People v. Pecci, J

COLORADO COURT OF APPEALS

Court of Appeals No.: 05CA2168
Larimer County District Court No. 01CR465
Honorable Terence A. Gilmore, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jason L. Pecci,

Defendant-Appellant.

ORDER AFFIRMED

Division A
Opinion by: JUDGE FURMAN
Román and Terry, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: December 6, 2007

John W. Suthers, Attorney General, Roger G. Billotte, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Ridley, McGreevy & Weisz, P.C., Barrett T. Weisz, Robert T. Fishman, Denver, Colorado, for Defendant-Appellant

The defendant, Jason L. Pecci, appeals the district court's order denying his Crim. P. 35(c) motion for postconviction relief without a hearing. We affirm.

I. Background

The defendant was charged with one count of first degree murder and one count of menacing after shooting a man who was allegedly involved in a romantic relationship with the defendant's estranged wife.

The presentence report revealed the following facts: On the night of the shooting, the defendant was at a bar and saw his estranged wife with the victim. The defendant spoke briefly with both of them and left. However, as he later drove by the bar, he decided there was "no way [his wife] would not know how angry he was." He then returned to the bar parking lot and saw the two leaving. He parked his truck behind his wife's car.

The defendant's wife got out of her car and began arguing with the defendant. He removed a revolver from under the seat of his truck and pointed it at his wife's face. His wife went back to her car and told the victim about the gun. When the victim got out of his

car and, along with the defendant's wife, approached the defendant, the defendant got out of the truck and fired a shot into the ground in front of the victim. The defendant's wife ran into the bar. At that point the defendant fired a shot at the victim which struck him in the chest and killed him.

The defendant pleaded guilty to an amended count of second degree murder, a class two felony, in exchange for dismissal of the first degree murder and menacing charges. He was sentenced to forty-eight years in the Department of Corrections. The defendant's sentence was affirmed on appeal. *People v. Pecci*, (Colo. App. No. 01CA2512, Feb. 27, 2003)(not published pursuant to C.A.R. 35(f)).

Subsequently, the defendant filed a timely motion for postconviction relief pursuant to Crim. P. 35(c), claiming his trial counsel was ineffective for failing to investigate adequately a heat of passion defense, and that there was an insufficient factual basis to support his guilty plea. The postconviction court disagreed, and denied the defendant's motion without a hearing.

The defendant challenges the district court's order denying his Crim. P. 35(c) motion without a hearing. We conclude based on the

record before us that counsel was not ineffective, and a sufficient factual basis existed for the defendant's guilty plea. Accordingly, we affirm the district court's order.

II. Effective Assistance of Counsel

The defendant contends his trial counsel was ineffective for failing to investigate certain witnesses, and this entitled him to a hearing on his Crim. P. 35(c) motion. We disagree.

The Sixth Amendment of the United States Constitution guarantees an accused the right to effective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 686 (1984); *People v. Garcia*, 815 P.2d 937, 940 (Colo. 1991). To obtain relief for a violation of this right, a defendant must establish both that trial counsel's performance fell below the range of reasonably competent assistance demanded of attorneys in criminal cases and that the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *Garcia*, 815 P.2d at 940-41.

However, a district court may deny a Crim. P. 35(c) motion without holding a hearing if a defendant's factual allegations fail to show that trial counsel rendered deficient performance, and that

the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687-88; *Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003); *Davis v. People*, 871 P.2d 769, 773 (Colo. 1994).

We review de novo the district court's denial of a motion for postconviction relief without a hearing. *People v. Trujillo*, 169 P.3d 235, 237 (Colo. App. 2007); *People v. Long*, 126 P.3d 284, 286 (Colo. App. 2005).

A. Deficient Performance

The defendant contends he showed deficient performance because trial counsel failed to investigate witnesses who were crucial to the development of a heat of passion defense. We disagree.

Trial counsel renders deficient performance if all avenues of fact relevant to a defendant's guilt are not investigated. *People v. White*, 182 Colo. 417, 422, 514 P.2d 69, 71 (1973); *see Strickland*, 466 U.S. at 687-88; *Davis*, 871 P.2d at 772.

