2025 IL App (4th) 240095-U

NO. 4-24-0095

FILED
February 4, 2025
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTONIO FLORENCE, Defendant-Appellant.	)	Appeal from the Circuit Court of Sangamon County No. 14CF183 Honorable Christopher G. Perrin, Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Knecht and Vancil concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the trial court's second-stage dismissal of defendant's postconviction petition because he failed to make a substantial showing that he received ineffective assistance of counsel.

¶ 2 Following a jury trial, defendant, Antonio Florence, was convicted of home invasion (720 ILCS 5/19-6(a)(6) (West 2014)), two counts of criminal sexual assault (*id.* § 11-1.20(a)(1)), two counts of aggravated battery (*id.* § 12-3.05(d)(4)), criminal sexual abuse (*id.* § 11-1.50(a)(1)), resisting a peace officer (*id.* § 31-1(a)), and two counts of attempting to disarm a peace officer (*id.* § 31-1a(b)). The trial court later sentenced him to prison terms of 24 years for home invasion and 24 years for each of the criminal sexual assault convictions, to be served consecutively. The court imposed various concurrent terms of imprisonment for the remaining offenses. Defendant appealed, and this court affirmed. *People v. Florence*, 2017 IL App (4th) 150448-U, ¶ 137.

¶ 3 Thereafter, defendant filed an amended postconviction petition contending, in pertinent part, that his trial and appellate counsel provided ineffective assistance by failing to argue one of his criminal sexual assault convictions should be vacated under the one-act, one-crime rule as a lesser-included offense of home invasion. The trial court granted the State's motion to dismiss defendant's petition.

¶ 4 Defendant appeals, arguing the court erred by dismissing his petition because he made a substantial showing of a constitutional claim of ineffective assistance of counsel. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. The Charges

¶ 7 In March 2014, defendant was charged by indictment with home invasion (720 ILCS 5/19-6(a)(6) (West 2014)), two counts of criminal sexual assault (*id.* § 11-1.20(a)(1)), two counts of aggravated battery (*id.* § 12-3.05(d)(4)), criminal sexual abuse (*id.* § 11-1.50(a)(1)), resisting a peace officer (*id.* § 31-1(a)), two counts of attempting to disarm a peace officer (*id.* § 31-1a(b)), and interfering with the reporting of domestic violence (*id.* § 12-3.5(a)). The State alleged, generally, that defendant entered Sonya Cornell's residence without authority and, once inside, sexually assaulted and abused her.

¶ 8 B. The Jury Trial

¶ 9 At defendant's jury trial, conducted in March 2015, the testimony showed defendant was the father of Cornell's teenage daughter, whom he stopped by Cornell's house occasionally to visit. On February 21, 2014, Cornell was at home alone when defendant knocked on her front door. Cornell opened the door and told defendant to leave, but he pushed the door further open, walked past Cornell, and entered the house. Although Cornell kept telling

defendant to leave, he followed Cornell into the back bedroom, where he sexually assaulted her. During the assault, Cornell managed to dial 911 on her phone, but defendant took the phone from her and threw it before anyone answered.

¶ 10 Eventually, defendant ended the sexual assault, and they returned to the living room. When a police officer arrived in response to the 911 call, defendant stood up, and Cornell observed that he had a pistol in his pants pocket. Cornell told the officer that defendant "just raped [her]" and he had a gun. Cornell testified defendant then hit the police officer and they went into the front yard, where she observed defendant "on top of the police officer, hitting him with the gun."

¶ 11 Springfield police officer Bryan Henson testified that he grabbed defendant's wrists and began pulling him out of the house after Cornell stated defendant raped her and had a gun. Defendant managed to pull one of his hands free and produced what looked like a black semiautomatic pistol, although it was later determined to be a BB pistol. Defendant and Henson struggled for control of the pistol. Defendant hit Henson in the head with a hard object, bit him on the arm and the face, and tried to remove Henson's pistol from its holster. Henson eventually fell down during the struggle. Defendant straddled him and continued trying to pull his pistol from its holster. When defendant tried to get other items, including a Taser from Henson's belt, Henson was able to draw his pistol and fire one shot, which struck defendant in the leg. He continued pulling the trigger, but the pistol jammed. Defendant appeared unaffected by the gunshot and repeatedly punched Henson in the head. Henson then heard sirens and verbal commands from assisting officers.

