2020 IL App (1st) 180491-U

No. 1-18-0491

Order filed December 4, 2020

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11 CR 12698
	)	
MARQUIS HARRISON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Gordon and Justice Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the trial court's denial of postconviction relief on defendant's claim that he received ineffective assistance of counsel in connection with his guilty plea where defendant has failed to demonstrate that counsel's advice concerning a potential defense was objectively unreasonable or that there is a reasonable probability that he would not have pleaded guilty absent the allegedly erroneous advice.

¶ 2 Defendant Marquis Harrison pleaded guilty to felony murder in exchange for a 25-year sentence and dismissal of other charges. Now seeking postconviction relief, defendant claims that

his plea counsel rendered ineffective assistance by misadvising him about the availability and/or viability of a potential defense to the felony murder charge. After an evidentiary hearing, the trial court denied relief. For the following reasons, we affirm.[1]

¶ 3 I. BACKGROUND

¶ 4 Unless otherwise noted, the facts recounted here are drawn from the factual basis provided by the State, and stipulated to by defendant, at the hearing on defendant's guilty plea. Around 5:50 a.m. on July 10, 2011, defendant stole a Range Rover SUV that was parked near 150 West North Avenue in Chicago. The owner had left his keys in the vehicle as he went to pay for parking and, when he did so, defendant jumped in the vehicle and sped off. A short time later, police officers Hector Reyno and John Utz pulled defendant over at 1251 West Blackhawk Street after observing him commit several traffic violations. (A police report in the record indicates that the officers observed defendant run two red lights.) Sergeant Kevin Nemes arrived on scene and parked his police SUV directly behind the stolen vehicle. As Officers Reyno and Utz approached the stolen vehicle from opposite sides, defendant put the vehicle in reverse and rammed into Sergeant Nemes' vehicle. Defendant then drove forward in the direction of Officers Reyno and Utz, both of whom jumped out of the way to avoid being hit. Defendant then sped off. With the officers in pursuit, he again ran several red lights. At 6:18 a.m., defendant ran through a stop sign at the intersection of Armitage and Hoyne and collided with a vehicle driven by Marciea Adkins, who died as a result of the injuries she suffered in the accident.

¶ 5 Defendant was charged with four counts of first degree murder, including three counts of felony murder, which alleged that defendant caused Adkins' death while committing the forcible

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

felonies of burglary, attempted first degree murder of a police officer, and aggravated assault of a police officer, respectively. In addition, defendant was charged with multiple counts of attempted first degree murder of a police officer, aggravated assault of a police officer with a motor vehicle, aggravated battery of a police officer, aggravated driving under the influence of alcohol, and aggravated fleeing or attempting to elude a police officer, as well as one count each of burglary, possession of a stolen motor vehicle, and leaving the scene of an accident involving death.

¶ 6 Defendant moved to dismiss the charge of felony murder predicated on burglary, arguing that his burglary of the Range Rover could not support felony murder liability for Adkins' death because the offense of burglary was complete before the fatal accident occurred and because he did not contemplate that the use of violence would be necessary to perpetrate or escape after committing the burglary. The trial court denied the motion.

¶ 7 Defendant then asked the court to participate in a plea conference under Illinois Supreme Court Rule 402(d)(1) (eff. July 1, 2012). After the conference, defendant pleaded guilty to the charge of felony murder predicated on burglary. In accordance with the agreement reached at the plea conference, the trial court sentenced defendant to 25 years in prison and the State dismissed the other charges.

¶ 8 More than a year later, defendant sent a letter to the trial court requesting a copy of court records for use in preparing a postconviction petition. The trial court construed the letter as a *pro se* postconviction petition and appointed counsel to represent defendant. Defendant's appointed counsel filed an amended postconviction petition, which alleged, among other things, that defendant's plea counsel was ineffective for erroneously advising defendant that he could not assert, as a defense to the charge of felony murder predicated on burglary, that he had reached a

temporary place of safety after the burglary was complete and before the fatal accident occurred, because he had no memory of the events at issue. Defendant argued that counsel's advice was objectively unreasonable because relevant facts supporting a temporary place of safety defense could have been established through other objective evidence. Defendant further asserted that he would not have pleaded guilty, and instead would have insisted on going to trial, if counsel had correctly advised him that he could assert the temporary place of safety defense. In a supporting affidavit, defendant attested that he wanted to raise the temporary place of safety defense at trial but that plea counsel told him he could not assert the defense because he did not remember the events in question.