Although the defendant admits that trial counsel explored a heat of passion defense by interviewing the defendant, the defendant's estranged wife, and the defendant's mother, and by

obtaining the defendant's mental health records, the defendant nonetheless claims trial counsel was ineffective because she did not investigate certain other witnesses. The defendant references the report of Dr. Friedman, a forensic psychologist whom his postconviction counsel consulted, and who thought the defendant's rage prevented him from thinking when he shot the victim; the defendant had no experience dealing with aggressive or violent confrontations; the defendant likely felt overwhelmed and frightened during this confrontation; and the defendant experienced the victim's behavior as provoking and intimidating. Dr. Friedman opined that "any reasonable person's emotions and passions could have been inflamed by the set of variables and facts associated with these circumstances."

The defendant also references postconviction counsel's interview with his brother-in-law, who thought defendant felt provoked at the time of the shooting. However, evidence supplied by Dr. Friedman and the defendant's brother-in-law were not crucial to the development of the heat of passion defense because trial counsel already was aware of or had investigated evidence of

the defendant's psychological and emotional state before the shooting. *See White*, 182 Colo. at 422, 514 P.2d at 71. The defendant's opening brief reveals as much. The opening brief states that the initial discovery in the case showed the following:

- The victim spent more than seven hours prior to the shooting drinking alcohol and appeared intoxicated at the time of the shooting;
- The victim "towered" over the defendant;
- The defendant's wife believed the victim's physical presence might have been a contributing factor in the shooting;
- The defendant informed his trial counsel that the victim was acting "very aggressively" in the parking lot, and even after the defendant fired the warning shot into the ground, the victim pushed him;
- The defendant's mother informed trial counsel about the defendant's mental health history and the emotional and psychological toll his relationship with his wife was having on the defendant in the days leading up to the shooting;

- The defendant's mother forwarded to trial counsel correspondence with a professor of psychiatry regarding whether the defendant's mental health could be used as a potential defense; and
- The defendant's wife advised trial counsel that the defendant "had this all bottled up inside" and he "[d]idn't know how to deal with it until it exploded."

The defendant does not dispute on appeal that these facts were known by his trial counsel, and would have been communicated to the defendant.

Thus, because trial counsel was aware of the defendant's emotional state, we conclude she did not render deficient performance by not also consulting a forensic psychologist or interviewing the defendant's brother-in-law. *See People v. Isham*, 923 P.2d 190, 196 (Colo. App. 1995) (counsel's duty to make reasonable investigations "may be influenced or determined by the defendant's own statements or actions").

In addition, the defendant claims defense counsel rendered deficient performance by not consulting with a forensic expert in

firearm ballistics, who would have provided evidence the victim was less than three feet from the defendant. However, the defendant's postconviction motion reveals trial counsel had similar information from eyewitnesses and from the investigating officers.

Accordingly, we conclude the district court did not err in finding trial counsel's performance was not deficient, and in denying the defendant's motion without a hearing. *See Davis*, 871 P.2d at 773 (counsel's decision not to interview certain witnesses, if made in the exercise of reasonable professional judgment, does not constitute ineffective assistance).

The court may determine an ineffective assistance of counsel claim solely on the basis of deficient performance without also deciding whether a defendant was prejudiced. *See People v. Osorio*, ___ P.3d ___, ___ (Colo. App. No. 05CA1765, May 3, 2007). However, we elect also to address whether the defendant was prejudiced.

B. Prejudice

The defendant contends he showed prejudice by claiming he would have insisted on going to trial, had trial counsel adequately

investigated evidence supporting a heat of passion defense. *See Hill v. Lockhart*, 474 U.S. 52 (1985); *Garcia*, 815 P.2d at 941 (counsel's performance prejudices defendant if he can show that, but for counsel's unprofessional errors, he would not have pled guilty and instead would have gone to trial). We disagree.

