2021 IL App (4th) 180412-U

NO. 4-18-0412

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 13, 2021
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RASHEED McGEE, Defendant-Appellant.	) Appeal from the) Circuit Court of) Livingston County) No. 15CF322)) Honorable) Jennifer Hartmann Bauknecht,) Judge Presiding.

JUSTICE CAVANAGH delivered the judgment of the court.
Justices Turner and Harris concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Defendant's claim of ineffective assistance of counsel is precluded when he cannot establish the prejudicial effect of counsel's conduct when he fully admitted to committing the offense on the witness stand.

(2) Defendant forfeited his claim that the presentence investigation (PSI) report was wholly inadequate when his counsel had no objection to the report as written. And any claim of ineffective assistance of counsel related to the presentation of an inadequate PSI report would be better brought in a collateral proceeding.

¶ 2 In February 2018, a jury found defendant, Rasheed McGee, guilty of aggravated battery. As required by statute, the trial court sentenced defendant as a Class X offender on the Class 2 offense to 10 years in prison, to be served consecutively to sentences defendant was already serving.

¶ 3 Defendant filed this direct appeal, claiming his trial counsel was ineffective for (1) failing to argue that throwing water on a correctional officer was not "insulting or provoking,"

(2) failing to argue against the State's motion *in limine* regarding the admission of prior aggravated-battery convictions for the purpose of impeaching defendant, (3) eliciting testimony from defendant about his prior aggravated-criminal-sexual-assault conviction, and (4) conceding defendant committed aggravated battery. Defendant claims the cumulative effect of these errors constituted ineffective assistance of counsel. In fact, defendant claims, this court should presume prejudice and remand for a new trial because counsel entirely failed to subject the State's case to meaningful adversarial testing.

¶ 4 Defendant also claims he is entitled to a new sentencing hearing because the PSI report was inadequate. In the alternative, defendant claims he is entitled to a new sentencing hearing because his counsel was ineffective for failing to object to the inadequate PSI report.

¶ 5 After this court's review of the record, we find no error, and accordingly, we affirm the trial court's judgment.

¶ 6 I. BACKGROUND

¶ 7 In November 2015, by information, the State charged defendant, an inmate at Pontiac Correctional Center (Pontiac), with one count of aggravated battery, a Class 2 felony (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)). The State alleged that on April 13, 2013, defendant knowingly made physical contact of an insulting or provoking nature with a Department of Corrections employee, corrections officer James Berry, who was at the time engaged in the performance of his official duties. Specifically, the information alleged defendant "threw an unknown liquid substance upon Officer James Berry, striking him about his body[.]" The information also provided that because defendant had been previously convicted of two Class 2 or greater felonies, if convicted, he would be sentenced as a Class X offender. See 730 ILCS 5/5-4.5-95(b) (West 2014).

¶ 8 At defendant's trial, Berry testified that on April 13, 2013, at approximately 5 p.m., he was collecting dinner trash in the north cell house. When he got to defendant's cell, he opened the upper food hatch and retrieved defendant's dinner tray. He threw the tray in the garbage and started to place a roll of toilet paper in the hatch when he saw defendant's hand come out with a cup. Berry said he turned away as a liquid substance, smelling of urine, struck him on the left side of his face, in his ear, in his eye, and on his shirt. Following protocol, Berry immediately secured the hatch and notified his lieutenant of the incident. He then proceeded to the health care unit for examination.

¶ 9 On cross-examination, Berry testified he did not recall having "any dealings" with defendant earlier that day. Berry denied that the general area of the cell house smelled of urine. He said he first noticed the smell when the substance was thrown.

¶ 10 On redirect examination, the following exchange occurred:

"Q. Officer Berry, when the defendant threw the substance that smelled like urine on you, did you find that to be insulting?

A. Yes.

Q. So, you did not appreciate being or having urine thrown at you?

A. No.

Q. That was not something that you had asked the defendant to do?

A. No."

¶ 11 Karl Webber, an investigator at Pontiac, testified he spoke with defendant about the incident. Defendant admitted throwing a substance on Berry because he was angry at Berry for not removing him from his cell, which defendant said was "dirty." Webber typed a statement using

defendant's exact words. Defendant reviewed the statement, initialed it, and signed it. The statement was admitted as People's Exhibit No. 1.

¶ 12 On cross-examination, the following exchange occurred:

"Q. Did [defendant], he indicated to you that the substance that he threw was water and urine. Is that correct?

A. That's what he told me in his statement. Yes.

Q. And were any tests performed on Officer Berry's uniforms to determine what substance was thrown on him?

MS. KRAUSE [(ASSISTANT STATE'S ATTORNEY)]: Objection, Your Honor.

THE COURT: What's the objection?

MS. KRAUSE: What's the relevance of this?

THE COURT: Counsel approach.

