2021 IL App (3d) 180437-U

Order filed February 22, 2021

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2021

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
	)	Rock Island County, Illinois,
Plaintiff-Appellee,	)	
	)	Appeal No. 3-18-0437
v.	)	Circuit No. 06-CF-893
	)	
JOSEPH C. HORTON,	)	Honorable
	)	Richard A. Zimmer,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Presiding Justice McDade and Justice O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant failed to make a substantial showing of a claim of ineffective assistance of appellate counsel because he failed to show prejudice with regard to his underlying claim of ineffective assistance of trial counsel.

¶ 2 The defendant, Joseph C. Horton, appeals the denial of his amended postconviction petition at the second stage of proceedings. The defendant argues that he made a substantial showing of a claim that his appellate counsel was ineffective for failing to argue on direct appeal

that his trial counsel was ineffective for failing to argue at the defendant's first trial that the prosecutor intentionally goaded him into moving for a mistrial.

¶ 3 I. BACKGROUND

¶ 4 The defendant was charged with three counts of criminal sexual assault (720 ILCS 5/12-13(a)(3) (West 2006)) for separate incidents involving his two sons and his stepdaughter.

¶ 5 The matter proceeded to a jury trial. The defendant was represented by private counsel, Jack Schwartz. The three child victims and Officer Bonnie Francis testified. Then, Mark Muench, an investigator at the Department of Children and Family Services, testified that he and a police officer questioned the defendant in connection with the instant case. Prior to the questioning, the officer read the defendant his *Miranda* rights, and the defendant agreed to speak with them. Muench stated that the interview was brief and lasted approximately 10 minutes. The court interrupted Muench's testimony and asked the jury to leave the courtroom.

¶ 6 The court stated that it did not know where the State was going with its questioning, but it wanted to make sure that Muench understood that if the defendant had invoked any of his *Miranda* rights, Muench could not tell the jury about it. Muench said that he did not know that. He asked if it would be inappropriate to say that the defendant asked for an attorney, and the court said that it would be inappropriate to say anything like that.

¶ 7 The jury was brought back in. The prosecutor asked Muench, "[D]id the defendant make any type of request of you or [the officer] during the time you attempted to question him?" Muench replied, "At one point he requested an attorney." The court again excused the jury. The court asked the prosecutor where she was going with this questioning. The prosecutor replied, "Did he ask for anything like can I go to the bathroom, can I, you know, I was going to have him testify that he was in handcuffs at the time and that, you know, that Mr. Muench did not hear him

say anything while he was sitting there. I clearly heard what you said when we were in here before. It wasn't—" The court said it understood. The court asked: "Want me to instruct the jury, or what do you want me to do? Anything? Or do you want to proceed?" Schwartz replied, "Do I want a mistrial? I don't know that that's what we want at this point." Schwartz requested time to look at the relevant case law and to speak with the defendant. The court gave Schwartz time to speak to the defendant.

¶ 8 When the parties went back on the record, the court stated that it was plain error to comment on the defendant's postarrest silence and asked Schwartz if he was moving for a mistrial. Schwartz replied, "I know. Then we start all over again." The parties had a discussion off the record in the court's chambers.

¶ 9 When the parties went back on the record, the following exchange occurred:

> "MR. SCHWARTZ: Judge, given the commentary by the witness we are going to move *** for a mistrial.
>
> THE COURT: The State's response?
>
> MS. HENNINGS [(ASSISTANT STATE'S ATTORNEY)]: I think we discussed this among ourselves as well. There's [a] case out there that indicates *** a response such as the one that was in the Record regarding the defendant requesting an attorney is plain error.
>
> THE COURT: All right. The Court, after—prior to the statement being made by the witness, the witness was admonished not to say anything about the invocation of any *Miranda* Rights. Then we came back in court and the Prosecutor did ask a question, but she got the answer that the defendant requested a lawyer. That was not *** the answer that the Prosecutor was looking for after,

especially after the Court admonished the witness not to say anything about the invocation of the rights. And so I don't find that there is any prosecutorial—I mean there is prosecutorial error, but it is not prosecutorial misconduct. I want to make that clear for the Record. She wasn't seeking that answer because the Court had already admonished the witness not to say it. Now, the question is whether or not manifest necessity warrants a mistrial based upon the, deciding, you have to look at each case based upon the facts. Whether the difficulty, whether the—what happened in court by the witness was a product of actions of the prosecutor, defense counsel, or trial judge, or was events over which the participants lacked control. And I think it's clear that after the Court admonished the witness not to say it, it really was not a product of the actions of the Prosecutor. Do you agree, Mr. Schwartz?

MR. SCHWARTZ: Whether it was prosecutorial misconduct or not?