The heat of passion mitigator recognizes that circumstances can cause a reasonable person to react passionately and violently. *People v. Ramirez*, 56 P.3d 89, 94 (Colo. 2002). Those circumstances entitle a defendant to have a jury determine whether the violent acts are mitigated, and thereby reduce murder from a class two felony to a class three felony. § 18-1-103(3)(b), C.R.S. 2007; *People v. Garcia*, 28 P.3d 340, 345-46 (Colo. 2001).

To establish heat of passion a defendant must show (1) the act causing the death was performed in a sudden heat of passion; (2) caused by a serious and highly provoking act of the intended victim; (3) which was sufficient to excite an irresistible passion in a reasonable person; and (4) between the provocation and the killing, an insufficient interval of time passed for the voice of reason and

humanity to be heard. § 18-3-103(3)(b), C.R.S. 2007; *Cassels v. People*, 92 P.3d 951, 955 (Colo. 2004).

The district court found the defendant left the bar, acquired the loaded handgun, and returned to the scene. The district court determined that the length of time necessary for the defendant to retrieve the gun would not entitle him to a heat of passion defense. Thus, the defendant was not prejudiced in taking the prosecutor's plea offer. We agree with the district court. Postconviction counsel's proffered evidence would not have benefited the defendant at trial because it would not have supported a heat of passion defense.

First, Dr. Friedman's report does not show that, when the defendant returned to the parking lot with a loaded gun, the victim engaged in a highly provoking act sufficient to excite an irresistible passion in an *objectively reasonable person*. *See People v. Howard*, 89 P.3d 441, 446 (Colo. App. 2003) (when considering whether an act was sufficient to excite an irresistible passion in a reasonable person, we analyze the circumstances from the viewpoint of an objectively reasonable person, not a subjectively reasonable person

possessing the individual defendant's personality traits or defects). Rather, Dr. Friedman's report references the defendant's *subjective* personality traits or defects:

- "based on what we know about [the defendant's] personality style or makeup . . . the sequence of events that occurred on April 1, 2001 . . . [the defendant] felt that [his wife's] sitting at the bar with her boyfriend was [an] attempt to 'advertise' their divorce and embarrass him";
- "[the defendant's] already diminished self-esteem and frustration . . . significantly interfered with his ability to interpret these events in a non-threatening or other than humiliating manner";
- "[the defendant] had never learned to express his angry impulses in a constructive or assertive manner";
- "[the defendant's] generalized coping style had been to either avoid or withdraw from threatening situations and to internalize his angry thoughts and emotions";

- "by the time [the defendant] drove past the bar and observed his wife in her [car] with her boyfriend his anger and humiliation had intensified"; and
- "[d]uring their initial confrontation [the defendant] was unable to express his anger in a constructive manner."

Second, Dr. Friedman's report does not attempt to explain whether an "insufficient interval of time passed for the voice of reason and humanity to be heard." *See People v. Sepulveda*, 65 P.3d 1002, 1007 (Colo. 2003); *see also People v. Lanari*, 926 P.2d 116, 122 (Colo. App. 1996) (district court properly rejected defendant's expert testimony because the offer of proof did not attempt to explain whether the time between defendant's finding out about the relationship and the shooting, with its intervening events, would be a sufficient cooling off period).

Third, the defendant does not show how the proffered evidence would have made a difference in his decision to accept the plea agreement or to insist on going to trial. *See People v. Rodriguez*, 914 P.2d 230, 300 (Colo. 1996) (vague and unsupported claim of error does not establish a violation of his right to effective

assistance of counsel). As the district court determined, the "[d]efendant benefited significantly from the plea agreement which reduced his sentence from a possible sentence of life without the possibility of parole."

Accordingly, we conclude the district court did not err in finding the defendant failed to show how, but for trial counsel's not investigating this evidence, he would not have pled guilty and instead would have gone to trial, and in denying the defendant's motion without a hearing. *See Coston v. People*, 633 P.2d 470, 472-73 (Colo. 1981) (defendant's jealousy over victim when she began another affair did not constitute adequate provocation to reduce murder to manslaughter); *People v. Mullins*, 188 Colo. 23, 26, 532 P.2d 733, 735 (1975) (evidence did not show a highly provoking act when defendant visited his ex-wife's house, knocked on the door, asked to see his ex-wife's husband, and shot and killed the husband).