¶ 9 The matter then proceeded to an evidentiary hearing at which defendant and plea counsel both testified. Defendant testified that he did not want to plead guilty and that he did so only because he thought he had to in order to appeal the denial of his motion to dismiss. He testified that he wanted to raise the temporary place of safety defense at trial but that plea counsel told him he "could not assert that defense" and that it "wouldn't work." On cross-examination, defendant conceded that counsel discussed the temporary place of safety defense with him and explained to him why it would not work. However, defendant denied that counsel explained to him that the defense "would not be a good defense in [his] case." Defendant testified that counsel instead "just told [him] that [the defense] would not work" and that he "could not use it." Unlike the allegations in his petition and supporting affidavit, defendant did not testify that counsel told him he could not use the temporary place of safety defense because he did not remember the relevant events.

¶ 10 Plea counsel testified that he conducted extensive research on the temporary place of safety defense. After researching the case law and considering the facts of defendant's case, counsel

concluded that the temporary place of safety defense would not succeed at trial. Counsel explained that conclusion to defendant and recommended that he request a plea conference with the court in the hope that the judge would offer a minimal sentence. After the conference, counsel had several lengthy discussions with defendant about the court's offer of a 25-year sentence. Counsel testified that defendant did not indicate in those discussions that he wanted to reject the plea offer and proceed to trial with the temporary place of safety defense.

¶ 11 On cross-examination, counsel agreed that the temporary place of safety defense was a "possible defense" that defendant could have asserted at trial. Counsel acknowledged that there were "breaks in the action" between defendant's burglary of the Range Rover and his collision with Adkins' vehicle, such as his period of "joyrid[ing]," his being stopped by police, and his subsequent flight. But counsel explained that, in his judgment, the defense still would not have been successful. Counsel also denied telling defendant that he could raise the temporary place of safety defense only if he remembered the events at issue.

¶ 12 In an oral ruling, the trial court denied postconviction relief. Citing the quality of plea counsel's work, the court declined to find counsel's performance "ineffective or incompetent." Specifically, the court found no "inkling that [defendant] was not fully apprised of the situation," or that he did not understand the "benefit [of] the bargain that he was receiving," when entering his plea. The court also found that, even if defendant had been able to defeat the charge of felony murder predicated on burglary with the temporary place of safety defense, the result of his case would not have changed because there was "ample evidence" to support a conviction on the alternative felony murder charge predicated on aggravated assault of a police officer. Following the trial court's ruling, defendant filed a timely notice of appeal.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant contends that the trial court erred in denying his request for postconviction relief. Specifically, defendant argues that he made a substantial showing that plea counsel rendered ineffective assistance by misadvising him that the temporary place of safety defense was not a viable defense to the charge of felony murder predicated on burglary. Because the trial court denied relief after an evidentiary hearing, we apply "a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel's actions support an ineffective assistance claim." *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 15 To prevail on an ineffective assistance claim, a defendant must show that his counsel performed deficiently and that he was prejudiced as a result. *Strickland v. Washington,* 466 U.S. 668, 687 (1984). To demonstrate deficient performance, the defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. When assessing counsel's performance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel's "challenged action might be considered sound trial strategy." (Internal quotation marks omitted.) *Id.* at 689.

¶ 16 To demonstrate prejudice, a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Where, as here, a defendant argues that counsel's deficient performance induced him to plead guilty, the prejudice prong requires him to "show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

¶ 17 Applying these standards, we conclude that defendant failed to establish either deficient performance or prejudice. With respect to the deficient performance prong, the first question we must address concerns the nature of plea counsel's advice to defendant. In his postconviction petition and supporting affidavit, defendant alleged that counsel told him he could not raise the temporary place of safety defense at trial unless he had a personal recollection of the events at issue. Defendant argued that this advice was objectively unreasonable because, even if he could not recall the relevant events, facts supporting the defense could have been established at trial via other means. Notably, defendant did not repeat this assertion at the evidentiary hearing. Instead, defendant denied that counsel explained to him that the temporary place of safety defense would not be a "good defense" and testified that counsel instead simply told him he "could not assert" the defense because it "would not work." Meanwhile, plea counsel denied telling defendant that he could only assert the temporary place of safety defense if he recalled the events at issue. To the contrary, counsel testified that he explained to defendant that the facts of his case did not support the temporary place of safety defense and that the defense would not be successful at trial.

¶ 18 As defendant notes, the trial court made no express credibility determination or factual findings about the nature of plea counsel's advice to defendant concerning the availability and viability of the temporary place of safety defense. Nonetheless, we think the court's conclusion that defendant was "fully apprised of the situation" he faced when pleading guilty is best read as an implicit finding that plea counsel's description of his advice to defendant was more credible than defendant's various conflicting allegations. In other words, we construe the court's decision as implicitly crediting plea counsel's testimony that he explained to defendant that he would not succeed with the temporary place of safety defense because the facts of his case did not support it,

and implicitly rejecting defendant's initial allegation that counsel told him he could not raise the defense if he did not remember the events at issue, as well as defendant's more vague contention at the evidentiary hearing that counsel simply told him he "could not assert" the defense because it "would not work." Because these implicit factual findings are not against the manifest weight of the evidence, we defer to them. *Nowicki*, 385 Ill. App. 3d at 81.

