

counsel to focus on obtaining a verdict of not guilty by reason of insanity or guilty but mentally ill. Further, even if counsel should have interviewed Carlisle, defendant cannot establish prejudice in light of the overwhelming evidence of his guilt. There is no reasonable probability a defense theory trying to implicate Thomas would have succeeded.

¶ 37 The trial court correctly concluded defendant failed to make a substantial showing of ineffective assistance of counsel. Because the court denied defendant's claim of ineffective assistance of trial counsel for declining to investigate Thomas as an alternate suspect, there was no reason for the court to allow defendant's request for forensic testing of items recovered from Thomas' motel room and car. The proper path for requesting such testing is under section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2010)), not a postconviction petition.

38 III. CONCLUSION

¶ 39 We affirm the trial court's judgment.

¶ 40 Affirmed.