

22CA2011 Peo v Stunes 11-30-2023

COLORADO COURT OF APPEALS

DATE FILED: November 30, 2023

Court of Appeals No. 22CA2011
Adams County District Court No. 08CR3407
Honorable Roberto Ramirez, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Kevin Duane Stunes,

Defendant-Appellant.

ORDER AFFIRMED

Division II
Opinion by JUDGE PAWAR
Fox and Berger*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)

Announced November 30, 2023

Philip J. Weiser, Attorney General, Carmen Moraleda, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Kevin Duane Stunes, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Defendant, Kevin Duane Stunes, appeals the postconviction court's summary denial of his two ineffective assistance of trial counsel claims. We affirm.

I. Background

¶ 2 Stunes admitted to killing his girlfriend while they were both high on methamphetamine. The prosecution charged him with first degree murder after deliberation. The only issue at trial was whether Stunes killed the victim after deliberation and with intent, as the charged offense required. Stunes' defense was that he did not kill her after deliberation and with intent because he was high on methamphetamine. The jury disagreed, finding Stunes guilty as charged and he was convicted and sentenced accordingly.

¶ 3 Stunes directly appealed his conviction. *People v. Stunes*, (Colo. App. No. 09CA2020, Nov. 29, 2012) (not published pursuant to C.A.R. 35(f)). He argued, among other things, that the prosecutor's use of various examples of actions taken "after deliberation" misstated the law on that element of first degree murder and amounted to prosecutorial misconduct. *Id.* at 8-11. Because trial counsel failed to object to any of these examples, the direct appeal division reviewed these arguments for plain error. *Id.*

at 8. The division concluded that some of the examples were proper and those that were improper did not rise to the level of plain error. *Id.* at 12-15. The division therefore rejected Stunes' prosecutorial misconduct arguments, and his other arguments, and affirmed the conviction. *Id.* at 16-17.

¶ 4 Stunes then filed the pro se Crim. P. 35(c) petition that is the subject of this appeal, alleging two claims of ineffective assistance of trial counsel. The first claim alleged that trial counsel was ineffective for failing to present testimony from a defense expert on the effects of methamphetamine use. The second claim alleged that trial counsel was ineffective for failing to object to some of the prosecutor's "after deliberation" examples — only those involving traffic analogies. The postconviction court denied both claims without a hearing. Stunes appeals that summary denial.

II. Ineffective Assistance of Counsel

¶ 5 We review the denial of ineffective assistance claims without a hearing *de novo*. *See People v. Taylor*, 2018 COA 175, ¶ 8.

¶ 6 An ineffective assistance claim requires the defendant to prove that (1) counsel's performance was constitutionally deficient and (2) counsel's constitutionally deficient performance prejudiced the

defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

The prejudice prong requires a defendant to show a reasonable probability that, but for counsel's deficient performance, "the result of the proceeding would have been different." *Id.* at 694. Courts may deny an ineffective assistance claim if the defendant fails to prove either deficient performance or prejudice. *See Ardolino v. People*, 69 P.3d 73, 77 (Colo. 2003).

¶ 7 To avoid summary denial, a defendant's Crim. P. 35(c) petition need not *prove* both prongs of a claim. Instead, the petition need only allege facts that, if true, establish both deficient performance and prejudice. *See People v. Timoshchuk*, 2018 COA 153, ¶ 10. But if the petition, files, and record clearly show that the defendant cannot prove at least one of the prongs, summary denial is appropriate. *Id.*

¶ 8 We now explain why the petition, files, and record clearly established that Stunes could not prove prejudice for either ineffective assistance claim.

A. Failure to Present Defense Expert Testimony

¶ 9 Stunes alleged in his petition that had trial counsel retained and presented testimony from a defense expert on the effects of

methamphetamine use, the jury would have concluded that Stunes did not kill the victim after deliberation and with intent. In the petition, Stunes argued that such testimony would have informed the jury that methamphetamine use can cause extreme paranoia, psychotic episodes, extreme tendencies towards irrational violence, and "white outs, i.e., drug induced behavior for which the person has no real recall and may fabricate events to fill in the blanks."

¶ 10 Our review of the record reveals that trial counsel elicited substantially the same expert testimony from the prosecution's forensic toxicologist. On cross-examination, the forensic toxicologist agreed that the psychological effects of methamphetamine use include "paranoia," "violence based on that paranoia," and "acts of aggression." She also confirmed that "chronic users can suffer from some type of paranoia stuff, even after they have come down from the effects of the initial use."

¶ 11 Stunes does not explain why this testimony would have been more impactful or persuasive coming from a defense expert. We therefore conclude that there is no reasonable probability that the result of the trial would have been different had the testimony come from a defense expert instead of the prosecution's forensic

toxicologist. Accordingly, Stunes cannot prove prejudice and the postconviction court properly denied this claim without a hearing.

B. Traffic Analogies

¶ 12 We come to the same conclusion about the summary denial of Stunes' claim based on trial counsel's failure to object to the traffic analogies used to explain "after deliberation." Stunes argues that had trial counsel objected to the use of these analogies, the direct appeal division would have reviewed for harmless error instead of plain error and reversed his conviction. We disagree.

¶ 13 It is true that the direct appeal division held that some of the analogies were improper. But the traffic analogies were not among these. Instead, the direct appeal division "perceive[d] no impropriety" in the use of the traffic analogies. *Stunes*, No. 09CA2020, slip op. at 12. Consequently, even if trial counsel had preserved an objection to the traffic analogies, the outcome of the direct appeal would have been the same.

¶ 14 In this appeal, Stunes also purports to challenge additional analogies the prosecutor used to explain "after deliberation." But because these additional analogies were not argued in his petition

in the postconviction court we do not consider them here. *See*
People v. Wolfe, 213 P.3d 1035, 1037 (Colo. App. 2009).

¶ 15 We therefore conclude that the record clearly shows that Stunes was not prejudiced by trial counsel's failure to object to the traffic analogies and the postconviction court properly denied this ineffective assistance claim without a hearing.

III. Disposition

¶ 16 The postconviction court's order is affirmed.

JUDGE FOX and JUDGE BERGER concur.

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Supreme Court of Colorado

May 20, 2024, Decided

No. 23SC943

Reporter**2024 Colo. LEXIS 425 * | 2024 WL 2409583**

Petitioner: Kevin Duane Stunes, v. Respondent: The People of the State of Colorado.

Notice: DECISION WITHOUT PUBLISHED OPINION**Prior History:** [*1] Court of Appeals Case No. 22CA2011.**Opinion**

Petition for Writ of Certiorari DENIED. EN BANC.

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