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2011 IL App (3d) 090563–U

Order filed August 17, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3–09–0563
)	Circuit No. 01–CF–1310
)	
MICHAEL L. SIMON,)	Honorable
)	Edward Burmila, Jr.,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Lytton and McDade concurred in the judgment.

ORDER

¶ 1 *Held:* After an evidentiary hearing, the trial court's decision to dismiss the defendant's postconviction petition was not manifestly erroneous where: (1) the immigration status of the victims was only marginally relevant to the ultimate determination of guilt; and (2) trial counsel's failure to cross-examine a victim about a pending felony charge was not prejudicial.

¶ 2 After a jury trial, the defendant, Michael L. Simon, was convicted of five counts of home invasion (720 ILCS 5/12–11(a)(1) (West 2000)) and four counts of armed robbery (720 ILCS 5/18–2(a)(1) (West 2000)). He was originally sentenced to nine 38-year sentences which were to

be served concurrently. On direct appeal, four of the five convictions for home invasion were vacated. *People v. Simon*, No. 3–02–0683 (2003) (unpublished order under Supreme Court Rule 23). Upon remand, the defendant's previous sentence was reimposed. The defendant then filed various posttrial motions, including, but not limited to, a motion for a new trial. That motion was denied, and his subsequent appeal was also denied. *People v. Simon*, No. 3–05–0401 (2007) (unpublished order under Supreme Court Rule 23).

¶ 3 Thereafter, the defendant filed a petition for postconviction relief. After hearing evidence and considering the arguments of the parties, the trial court denied the petition. The defendant appealed, arguing that he was deprived of his right to effective assistance of counsel because his trial counsel: (1) failed to investigate or cross-examine the State's witnesses with regard to their immigration status; and (2) failed to impeach one of the victims with a pending felony charge.

¶ 4 **FACTS**

¶ 5 The defendant was charged with home invasion and armed robbery for an incident that occurred on August 25, 2001, in which it was alleged that he took money from Joaquin Vargas Domingues (Vargas), Guillermo Torres Hernandez, Jose Cardona, Juan Alvizo, and Juan Alberto Gamino at knifepoint. Prior to trial, the State tendered copies of Law Enforcement Agencies Data Systems (LEADS) printouts for the five victims which could be used for impeachment purposes. The LEADS printout revealed that Vargas had an alias of Jose Gamino.

¶ 6 Also prior to trial, defense counsel requested information relating to the immigration status of the victims. The judge ordered the State to turn over whatever information it had, but did not require the State to conduct an investigation into their residency status.

¶ 7 After the jury was selected, the State made an oral pretrial motion *in limine* to prohibit the defense counsel from making any reference to the citizenship of the victims. Defense counsel responded, "I don't intend on asking them, you know, are you a citizen of the United States, anything to that effect. But if I wanted to ask them, certainly, have they been—do they know English, or have they been trying to learn English, anything like that would be the only question." The court ultimately denied the motion, but advised counsel that if she was going to address the issue she should advise the court in advance.

¶ 8 At trial, Vargas, Cardona, Alvizo, and Gamino testified that they lived at 1713 Sterling Avenue along with a couple of other men. Around 6 a.m. on August 25, 2001, two women entered their home and offered to do a strip act for money. Shortly thereafter, two men entered the home with knives. One of the men, identified as the shorter one, demanded money and threatened to kill them. The taller man, identified as the defendant, stood by the door and watched. The robbers took money and left.

¶ 9 Robert Momany and Lisa Brooks, who were codefendants in this case, also testified. Both Brooks and Momany testified that in the early morning hours of August 25, 2001, they were at the defendant's house with the defendant and another woman later identified as Elizabeth Redfern, who came up with the idea of going to the victims' home for some money. Momany and the defendant drove the women to the house. According to Brooks, they decided in the car that one of the women would perform a dance for the men and get paid for it, or that Momany and the defendant would simply rob the men.

¶ 10 Momany and Brooks testified that Momany and the defendant eventually entered the home, and Momany demanded money from the victims. The defendant stood behind Momany with a knife in his hand. The four of them took the money and left.

