

NOTICE
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2013 IL App (4th) 120244-U

NO. 4-12-0244

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 10, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
CORRIE SINGLETON,)	No. 07CF172
Defendant-Appellant.)	
)	Honorable
)	Jennifer Bauknecht,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

¶ 1 Held: The trial court's decision, after an evidentiary hearing under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2008)), finding defendant had not proved he was denied his constitutional right to counsel of his choosing and to the effective assistance of counsel, is not against the manifest weight of the evidence.

¶ 2 In January 2012, a third-stage evidentiary hearing was held on the amended petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)), filed by defendant, Corrie Singleton. In his amended petition, defendant argued he was denied the effective assistance of counsel at his bench trial because counsel failed to seek a continuance or inform the trial court of defendant's allegation the staff of the Department of Corrections (DOC) purposefully thwarted his efforts to obtain private counsel. After the evidentiary hearing, the court denied defendant's postconviction petition.

¶ 3 Defendant appeals, arguing the trial court's dismissal was manifestly erroneous. Defendant maintains (1) the State failed to disprove his claim DOC staff intentionally misdialled telephone numbers and thwarted his attempts to hire counsel of his own choosing, and (2) the trial court's decision finding trial counsel's testimony credible was against the manifest weight of the evidence. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2007, the State charged defendant, an inmate, with criminal damage to government-supported property, a wall and a sink in his cell (720 ILCS 5/21-4(1)(a) (West 2006)). Counsel was appointed to represent defendant.

¶ 6 In September 2007, at a preliminary hearing, defense counsel told the trial court defendant hoped to call his family to try to retain private counsel. The court ordered defendant be permitted three noncollect calls to either family members or an attorney. The court informed defendant he had "three shots at it," and, if defendant was unsuccessful in hiring his own counsel, he would continue to be represented by appointed counsel.

¶ 7 In October 2007, defense counsel informed the trial court defendant had difficulty talking with his family due to security restrictions regarding discussing his case. Defense counsel asked the court for two more telephone calls. The court directed the DOC to, within one week, arrange for defendant to make two calls to family or an attorney. The court concluded if defendant was unable to find private counsel by then, the trial would proceed and defendant would have to stay with appointed counsel. Defendant's trial was scheduled for December 2007. The court informed defendant he had "a long time to get a lawyer."

¶ 8 In December 2007, defendant's bench trial was held. Before trial, defense counsel

did not seek a continuance. Defendant was found guilty. He was later sentenced to two years' imprisonment, to be served consecutively to the terms he was then serving. At sentencing, defendant informed the court he was denied his court-mandated telephone calls.

¶ 9 Defendant filed a direct appeal of his conviction. This court, in October 2008, affirmed his conviction. *People v. Singleton*, No. 4-08-0107 (October 23, 2008) (unpublished order under Supreme Court Rule 23).

¶ 10 In June 2008, while his direct appeal was pending, defendant filed his *pro se* postconviction petition. In his *pro se* petition, defendant asserted trial counsel provided ineffective assistance of counsel on several grounds, including alleging his counsel failed to seek a continuance to allow him to obtain private counsel after DOC staff denied him the court-mandated telephone calls. Defendant alleged DOC staff intentionally dialed wrong telephone numbers, and, of the five calls he was allowed to make, he only spoke with someone two times and was only permitted to talk less than a minute during each call.

¶ 11 In July 2008, the trial court found defendant's petition frivolous and patently without merit and dismissed it. Defendant filed notice of appeal. The trial court appointed the office of the State Appellate Defender (OSAD) to represent defendant. In April 2009, OSAD moved to withdraw as counsel.

¶ 12 This court denied OSAD's motion to withdraw. We concluded defendant may have stated the gist of a constitutional claim when he alleged counsel was ineffective for refusing to move for a continuance after DOC staff refused to provide defendant the court-ordered telephone calls to hire private counsel. This court ordered OSAD to file another motion to withdraw on that issue or brief the issue for review.

¶ 13 In January 2010, OSAD filed an appellant brief. Defendant argued his petition stated the gist of a constitutional claim because he was denied his constitutional right to counsel of his own choosing. The State argued defendant forfeited the argument because it could have been raised on direct appeal and a motion to continue would have been futile because the trial court told defendant the most recent order for a continuance was the final one. The State further claimed defendant was unable to establish prejudice.

¶ 14 In July 2010, this court found defendant stated the gist of a constitutional claim he was denied counsel of his choice and remanded for further proceedings. See *People v. Singleton*, No. 4-08-0514 (July 27, 2010) (unpublished order under Supreme Court Rule 23). In reaching this decision, we concluded defendant's argument was not forfeited because the facts underlying defendant's allegations DOC staff were thwarting his efforts to obtain counsel were not of record. We also found the record did not establish that another motion to continue would have been futile, as the record showed the trial court was amenable to granting continuances for this purpose and, before trial, had not been informed of defendant's allegations his efforts were being actively thwarted. We further concluded defendant need not establish the prejudice prong of the ineffective-assistance-of-counsel test, because prejudice is presumed when a defendant is denied counsel of his own choosing. See *People v. Bingham*, 364 Ill. App. 3d 642, 649-50, 847 N.E.2d 903, 910 (2006).

¶ 15 On remand, counsel was appointed to represent defendant. In April 2011, defendant filed an amended postconviction petition. Defendant alleged the DOC failed to comply with the trial court's September 7, 2007, order, which directed the DOC to permit defendant to make telephone calls for the purpose of retaining private counsel. Defendant further

alleged he informed his appointed trial counsel of these allegations before trial, but counsel failed to address the issue or seek a continuance. Defendant alleged trial counsel provided him ineffective assistance and he was denied his constitutional right to counsel of his own choosing.