(The following proceedings were had outside the hearing of the jury.)

THE COURT: What's the relevance?

MR. MASON [(DEFENSE ATTORNEY)]: There is none.

THE COURT: Okay. Thank you.

(The following proceedings were had in the presence and the hearing of the jury.)

THE COURT: Okay. The objection is sustained. The witness does not need to answer that question. And, Mr. Mason, you may move on."

The State rested.

¶ 13 Defendant testified he was 49 years old. He further testified as follows:

"Q. And what are the offenses for which you are incarcerated?

A. I was originally railroaded in prison for aggravated criminal sexual assault which I didn't do.

Q. And are there other, are there—are you also serving time for aggravated batteries?

A. Yes, I am."

¶ 14 Defendant explained what had occurred on April 13, 2013. He said Berry and another officer "had been beating on [him] and stuff like that." He said they put him in a dirty cell. He "asked them to get [him] out [of] the cell"; Berry refused. So, after dinner, defendant said he "threw water on him." He said: "I don't throw piss or shit or none of that stuff. I don't play with that."

¶ 15 On cross-examination, defendant admitted he threw water on Berry in anger and in retaliation. Defendant said: "It was also retaliation of something he had done to me."

¶ 16 Defendant rested.

¶ 17 Upon the State's tender, the trial court allowed the admission of certified copies of defendant's two prior convictions.

¶ 18 The jury found defendant guilty.

¶ 19 At the April 5, 2018, sentencing, the trial court noted it had reviewed the PSI report "filed March 29th or so." Neither party had any objection or correction. Defendant's counsel tendered defendant's answers to a questionnaire, which the court marked as an exhibit. Neither party presented further evidence. The State recommended a sentence of 10 years in prison based upon defendant's "significant criminal history," including his eight prior aggravated-battery convictions against an officer, for which he had received a maximum sentence of seven years. The

State urged the court to "send a message" to deter such conduct. Defendant's counsel recommended the minimum sentence of six years.

¶ 20 The trial court sentenced defendant to 10 years in prison based on his prior record, the seriousness of the crime, and the need for deterrence. The court later denied defendant's motion to reconsider his sentence.

¶ 21 This appeal followed.

¶ 22 II. ANALYSIS

¶ 23 A. Jury Trial

¶ 24 Defendant claims his counsel rendered ineffective assistance during the jury trial and at sentencing. Specifically, defendant argues counsel made several individual unreasonable errors and, those errors combined, demonstrated that counsel entirely failed to subject the State's case to meaningful adversarial testing. Therefore, defendant asks this court to first analyze counsel's conduct under the standard set forth in *Cronic*, where the errors were such that prejudice can be presumed. See *United States v. Cronic*, 466 U.S. 648, 659-661 (1984). In the alternative, he asks that we evaluate each claimed error under the standard set forth in *Strickland*, where we would conduct the familiar two-prong analysis as to each claim. See *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 25 Under *Strickland*, to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and 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. Because

a defendant must satisfy both prongs of the *Strickland* test to prevail, the failure to establish either precludes a finding of ineffective assistance of counsel. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 26 That said, the Court in *Strickland* also noted there are some circumstances so likely to prejudice the accused that such prejudice need not be shown but instead will be presumed. *Strickland*, 466 U.S. at 692. In *Cronic*, which was a companion case to *Strickland*, the Court explained that prejudice may be presumed where (1) the defendant "is denied counsel at a critical stage," (2) counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," or (3) counsel is called upon to represent a client in circumstances under which no lawyer could prove effective assistance. *Cronic*, 466 U.S. at 659-61.

¶ 27 Here, defendant is arguing that counsel's performance at the jury trial triggered the second *Cronic* exception—namely, failing to subject the prosecution's case to meaningful adversarial testing. In *People v. Caballero*, 126 Ill. 2d 248 (1989), this court explained that the second *Cronic* exception applies when "counsel's effectiveness has fallen to such a low level as to amount not merely to incompetence, but to no representation at all." (Internal quotation marks omitted.) *Id.* at 267 (citing *Cronic*, 466 U.S. at 659).

¶ 28 Before addressing counsel's conduct, we look to that of defendant. Battery occurs when a person "knowingly without legal justification and by any means *** makes physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3(a)(2) (West 2014). In the present case, defendant was charged with aggravated battery because he had allegedly committed battery upon a correctional officer engaged in his official duties. See 720 ILCS 5/12-3.05(d)(4)(i) (West 2014).

¶ 29 At his jury trial, defendant chose to testify. On the witness stand, he admitted he threw a liquid substance on Berry in anger and in retaliation. Based solely on defendant's testimony, even without Berry's testimony that he was insulted and provoked, a jury would easily find defendant engaged in "physical contact of an insulting or provoking nature" (720 ILCS 5/12-3(a)(2) (West 2014)), and it was committed upon a correctional officer engaged in his official duties (720 ILCS 5/12-3.05(d)(4)(i) (West 2014)).