III. Guilty Plea

The defendant also contends there was an insufficient factual basis to support his guilty plea. The defendant maintains that,

although at the plea hearing he had admitted to the court that he "knowingly" committed the offense, he also stated in connection with the presentence report that he had acted "recklessly," and that he had made other statements consistent with the heat of passion defense. We conclude there was no error.

Crim. P. 11 requires the district court to determine whether a sufficient factual basis exists for a guilty plea before accepting it, unless the finding of a factual basis is waived by a defendant. *People v. Fleming*, 781 P.2d 1384, 1388 (Colo. 1989). A factual basis consists of those facts that establish an offense has been committed, and can properly be determined by: (1) facts admitted to by a defendant; (2) facts or fact-finding stipulated to by a defendant; or (3) facts found by a jury. *People v. Rockwell*, 125 P.3d 410, 418 (Colo. 2005). A factual basis may thus exist when a defendant admits to the elements of the crime, *see Fleming*, 781 P.2d at 1388, or when a defendant admits that he "did do that with which" he was charged. *See People v. Cushon*, 650 P.2d 527, 528 (Colo. 1982). Further, admissions related to criminal conduct made by a defendant during questioning by the district court may support a

factual basis. *People v. Carino*, 193 Colo. 412, 414, 566 P.2d 1061, 1062 (1977).

During the providency hearing, the defendant admitted to the elements of the crime, including the "knowingly" element, and further admitted as follows:

> [COURT]: Do you acknowledge that you caused the death of [the victim]?
>
> [DEFENDANT]: I do.
>
> [COURT]: You did that knowing what you were doing?
>
> [DEFENDANT]: Without prior deliberation, but knowingly, yes.
>
> [COURT]: And how did you cause the death of [the victim]?
>
> [DEFENDANT]: Gunshot.
>
> [COURT]: And you knew the gun was loaded when you fired it?
>
> [DEFENDANT]: Yes, sir.
>
> [COURT]: Do you understand the People are required to prove that the mental culpability, as your attorney has discussed it with you, in this particular case, knowingly, that you're aware of what your conduct was and practically certain to cause that result?
>
> [DEFENDANT]: Yes.

[COURT]: This happened on April 1st in Larimer County?

[DEFENDANT]: Yes, it did.

As additional factual basis, the district court took judicial notice of the evidence and its findings following the preliminary hearing, which included a finding that there was evidence of deliberation. Defense counsel indicated she had no objection to the district court's doing so.

Nevertheless, the defendant maintains that under *Carino* the court was required to inquire again into the factual basis for the plea prior to sentencing because doubts were raised by certain statements in the presentence report. Specifically, he points to his statement in the report that he acted "recklessly," and claims he made other statements consistent with the heat of passion defense.

We do not read *Carino* so broadly as to create an affirmative duty on the district court to inquire into the factual basis of a plea any time a defendant's statement in his presentence report could be read as undermining the mental state set forth in his plea. *See Carino*, 193 Colo. at 415, 566 P.2d at 1063 (although district court may vacate a guilty plea if it doubts the credibility of the charge, it

should instead have first inquired into the factual basis).

Rather, *Carino* stands for the proposition that, where a district court concludes the charges are not supported by the facts included in the record of all court appearances and in the presentence report, it may on its own motion: (1) vacate the guilty plea and reinstate the original charges for trial; (2) reconsider the presentencing report in its entirety to determine whether the report supports an adequate factual basis; or (3) determine whether the defendant has waived the establishment of a factual basis. *Id.* at 414, 566 P.2d at 1063.

The defendant points to nothing in the record that indicates the district court questioned the validity of the factual basis. Further, given the district court's inquiries into a factual basis and the unequivocal statements it received from the defendant, we cannot conclude the district court erred in not further questioning the factual basis of the second degree murder charge.

The order is affirmed.

JUDGE ROMÁN and JUDGE TERRY concur.