¶ 19 The next question, then, is whether it was objectively unreasonable for plea counsel to advise defendant that the temporary place of safety defense would not succeed at trial in light of the facts of his case. We conclude that counsel's advice was well within the range of reasonable professional assistance. To explain why, we must discuss the contours of the temporary place of safety defense.

¶ 20 Under the felony murder rule, a person is guilty of first degree murder if he kills an individual without lawful justification while "attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9–1(a)(3) (West 2010). The term "forcible felony" is defined to include several enumerated felonies, including (as relevant here) burglary, as well as "any other felony which involves the use or threat of physical force or violence against any individual." 720 ILCS 5/2–8 (West 2010). It is well established that "a defendant may be held responsible [under the felony murder rule] for a death that occurs during an escape following the commission of a forcible felony." *People v. Klebanowski*, 221 Ill. 2d 538, 546 (2006). However, for the escape rule to apply, the underlying felony and subsequent killing must "occur as part of a continuous criminal transaction," with no "break in the chain of events between the felony and the killing." *People v. Moore*, 375 Ill. App. 3d 234, 241 (2007) (citing *State v. Pierce*, 23 S.W.3d 289, 294-95 (Tenn. 2000)).

¶ 21 To determine whether a felony and subsequent killing occurred as part of a continuous criminal transaction, a court must consider "whether the killing and the felony were closely related in time, place, causation and continuity of action." *Moore*, 375 Ill. App. 3d at 241 (citing *Pierce*, 23 S.W.3d at 294). A court also must consider "whether the felon has reached a place of temporary safety" after the felony is complete, which is "[o]ne of the most important factors to consider in determining whether there has been a break in the chain of events" between the felony and the killing. *Moore*, 375 Ill. App. 3d at 241 (citing *Pierce*, 23 S.W.3d at 295).

¶ 22 Defendant contends that plea counsel's advice concerning the viability of the temporary place of safety defense in his case was objectively unreasonable. While defendant acknowledges that the defense "may have been a difficult one to assert," he nonetheless maintains that there were "distinguishable breaks in activity" between his burglary of the Range Rover and his collision with Adkins' vehicle that would have supported reliance on the defense. But the only breaks defendant identifies are his supposed period of joyriding after stealing the car, his being stopped by police, and his subsequent flight that culminated in the fatal collision.

¶ 23 Nothing in that course of events suggests that defendant had reached a temporary place of safety following the burglary and before the collision. While defendant describes his actions in the immediate aftermath of the burglary as joyriding, police reports in the record indicate that officers observed defendant run two red lights before pulling him over. That evidence is more consistent with the theory that defendant was still in the process of escaping from the burglary when he was pulled over by police than it is with the notion that he was engaged in the type of casual activity that would suggest he had reached a temporary place of safety. This sequence of events—defendant being stopped by police while attempting to escape from the burglary and causing the

fatal accident with Adkins while fleeing from the police—also establishes the requisite causal connection between the burglary and Adkins' death to support application of the felony murder rule. See *People v. Gillis*, 712 N.W.2d 419, 437 (Mich. 2006) (finding that the "defendant's act of speeding away from [a police officer] during [an] attempted traffic stop [as the defendant fled from a home invasion] suggests both a causal connection and a continuity of action between the home invasion and the [deaths that occurred in an ensuing car accident]").

¶ 24 Moreover, defendant ignores the close temporal and geographic proximity between the burglary and the collision. When providing a factual basis for defendant's guilty plea, the State noted that the burglary occurred at approximately 5:50 a.m. and that the fatal collision occurred just 28 minutes later, at 6:18 a.m. In addition, based on the addresses provided in the factual basis, we may take judicial notice that the location of the burglary and the location of the collision are about three miles apart. See *People v. Clark*, 406 Ill. App. 3d 622, 633-34 (2010) (court may take judicial notice of approximate driving distance between two points referenced in the record using Google Maps).

¶ 25 In contrast, in *Moore*, where we reversed a felony murder conviction that was predicated on the defendant's burglary of a vehicle and subsequent car crash during a police chase, "[t]he evidence establishe[d] that for almost 24 hours [before the accident], the defendant had enjoyed the use of the stolen [vehicle], unmolested by the police." *Moore*, 375 Ill. App. 3d at 240. And in *Pierce*, which *Moore* cited with approval, the Tennessee Supreme Court reversed a felony murder conviction predicated on the theft of a vehicle and subsequent fatal accident where the underlying felony and the ensuing accident were separated by 20 days and more than 600 miles. *Pierce*, 23 S.W.3d at 297. On the other hand, in *Gillis*, which *Moore* distinguished, the Michigan Supreme

Court affirmed a felony murder conviction predicated on home invasion where the defendant was involved in a fatal car accident about 18 minutes after fleeing from the home invasion and a little more than 10 miles away. *Gillis*, 712 N.W.2d at 436-37.