¶ 11 Investigator Michael Guilfoyle testified that he questioned the defendant about the incident on September 4, 2001. The defendant admitted that he was involved in the robbery. However, Guilfoyle did not obtain a written or videotaped statement from the defendant, and did not mention the defendant's admission in his report.

¶ 12 The defendant testified on his own behalf, and denied any involvement in the robbery. He denied making any statement to Guilfoyle. On cross-examination, the defendant said he did not remember where he was the morning of the incident. Ultimately, the defendant was found guilty and sentenced to 38 years' imprisonment.

¶ 13 On September 4, 2007, the defendant filed a petition for postconviction relief based on ineffective assistance of counsel. The trial court found that the defendant presented the gist of a constitutional claim. On September 24, 2008, the defendant, through counsel, amended the petition and alleged: (1) that trial counsel was ineffective for failing to explore the issue of the victims' immigration status; and (2) trial and appellate counsel were ineffective for failing to raise numerous other issues which individually may have been harmless to the defendant, but in the aggregate deprived the defendant of effective representation.

¶ 14 The State filed a motion to dismiss the amended postconviction petition. The trial court granted the State's motion with regard to the second issue, but denied the motion with respect to the first allegation. The defendant then sought an amendment to the postconviction petition

because postconviction counsel had recently discovered that Vargas had a pending felony charge under the alias of Jose Gamino at the time of the defendant's trial.

¶ 15 The defendant's postconviction petition proceeded to an evidentiary hearing on both the immigration status issue and the pending felony charge issue. At the evidentiary hearing, Vargas testified that he was in the country illegally at the time of the defendant's trial. Postconviction counsel was unable to discover the immigration status of the other victims.

¶ 16 Regarding the second issue, postconviction counsel's initial argument at the evidentiary hearing was that the State erred by failing to disclose this information. However, during the course of the hearing, it became clear that the information was in the LEADS documents provided by the State. Postconviction counsel then orally alleged ineffective assistance of trial counsel on that issue.

¶ 17 After hearing arguments, the trial court ruled:

"Now both of those circumstances, failing to cross examine the witness [about his immigration status] and failing to scrutinize the discovery as closely as it should have been scrutinized, could lead to a claim of ineffective assistance of counsel; but as [the Assistant State's Attorney] argued, there is more than one prong to that argument and it isn't simply a question of failing to do something, it is also a question of the effect, and looking at the evidence in the case as to whether or not the outcome of a trial would have been any different.

Given the circumstances of this case, the testimony of the eyewitnesses, and the defendant's codefendants who testified in this matter, even if those failings on counsel's

part rose to the level of ineffective assistance, I do not believe that it would have affected the outcome of this trial."

¶ 18 The trial court then denied the defendant's postconviction petition. The defendant appealed.

¶ 19 ANALYSIS

¶ 20 The Post-Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (West 2008)) provides a remedy to criminal defendants who claim that their constitutional rights were violated at trial. *People v. Whitfield*, 217 Ill. 2d 177 (2005). A postconviction proceeding is a collateral attack upon a final judgment; its purpose is not to determine guilt or innocence, but to inquire into constitutional issues which have not been, and could not have been, previously adjudicated. *Id.* In a postconviction proceeding, the petitioner bears the burden of proving that a substantial constitutional violation occurred at trial.

¶ 21 In order to demonstrate ineffective assistance of counsel, a defendant must show that his counsel's performance was so deficient that it fell below an objective standard of reasonableness and the defendant was prejudiced by his counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984). A defendant shows prejudice by demonstrating that, but for counsel's error, there is a reasonable probability the result of the proceeding would have been different. *People v. Peebles*, 205 Ill. 2d 480 (2002). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Caballero*, 126 Ill. 2d 248 (1989). If it is easier to dispose of an ineffective assistance of counsel claim on the ground that it lacks sufficient prejudice, the court may proceed directly to the second prong and

need not determine whether counsel's performance was deficient. *People v. Givens*, 237 Ill. 2d 311 (2010).