¶ 30 Defendant claims that counsel should have argued, consistent with defendant's testimony, that the substance was water and not urine. He claims that throwing water would have removed his conduct from the definition of aggravated battery. That is not so.

¶ 31 Our courts have consistently found that throwing any liquid substance on a correctional officer or a peace officer engaged in their official duties constitutes aggravated battery. It does not matter if it was water or urine. See *People v. Walker*, 291 Ill. App. 3d 597, 601, (1997) ("The only factual issue in dispute was whether the substance thrown was water or urine, and, as we subsequently explain, the nature of the substance thrown would make no difference."); see also *People v. Peck*, 260 Ill. App. 3d 812, 813-14 (1994) (holding that spitting in the face of a police officer amounted to aggravated battery); *People v. Bracey*, 345 Ill. App. 3d 314 (2003), *rev'd on other grounds*, 213 Ill. 2d 265 (2004) (holding that throwing apple juice at an inmate where correctional officer standing next to target inmate was struck constituted aggravated battery); *People v. Wrencher*, 2011 IL App (4th) 080619, ¶ 55 (holding that spitting blood on an officer was insulting and provoking contact even though the victim did not testify to that); and *People v. Nichols*, 2012 IL App (4th) 110519, ¶ 43 (holding that an inmate who threw two cartons of an unknown liquid substance on a corrections officer was guilty of aggravated battery). In these cases, the triers of fact were permitted to infer the insulting or provoking nature of the "obviously

repulsive contacts" upon unsuspecting officers who sought a health examination immediately thereafter. *Nichols*, 2012 IL App (4th) 110519, ¶ 43. This is true regardless of the substance.

¶ 32 Here, the only disputed issue was whether the substance was water or urine, as defendant fully admitted on the witness stand that he threw water on Berry in anger and retaliation. As shown above, the substance did not matter. Defendant admitted his guilt on the stand. Thus, there was nothing more for the jury to decide or for counsel to argue.

¶ 33 Defendant cannot reasonably frame any argument of ineffective assistance of counsel when he, after exercising his right to testify, clearly and unequivocally admitted to throwing a liquid substance on the correctional officer as he was performing his official duties. He admitted he was angry and threw the substance in retaliation for earlier events. Berry testified he immediately advised his lieutenant and proceeded to the health unit for examination. Based on defendant's admission and Berry's testimony, the jury found defendant guilty.

¶ 34 Even if counsel had (1) argued the substance thrown was water and not urine, (2) argued against the use of defendant's prior aggravated-battery-conviction for purposes of impeachment, (3) objected to the State's leading questions to Berry as to whether he was insulted or provoked, and (4) not conceded defendant's guilt during his closing argument, the result of this appeal would be the same. Defendant cannot demonstrate prejudice from counsel's conduct after defendant admitted during his testimony, he threw a liquid substance at Berry in anger and retaliation. There was nothing counsel could do to present a defense or to have changed the outcome of the trial.

¶ 35 B. Sentencing

¶ 36 Defendant also argues he is entitled to a new sentencing hearing because the trial court relied on a wholly inadequate PSI report. In the alternative, defendant claims his counsel was

ineffective for failing to bring the deficiencies in the PSI report to the trial court's attention. Defendant has been incarcerated since 1991 and suffers from mental health issues. The tendered PSI report did not contain any information about defendant's physical or mental health condition, his family history, or his education.

¶ 37 Defendant failed to bring any perceived deficiencies in the PSI report to the trial court's attention. As such, he has forfeited our review of the same. See *People v. Meeks*, 81 Ill. 2d 524, 533 (1980) (holding that any objections to the sufficiency of the PSI report must first be presented to the trial court); *People v. Hibbler*, 2019 IL App (4th) 160897, ¶ 56 (stating that a defendant must raise any and all objections to the PSI report to the trial court). Here, when the court asked the parties if either had any additions or modifications to the PSI report, counsel said he had no objection to the report itself. Thus, defendant is estopped from complaining about the sufficiency of the report in this appeal. *Id.* ¶ 59.

¶ 38 Now, whether counsel's acceptance of the claimed deficient PSI constitutes ineffective assistance of counsel is not an issue that can be determined on direct appeal because the record is devoid of the pertinent details that would be useful in making that determination. That is, the record before us is insufficient. It does not include the material claimed missing from the PSI report. As such, we are unable to determine whether counsel's acquiescence to the prepared PSI report constituted ineffective assistance of counsel. Instead, that claim may be presented in a collateral proceeding where the record can be better established and include the facts necessary for the presentation of defendant's claim. See *People v. Veach*, 2017 IL 120649, ¶ 46 (stating that ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim).

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the trial court's judgment.

¶ 41 Affirmed.