¶ 12 Defendant ignored the officers' verbal commands and continued to resist and struggle with the responding officers. One of the responding officers testified that defendant

grabbed his service weapon and tried to pull it away. The officers were required to use physical force, including the use of a Taser, to place defendant in custody.

¶ 13 Based on that evidence, the jury found defendant guilty of all charges except the final count of the indictment alleging defendant interfered with the reporting of domestic violence (*id.* § 12-3.5(a)).

¶ 14 C. Sentencing

¶ 15 The trial court imposed an aggregate sentence of 72 years' imprisonment, consisting of 24 years for home invasion and 24 years for each count of criminal sexual assault, to be served consecutively. The court also imposed concurrent terms of 10 years for each count of aggravated battery and attempting to disarm a peace officer, and 4 years for criminal sexual abuse and resisting a peace officer.

¶ 16 D. The Direct Appeal

¶ 17 Defendant appealed, arguing that (1) the trial court erred by giving the jury a supplementary instruction that conflicted with the original pattern jury instructions, (2) the court erred by failing to make an independent determination of his fitness to stand trial and by failing to find a *bona fide* doubt as to his fitness prior to sentencing, (3) the prosecutor's improper remarks in closing argument and surrebuttal deprived him of a fair trial, and (4) the circuit clerk exceeded his authority by imposing fines. *Florence*, 2017 IL App (4th) 150448-U, ¶¶ 3-8. This court agreed that the fines should be vacated because circuit clerks lack the authority to impose fines but rejected defendant's other claims. Accordingly, this court affirmed the trial court's judgment and remanded with directions to vacate the fines imposed by the circuit clerk. *Id.* ¶¶ 137-38.

¶ 18 E. The Postconviction Petition

¶ 19 In January 2018, defendant *pro se* filed a petition seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). The trial court issued an order appointing counsel to represent defendant on his petition. In December 2020, postconviction counsel filed an amended petition alleging, in pertinent part, that defendant's trial and appellate counsel provided ineffective assistance by failing to argue one of defendant's convictions of criminal sexual assault should be vacated under the one-act, one-crime rule as a lesser-included offense of home invasion.

¶ 20 In March 2021, the State filed a motion to dismiss the amended petition. The State contended that, at the time of defendant's sentencing in 2015 and his direct appeal, which became final in 2017, the prevailing case law provided that criminal sexual assault was not a lesser-included offense of home invasion. See *People v. Bouchee*, 2011 IL App (2d) 090542, ¶ 11; *People v. Fuller*, 2013 IL App (3d) 110391, ¶¶ 20-22. Although those cases were subsequently overruled, the State asserted counsel was not required to foresee a future change in the law as part of providing effective assistance. The State, therefore, maintained defendant failed to establish that either his trial or appellate counsel performed deficiently by not raising this claim.

¶ 21 In a written order filed in January 2024, the trial court granted the State's motion to dismiss defendant's petition, finding that defendant's attorneys were "not ineffective for deciding not to make an argument contrary to binding precedent, or for not foreseeing that precedent would be overturned in the future."

¶ 22 This appeal followed.

¶ 23 II. ANALYSIS

¶ 24 As an initial matter, defendant contends on appeal that he made a substantial showing that his trial and appellate counsel provided ineffective assistance by failing to raise a claim that his conviction for one count of criminal sexual assault and his conviction for criminal sexual abuse should be vacated under the one-act, one-crime rule. In his amended postconviction petition, however, defendant alleged only that his attorneys provided ineffective assistance by failing to argue one of his convictions for criminal sexual *assault* should be vacated; because defendant did not allege any issue concerning his criminal sexual *abuse* conviction in his postconviction petition, we limit our discussion to whether he made a substantial showing that his attorneys provided ineffective assistance by failing to argue one of his criminal sexual *assault* convictions should be vacated. See *People v. Jones*, 213 Ill. 2d 498, 504-08 (2004) (holding that claims not raised in a postconviction petition may not be raised for the first time on appeal from dismissal of the petition).