THE COURT: No, no, no, no. Whether or not what happened was her fault, was a product of what she asked. I have to go through the various factors. There's twelve factors I'm going through.

MR. SCHWARTZ: We don't believe that the question specifically was designed to elicit that response.

THE COURT: Okay. So it wasn't. It was something which she did not have control of.

MR. SCHWARTZ: No, she didn't expect that response."

¶ 10 The court went through the other relevant factors. The court found that there was no evidence that the prosecution intentionally created or manipulated the problem to strengthen its

case. The court stated that it did not believe that the error could have been cured by another alternative. The court stated that it was granting the mistrial solely for the purpose of protecting the defendant against possible prejudice. The court asked Schwartz if he agreed, and Schwartz said yes. The court stated: "I want to make it clear that this motion for mistrial is being made by the defense. Jeopardy has not attached. So that there's—she wasn't doing this to sabotage her case in any way. And that the defendant can be retried on this case." The court granted the motion for a mistrial.

¶ 11 Approximately three weeks later, Schwartz filed a motion to dismiss the charges arguing that retrial of the defendant should be barred on double jeopardy grounds. The motion alleged that the State committed prosecutorial misconduct by inviting Muench to choose between perjury and plain error when it asked if the defendant had made any requests. The motion noted that it was plain error for a prosecutor to seek to use a defendant's invocation of *Miranda* rights against him. The motion asserted that the plain error in the case was attributable to prosecutorial overreaching such that retrial was barred. The motion alleged that the court terminated the case improperly by forcing the defense to move for a mistrial.

¶ 12 Following a hearing, the court denied the motion. The court stated that it did not force Schwartz to move for a mistrial. The court found that the error at trial was attributable to Muench, not the prosecutor. The court said that "the prosecutor wasn't trying to bring out that information at all."

¶ 13 The defendant filed an interlocutory appeal arguing that the court erred by denying his motion to dismiss because the prosecutor was overreaching in her questioning of Muench and double jeopardy had attached. *People v. Horton*, No. 3-07-0727 (2009) (unpublished order under Illinois Supreme Court Rule 23). The appellate court affirmed the judgment of the circuit court.

Id. The appellate court reasoned that the defendant was barred by judicial estoppel from making this argument because he had taken an inconsistent position in the circuit court and received the benefit of a new trial. *Id.*

¶ 14 On remand, a bench trial was held. The defendant was represented by Herb Schultz, an attorney appointed by the court, at the second trial. The court found the defendant guilty of all three counts and imposed consecutive sentences of four years' imprisonment on each count.

¶ 15 On direct appeal, the defendant argued that the evidence was insufficient to support his convictions, prosecutorial misconduct occurred during closing arguments, and the circuit court erred in failing to appoint new counsel to investigate the defendant's posttrial claims of ineffective assistance of counsel. *People v. Horton*, 2012 IL App (3d) 100221-U, ¶ 2. We affirmed the defendant's convictions. *Id.* ¶ 52.

¶ 16 The defendant filed a postconviction petition as a self-represented litigant. In the petition, the defendant argued, *inter alia*, that Schwartz was ineffective for failing to preserve the defendant's double jeopardy claim during the first trial by agreeing that the State did not commit prosecutorial misconduct and by requesting a mistrial.

¶ 17 The circuit court advanced the petition to the second stage of postconviction proceedings and appointed counsel. Postconviction counsel filed an amended petition alleging that the defendant was retried in violation of double jeopardy principles. The petition also claimed that the defendant received ineffective assistance of counsel where Schwartz failed to argue at trial that the State's questioning of Muench goaded the defense into asking for a mistrial. The petition also alleged that Schwartz labored under a conflict of interest where he continued to represent the defendant in the interlocutory appeal because it prevented the defendant from raising a claim of ineffective assistance of counsel on appeal. The petition alleged that Schultz was ineffective

for failing to raise Schwartz's ineffectiveness in a posttrial motion, and appellate counsel was ineffective for failing to argue that Schwartz was ineffective on direct appeal.

¶ 18 The State filed a motion to dismiss the amended postconviction petition.

¶ 19 After hearing arguments, the circuit court granted the State's motion to dismiss, finding that the defendant had not made a substantial showing of a constitutional violation. The court reasoned that the prosecutor did not intentionally goad the defendant into asking for a mistrial and that there was no prejudice.

¶ 20 II. ANALYSIS

¶ 21 The defendant argues that the court erred in dismissing his amended postconviction petition at the second stage of postconviction proceedings because the petition made a substantial showing that appellate counsel was ineffective for failing to argue that Schultz was ineffective for failing to argue in a posttrial motion that Schwartz was ineffective. Specifically, the defendant contends that Schwartz was ineffective because he failed to argue at the defendant's first trial that the prosecutor goaded the defense into asking for a mistrial, and the defendant was tried a second time in violation of his right against double jeopardy. The defendant contends that there is a reasonable probability that the issue would have been successful on direct appeal.