¶ 22 In reviewing the denial of a postconviction petition after an evidentiary hearing, we will not reverse the trial court's ruling unless it was manifestly erroneous. *People v. Pendleton*, 223 Ill. 2d 458 (2006).

¶ 23 As stated, the defendant raised two claims of ineffective assistance of counsel. First, the defendant argued that his trial counsel was ineffective for failing to investigate or raise the issue of the victims' immigration status. Secondly, the defendant argued that his trial counsel was ineffective in failing to impeach Vargas with a pending felony charge.

¶ 24 Regarding the defendant's first argument, we find that the defendant was not prejudiced by counsel's alleged error. As an initial matter, we note that the defendant could only prove that one of the four victims that testified at trial was an undocumented worker. Therefore, any argument that all of the victims were in the country illegally is pure speculation. See *People v. Walls*, 323 Ill. App. 3d 436 (2001).

¶ 25 Even assuming all of the victims were undocumented, and defense counsel had raised the issue at trial, it is not reasonably probable that the outcome of the trial would have been altered. We find the *Walls* case instructive. In that case, the defendant was convicted of armed robbery, armed violence, aggravated kidnaping, and aggravated battery. *Id.* The defendant alleged that the State committed a discovery violation because it did not release the victim's Immigration and Naturalization Service (INS) file number or the name of the investigator handling his case prior to trial. *Id.* He also argued that defense counsel was ineffective for failing to uncover the victim's INS file prior to trial. *Id.*

¶ 26 Regarding the purported discovery violation, the *Walls* court found that the evidence was not material. *Id.* The court noted that even if the evidence showed that the victim was an illegal alien, that information would not "have put the entire case in such a different light so as to undermine defendant's conviction." *Id.* at 446. In addition, since the court found that the evidence was not material, the defendant was not prejudiced by counsel's failure to subpoena the INS file. *Id.* The court reiterated that the information "was not outcome determinative." *Id.* at 446.

¶ 27 Similarly, we find that in this case defense counsel's failure to raise the immigration status of the victims does not undermine confidence in the verdict. As the court explained in *Walls*, the information was not material to determining the guilt of the defendant for the charged crime. *Id.* While the immigration status of a State's witness may be relevant in determining a witness's potential bias (*People v. Austin*, 123 Ill. App. 3d 788 (1984)), the information is not outcome determinative. See also *Toliver v. Hulick*, 470 F.3d 1204, 1208 (2006) (finding that immigration status of State's witness was "at best, marginally relevant").

¶ 28 At the very least, the trial court's finding that the defendant could not satisfy the second prong of the *Strickland* test was not manifestly erroneous. As the court stated, the evidence against the defendant consisted of the four victims' testimony, the testimony of the two codefendants, and an officer who testified that the defendant admitted to his participation in the crimes. Against such evidence, cross-examining the victims as to their immigration status would not have been reasonably likely to produce a different result at trial. See *Austin*, 123 Ill. App. 3d 788 (error in prohibiting cross-examination of the witnesses' residency status to establish bias or motive to testify falsely was harmless because evidence of guilt was overwhelming).

¶ 29 The defendant was also not prejudiced by defense counsel's failure to cross-examine Vargas as to his pending felony charge. Certainly, evidence of pending charges is admissible to show that a witness's testimony may be influenced by bias, interest, or motive to lie. *People v. Davis*, 185 Ill. 2d 317 (1998). However, in the instant case, Vargas was one of six witnesses who testified that the defendant participated in the robbery. The credibility of Vargas was not critical to the State's case. *Cf. People v. Anthony Roy W.*, 324 Ill. App. 3d 181 (2001) (holding that in a criminal sexual assault case it was prejudicial to the defendant not to impeach victim with pending charges because she was the only witness and her credibility was determinative). Accordingly, even if Vargas had been properly impeached, the result at trial is still a verdict worthy of confidence. See *Davis*, 185 Ill. 2d 317 (limiting cross-examination of State's witness was harmless error where, even without the witness's testimony, there was overwhelming evidence of guilt).

¶ 30

CONCLUSION

¶ 31 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 32 Affirmed.