¶ 25 Defendant argues Illinois law at the time of his trial and direct appeal was, "at worst," in conflict concerning whether predicate offenses were lesser-included offenses. He insists the case law existing at that time provided support for counsel to assert the claim that one of his convictions of criminal sexual assault should be vacated under the one-act, one-crime rule as a lesser-included offense of home invasion. Accordingly, defendant maintains his trial and appellate counsel provided ineffective assistance by failing to raise that claim, and the trial court erred by dismissing his amended postconviction petition because it presented a substantial showing of a constitutional violation.

¶ 26 The State responds that, at the time of defendant's trial and direct appeal, *Bouchee* and *Fuller* were the established case law on this issue, and they held the predicate offense of

criminal sexual assault was not a lesser-included offense of home invasion. Although those cases were subsequently overruled in *People v. Reveles-Cordova*, 2020 IL 124797, the State notes that counsel's performance cannot be viewed in hindsight but must be considered with reference to the law in effect at the time of counsel's performance. The State argues defendant's trial and appellate counsel were not required to anticipate a future change in the law, and the trial court did not err by finding counsel reasonably relied on the binding precedent in existence at the time of the trial and direct appeal. The State, therefore, contends the court properly dismissed defendant's amended postconviction petition because it failed to make a substantial showing of a claim of ineffective assistance of counsel. We agree with the State.

¶ 27 A. The Applicable Law

¶ 28 1. *The Post-Conviction Hearing Act*

¶ 29 The Act provides a procedure for a criminal defendant to assert "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2018). The Act sets forth a three-stage process for adjudicating postconviction petitions. *People v. Buffer*, 2019 IL 122327, ¶ 45. At the first stage, the trial court independently reviews the petition and may summarily dismiss it if the petition is frivolous or patently without merit. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). If the petition is not summarily dismissed at the first stage as frivolous or patently without merit, it is advanced to the second stage of the proceedings. *Id.*

¶ 30 At the second stage of postconviction proceedings, the trial court may appoint counsel for an indigent defendant, and the State may file responsive pleadings. *People v. House*, 2021 IL 125124, ¶ 17. The defendant bears the burden of making a substantial showing of a

constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 35. The court will dismiss the petition if it fails to make a substantial showing of a constitutional violation, but if such a showing is made, the petition is advanced to a third-stage evidentiary hearing. *People v. Johnson*, 2018 IL 122227, ¶ 15. The dismissal of a postconviction petition at the second stage is reviewed *de novo*. *People v. Dupree*, 2018 IL 122307, ¶ 29.

¶ 31 2. *Ineffective Assistance of Counsel*

¶ 32 The right to effective assistance of counsel is guaranteed by the sixth and fourteenth amendments to the United States Constitution (U.S. Const., amends. VI, XIV). *People v. Alexander*, 2019 IL App (4th) 170425, ¶ 16. Claims alleging ineffective assistance of counsel are analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Henderson*, 2013 IL 114040, ¶ 11. To prevail on an ineffective assistance claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Patrenko*, 237 Ill. 2d 490, 496 (2010). Deficient performance is established by showing the attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20 (2004). "Effective assistance of counsel refers to competent, not perfect representation." *Id.* at 220. Judicial review of counsel's performance is highly deferential. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 38. A defendant establishes the prejudice prong of an ineffective assistance claim by showing that, absent counsel's errors, a reasonable probability exists that the result of the proceeding would have been different. *People v. Hale*, 2013 IL 113140, ¶ 18. A defendant must satisfy both prongs of the *Strickland* test to prevail on a claim of ineffective assistance of counsel. *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 33 3. *The One-Act, One-Crime Rule*

¶ 34 In explaining the one-act, one-crime rule, the supreme court stated in *People v. King*, 66 Ill. 2d 551, 566 (1977), "Prejudice results to the defendant only in those instances where more than one offense is carved from the same physical act. Prejudice, with regard to multiple acts, exists only when the defendant is convicted of more than one offense, some of which are, by definition, lesser included offenses." The supreme court subsequently reaffirmed and clarified the one-act, one-crime rule, as follows:

> "Under *King*, a court first determines whether a defendant's conduct consisted of separate acts or a single physical act. Multiple convictions are improper if they are based on precisely the same physical act. [Citations.] If the court determines that the defendant committed multiple acts, the court then goes on to determine whether any of the offenses are lesser included offenses. [Citations.] If so, then, under *King*, multiple convictions are improper; if not, then multiple convictions may be entered." *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996).