¶ 22 "Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true ***." *Id.* Accordingly, the circuit court may not engage in fact-finding at the second stage. *People v. Carter*, 2017 IL App (1st) 151297, ¶ 127. When the circuit court dismisses a postconviction

petition at the second stage of proceedings, we review the court's decision *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 23 To show that appellate counsel provided ineffective assistance in failing to argue a particular issue, the defendant "must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the defendant." *People v. Simms*, 192 Ill. 2d 348, 362 (2000). To show prejudice in this context, the defendant must show that the underlying issue was meritorious. *Id.*

¶ 24 Accordingly, we proceed to consider the merits of the underlying issue the defendant claims appellate counsel should have raised—namely, that Schwartz was ineffective for failing to argue that the prosecutor goaded the defense into asking for a mistrial. "To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Domagala*, 2013 IL 113688, ¶ 36. Thus, the defendant was required to demonstrate that (1) Schwartz performed deficiently in failing to argue at the defendant's first trial that the prosecution goaded him into asking for a mistrial, and (2) there is a reasonable probability that the result of the proceeding in the circuit court would have been different if Schwartz had made this argument. See *id.*

¶ 25 In order for double jeopardy to bar retrial after the defendant has moved for a mistrial, "the prosecutor must actually intend to cause a defendant to seek a mistrial." *People v. Nelson*, 193 Ill. 2d 216, 221 (2000). It is not enough for a prosecutor to act in bad faith. *People v. Bennett*, 2013 IL App (1st) 121168, ¶ 16. Rather, "[d]ouble jeopardy attaches only when 'the prosecutor's actual intent was to "goad" the defendant into moving for a mistrial,' a rare

circumstance. *Id.* (quoting *People ex rel. City of Chicago v. Hollins,* 368 Ill. App. 3d 934, 942 (2006)).

¶ 26 Here, even assuming that Schwartz performed deficiently in failing to argue at the defendant's first trial that the prosecutor intentionally goaded him into moving for a mistrial, the defendant has not demonstrated that there is a reasonable probability that the result of the proceeding in the circuit court would have been different absent this error. The circuit court's factual findings show that it would not have found that the prosecutor intentionally goaded the defense into asking for a mistrial. We note that it is proper to consider the circuit court's findings in assessing whether the defendant was prejudiced by Schwartz's alleged error. See *People v. Patterson*, 192 Ill. 2d 93, 112-13 (2000).

¶ 27 At the time the circuit court granted the mistrial, it considered the circumstances surrounding Muench's improper testimony, including its explicit admonishment to Muench not to say anything concerning the defendant's invocation of his *Miranda* rights and the prosecutor's explanation for the question that drew out the improper testimony. The court found that the prosecutor did not intend to elicit Muench's improper testimony, and it discussed this finding extensively. It also explicitly found that the prosecutor was not trying to sabotage her case by posing the question to Muench.

¶ 28 While Schwartz initially agreed that the prosecutor did not intend to evoke Muench's response, the circuit court's finding that the prosecutor did not intentionally elicit Muench's improper testimony was not merely an acceptance of this concession. In fact, a few weeks after the mistrial was granted, Schwartz argued in his motion to dismiss that the State committed prosecutorial misconduct and that retrial was barred by double jeopardy principles. The circuit court rejected this argument, reasoning that Muench's testimony concerning the defendant's

invocation of his *Miranda* rights was attributable to Muench, not the prosecutor. The court stated the prosecutor "wasn't trying to bring out that information at all."

¶ 29 In light of the circuit court's findings, it is not reasonably probable that the court would have barred the defendant's retrial if Schwartz had initially argued that the prosecutor intentionally goaded him into moving for a mistrial. To do so, the circuit court would have had to find not only that the prosecutor intended to elicit the improper testimony—which it explicitly declined to do—but also that the prosecutor did so with the actual intent to cause the defendant to seek a mistrial. See *Bennett*, 2013 IL App (1st) 121168, ¶ 16.

¶ 30 Thus, the defendant has not shown prejudice with regard to his underlying claim that Schwartz was ineffective for failing to argue at his first trial that the prosecutor intentionally goaded him into moving for a mistrial. Accordingly, the defendant has failed to make a substantial showing of a claim of ineffective assistance of appellate counsel, as there is no reasonable probability that the result of the proceedings on direct appeal would have been different if appellate counsel had raised this issue. See *Simms*, 192 Ill. 2d at 362.

¶ 31 III. CONCLUSION

¶ 32 The judgment of the circuit court of Rock Island County is affirmed.

¶ 33 Affirmed.