¶ 26 The facts presented here are far more similar to the facts in *Gillis*, where felony murder liability was found, than they are to the facts presented in *Moore* and *Pierce*, where the temporary place of safety defense prevailed. In light of those decisions, it was not objectively unreasonable for plea counsel to advise defendant that the temporary place of safety defense offered him no prospect of success at trial. Even "an erroneous strategic prediction about the outcome of a trial is not necessarily deficient performance." *Lafler v. Cooper*, 566 U.S. 156, 174 (2012). Here, plea counsel researched the temporary place of safety defense and concluded that the facts of defendant's case did not support it. Considering the decisions discussed above and the facts of defendant's case, we do not believe that counsel's strategic prediction was erroneous. At the very least, we cannot say that it fell outside "the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. Accordingly, counsel's performance was not constitutionally deficient and the trial court did not err in denying relief on defendant's ineffective assistance claim.

¶ 27 Alternatively, defendant cannot prevail on his ineffective assistance claim, even assuming counsel's performance were deficient, because he has not shown the required prejudice. As noted, to demonstrate prejudice defendant was required to show a reasonable probability that, absent counsel's allegedly erroneous advice, he would not have pleaded guilty and would have insisted on going to trial. *Hill*, 474 U.S. at 59. Defendant asserts that he would not have pleaded guilty if counsel had advised him that he could raise the temporary place of safety defense at trial. But "[a] bare allegation that the defendant would have pleaded not guilty and insisted on a trial if counsel

had not been deficient is not enough to establish prejudice." *People v. Hall*, 217 Ill. 2d 324, 335 (2005). "Rather, the defendant's claim 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.

¶ 28 Defendant does not assert a claim of innocence. Instead, he contends that the temporary place of safety defense was a plausible defense that he could have raised at trial, and that his articulation of that defense suffices to establish that he was prejudiced by counsel's allegedly deficient advice concerning the defense. But the mere fact that defendant would have been able to *assert* the temporary place of safety defense at trial does not mean that it constituted a *plausible* or *realistic* defense for purposes of showing prejudice. As the Supreme Court has explained, "where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the 'prejudice' inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial." *Hill*, 474 U.S. at 59; see also *Lee v. United States*, 137 S. Ct. 1958, 1966 (2017) ("As a general matter, it makes sense that a defendant who has no realistic defense to a charge supported by sufficient evidence will be unable to carry his burden of showing prejudice from accepting a guilty plea.").

¶ 29 As explained above in the context of the deficient performance inquiry, defendant had no reasonable prospect of success at trial with the temporary place of safety defense. The relatively close proximity in both time and distance between defendant's burglary of the Range Rover and his fatal collision with Adkins, and the continuity of his actions between those events, undermine any notion that he had reached a temporary place of safety following the burglary and before the collision. Indeed, both here and at the evidentiary hearing, defendant's postconviction attorneys

have candidly acknowledged that the temporary place of safety defense was "a very weak defense" and that it would have been "a difficult one to assert."

¶ 30 At bottom, demonstrating prejudice in the guilty plea context requires a defendant to "convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla v. Kentucky*, 559 U.S. 356, 372 (2010). Defendant faced a sentencing range of 20 to 60 years if convicted of any of the three counts of felony murder with which he was charged (730 ILCS 5/5–4.5–20(a) (West 2010)), plus a possibly consecutive sentence in the range of 20 to 80 years if convicted of either of the additional counts of attempted first degree murder of a police officer with which he was charged (see 720 ILCS 5/8–4(c)(1)(A) (West 2010); 720 ILCS 5/9–1(b)(1) (West 2010); 730 ILCS 5/5–8–4(d)(1) (West 2010)). Facing a sentence of up to 60 (or even 140) years in prison, it is difficult to believe that a rational defendant would reject a plea offer that guaranteed a 25-year sentence (near the bottom of the applicable sentencing range) and proceed to trial with nothing more than an admittedly "weak defense" on which it would have been "difficult" to prevail. Because defendant has not shown a reasonable probability that he would not have pleaded guilty and would have insisted on going to trial absent counsel's allegedly deficient advice concerning the availability or viability of the temporary place of safety defense, he has not demonstrated that he was prejudiced by counsel's advice. For that reason as well, the trial court did not err in denying defendant's request for postconviction relief.[2]

[2] Although the trial court did not rely on the same reasoning in finding that defendant had failed to demonstrate prejudice, we may affirm the lower court's judgment on any basis supported in the record. *People v. Daniel*, 2013 IL App (1st) 111876, ¶ 37. In light of our holding, we need not address the trial court's alternative rationale for finding that defendant did not show prejudice.

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 33 Affirmed.