¶ 35 B. This Case

¶ 36 Our decision on whether counsel was ineffective for failing to argue that defendant's criminal sexual assault conviction must be vacated as a lesser-included offense of home invasion must be based on the law in effect at the time of defendant's trial and direct appeal. See *People v. Perry*, 224 Ill. 2d 312, 344 (2007) (holding counsel's performance must be evaluated based on counsel's perspective at the relevant time, not through "the lens of hindsight"); *People v Reed*, 2014 IL App (1st) 122610, ¶ 66 (holding counsel's effectiveness must be assessed based on the perspective at the time of the alleged error). Defendant's trial

occurred in 2015, and the decision in his direct appeal was filed on August 1, 2017. Prior to that time, the Second and Third Districts had held criminal sexual assault was not a lesser-included offense of home invasion. See *Bouchee*, 2011 IL App (2d) 090542, ¶ 10; *Fuller*, 2013 IL App (3d) 110391, ¶ 22. Those decisions were the controlling case law at the time of defendant's trial and direct appeal on the specific issue of whether the predicate offense of criminal sexual assault was a lesser-included offense of home invasion. Defendant does not identify any other Illinois case law in existence at the time that conflicted with the specific holdings of *Bouchee* and *Fuller* that criminal sexual assault was not a lesser-included offense of home invasion.

¶ 37 A conflict in the case law arose in 2019, when this court disagreed with *Bouchee* and *Fuller* and held a defendant's predicate offense of criminal sexual assault was a lesser-included offense of home invasion. See *People v. Skaggs*, 2019 IL App (4th) 160335, ¶¶ 33-45. The conflict in the case law was subsequently resolved in 2020, when the supreme court held criminal sexual assault was a lesser-included offense of home invasion because "[p]roof of criminal sexual assault is a necessary element of proof of home invasion predicated on criminal sexual assault." *Reveles-Cordova*, 2020 IL 124797, ¶ 21. Accordingly, the supreme court overruled the decisions in *Bouchee* and *Fuller*. *Id.*

¶ 38 Defendant argues that his trial and appellate counsel should have challenged the holdings in *Bouchee* and *Fuller* in 2015 and 2017 because they were "aberrant decisions" and contrary to other existing precedent that generally held various predicate offenses were lesser-included offenses. See *People v. Smith*, 183 Ill. 2d 425, 432 (1998) (holding armed robbery is a lesser-included offense of felony murder predicated on armed robbery); *People v. Donaldson*, 91 Ill. 2d 164, 170 (1982) (holding aggravated battery is a lesser-included offense of armed violence predicated on aggravated battery); *People v. Gillespie*, 2014 IL App (4th) 121146, ¶¶ 23-25

(holding robbery is a lesser-included offense of aggravated criminal sexual assault predicated on robbery). Defendant notes that in *Gillespie*, this court distinguished *Bouchee* because it involved different offenses, but this court also "disagree[d] with *Bouchee*'s examination of all subsections of a statute in applying the abstract elements approach." *Gillespie*, 2014 IL App (4th) 121146, ¶¶ 18-22.

¶ 39 Critically, the cases cited by defendant did not decide the specific issue involved in this case—whether the predicate offense of criminal sexual assault is a lesser-included offense of home invasion—and defendant does not contend they did. Additionally, in *Gillespie*, this court did not express a belief that *Bouchee* and *Fuller* were incorrectly decided. In fact, this court only mentioned *Fuller* in passing, noting that *Fuller* followed *Bouchee*. See *id.* ¶ 15. After concluding *Bouchee* was distinguishable, this court went on to disagree with part of its reasoning, including its "examination of all subsections of a statute in applying the abstract elements approach" for determining whether a charged offense is a lesser-included offense. *Id.* ¶¶ 18-22. Nonetheless, the fact remains that, at the time of defendant's trial and direct appeal, *Bouchee* and *Fuller* were directly on point, and those cases were the controlling precedent on the specific issue presented in this case. They expressly held the predicate offense of criminal sexual assault was not a lesser-included offense of home invasion. *Bouchee*, 2011 IL App (2d) 090542, ¶ 10; *Fuller*, 2013 IL App (3d) 110391, ¶ 22.

¶ 40 "[T]he relevant focus under *Strickland* is on the state of the law at the time of defendant's trial and appeal." *People v. Cathey*, 2012 IL 111746, ¶ 26. Counsel cannot be held incompetent for failing to accurately predict that existing law will change. *People v. English*, 2013 IL 112890, ¶ 34. Accordingly, "[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." *Strickland*, 466 U.S. at 689.

¶ 41 This court recently addressed a similar issue in *People v. Spiller*, 2024 IL App (4th) 231181-U. In that case, the defendant contended his trial counsel was ineffective for failing to file and litigate a motion to suppress evidence recovered in a search of his vehicle, which was based solely on the odor of cannabis. *Id.* ¶ 75. Relying on the supreme court's recent decision in *People v. Redmond*, 2024 IL 129201, ¶ 54 (holding the odor of burnt cannabis alone does not provide probable cause for a vehicle search), the defendant argued counsel should have filed a motion to suppress to preserve the issue for appellate review and the holding in *Redmond* would have required this court to vacate his conviction and remand for a new trial. *Spiller*, 2024 IL App (4th) 231181-U, ¶ 76. The defendant, therefore, maintained his trial counsel provided ineffective assistance by failing to preserve the issue for appellate review. *Id.* ¶ 75.

¶ 42 This court noted that *Redmond* had yet to be decided at the time of the defendant's trial in 2023 and the binding Fourth District precedent provided that the odor of cannabis alone, whether raw or burnt, was sufficient to provide probable cause to search a vehicle. *Id.* ¶¶ 82-84. We noted that if defense counsel had filed a motion to suppress the evidence obtained in the search, the trial court would have been required to deny it. *Id.* ¶ 84. Based on these circumstances, this court held, "[W]e will not deem defense counsel ineffective for failing to file a motion which, at the time of trial, was meritless" *Id.* ¶ 87. This court further wrote as follows:

> "We reject the implication of defendant's argument that counsel is required to preserve an issue merely for the possibility that it might later become meritorious by a subsequent change in the law. We will not add clairvoyance to the standard for reasonably competent counsel, nor do we believe there is any

merit to defendant's implication that counsel failed 'to perform basic research' into the law surrounding cannabis and probable cause by allegedly not predicting the Illinois Supreme Court's decision in *Redmond*." *Id.* ¶ 88.

¶ 43 This court noted the record did not "contain any evidence that defense counsel's decision not to file a motion to suppress was anything other than sound trial strategy based on her knowledge of the law at the time of [the] defendant's trial." *Id.* ¶ 89. This court concluded counsel was not ineffective for failing to file a motion to suppress because the binding case law in effect at the time of the defendant's trial provided that the odor of cannabis alone established probable cause to search the vehicle. *Id.* ¶ 95.

¶ 44 Similarly, in this case, we conclude that the trial court correctly found defendant's trial and appellate counsel were not unreasonable and did not provide deficient representation by relying on the established precedent in effect at the time of defendant's trial and appeal. As noted, at the time of defendant's trial and appeal, the only Illinois precedent on this specific issue provided that the predicate offense of criminal sexual assault was not a lesser-included offense of home invasion. Defendant's trial and appellate counsel were not required to be clairvoyant or anticipate a change in the law as part of providing competent representation.

¶ 45 Accordingly, we conclude defendant has failed to establish a substantial showing that his trial and appellate counsel provided deficient performance by failing to raise the claim alleged in defendant's amended postconviction petition—that one of his criminal sexual assault convictions should be vacated under the one-act, one-crime rule as a lesser-included offense of home invasion. Because defendant failed to establish deficient performance, we need not address the prejudice prong of defendant's ineffective assistance claim. See *People v. Synowiecki*, 2023 IL App (4th) 220834, ¶ 23 (holding the failure to establish either prong of the *Strickland* test

precludes a claim of ineffective assistance of counsel). We hold the trial court did not err by dismissing defendant's amended postconviction petition at the second stage of the proceedings because defendant did not make a substantial showing of a constitutional violation.

¶ 46 III. CONCLUSION

¶ 47 For the reasons stated, we affirm the judgment of the trial court.

¶ 48 Affirmed.