¶ 16 In May 2011, the State issued a subpoena *duces tecum*, commanding the production of "[a] copy of all records of calls from October 2007 through December 4, 2007; and all requests for calls from October 2007 through December 4, 2007." The DOC responded in June 2011 with a letter stating a search was conducted but no documentation concerning the State's request was found. The DOC further stated Stephen Smith, a corrections counselor, was contacted. Smith, in December 2007, authored a "counseling summary" in regards to "some concern about a grievance on a legal phone call." Smith noted 20 legal phone calls were made by defendant between September 11, 2007, and October 21, 2007. Smith further noted the calls were made to numerous telephone numbers.

¶ 17 On June 30, 2011, the State filed an answer to defendant's amended petition. In the prayer for relief, the State also asked the court to dismiss defendant's petition.

¶ 18 In January 2012, an evidentiary hearing was held on defendant's amended petition. At the hearing, defendant testified. According to defendant, he recalled obtaining a court order allowing him to make phone calls for the purpose of trying to retain an attorney. Defendant's family was planning to find an attorney. His family did not want the appointed attorney representing defendant "because he wasn't being professional or something with my case." Defendant had spoken to his mother about the topic. He believed he would have had the ability to hire an attorney.

¶ 19 Defendant testified, after the trial court ordered the phone calls, he "was able to

obtain one phone call." After that first call, defendant had "difficulty with the officers dialing the wrong number intentionally and saying that I gave them a wrong number when I provided them adequate numbers." Defendant's first attempt was to his uncles and his mother. Defendant watched the officer dial the number. The officers "intentionally dialed the wrong number because at the time I had a lot of problems with staff because I had a lot of staff assaults."

¶ 20 Defendant stated he tried to talk to his trial counsel about this issue. Defendant explained to counsel what was occurring. The first time defendant did so, counsel "walked off." The second time defendant raised the issue, counsel raised it with the judge and asked for another court order. At that time, defendant was granted two more phone calls. Again, DOC staff intentionally misdialed his calls. Defendant was also given other telephone calls. He "had court stuff going on with [his] original case." The attorneys would call defendant and arrange telephone calls. Defendant stated when officers dialed the number for his appellate attorney, he was able to talk to his attorney. For his other calls to family, "there was always something wrong with the phone." Officers told him the number was disconnected or not working any longer. Defendant told trial counsel about this issue immediately before the bench trial. Trial counsel responded by simply stating they were going to trial.

¶ 21 On cross-examination, defendant testified he wanted a new attorney. Defendant could not see what numbers the officers were dialing because he was handcuffed to the floor. Defendant testified he wrote letters to his family but he had "problems with writing." The purpose of the phone calls was so that he could speak directly with his family. Defendant testified his trial counsel would not go over his case with him. Defendant wanted trial counsel to raise his mental health issues and call witnesses on the issues, but he would not.

¶ 22 On redirect examination, defendant testified his family had the money to retain private counsel.

¶ 23 Smith and defendant's trial counsel, Randell Morgan, testified for the State. Smith, a correctional counselor with the DOC, testified defendant was an inmate assigned to him. As a counselor, Smith's role was to visit the inmates and listen to their complaints. Smith's responsibilities included looking into the complaints to verify them. Smith met with defendant in December 2007. At some point, defendant complained to Smith about not being allowed out of his cell to make telephone calls. Defendant told Smith he was going to try to get an attorney. Smith investigated defendant's accusation. He went to the lieutenant's office and examined the telephone log book. Smith wrote down the telephone calls defendant made in September and October 2007 and entered the information into the computer. Smith counted 20 calls made by defendant during that time period. According to Smith, his report is something made during the regular course of his job as counselor at Pontiac Correctional Center.

¶ 24 On cross examination, defense counsel questioned Smith regarding his report of defendant's telephone calls. Counsel asked the reason no information, other than the dates of the calls, appeared in his report. Smith explained he was only investigating defendant's complaint he was not brought to the office to make the telephone calls.

¶ 25 Smith testified his report was a "counseling summary." The first step in the grievance process was for a grievance to be filed with a counselor. The counselor performed an investigation and answered the grievance. If the inmate disagreed with the counselor's response, the inmate could forward the grievance to the grievance officer.

¶ 26 Morgan, a Livingston County public defender, testified he represented defendant

in the underlying case. In September 2007, at the first court hearing on the matter, defendant told Morgan he wanted to hire private counsel and to speak to family members so they could hire private counsel and pay for it. Morgan informed the trial court of defendant's wishes, and the court entered an order mandating defendant receive telephone calls. At the second hearing, in October 2011, defendant told Morgan he did not receive all of his calls. Morgan informed the court of defendant's assertion. The trial court issued a second order providing defendant additional phone calls.

¶ 27 According to Morgan, defendant's bench trial occurred on December 3, 2007. Between the time of the October 2011 order and the trial, defendant did not raise the phone-call issue again. Morgan received two letters from defendant in this time regarding the case, and defendant did not mention being denied phone calls or wanting to hire private counsel. Defendant did not, on that date, ask Morgan to seek a continuance. Morgan stated he would have asked for more telephone calls if defendant wanted those calls. Morgan and defendant prepared for the trial and the trial occurred.

¶ 28 On cross-examination, Morgan testified he did not recall how much time he spent with defendant before the bench trial.

¶ 29 At the end of the hearing, the trial court concluded defendant had not proved a substantial violation of his constitutional rights. The court found defendant did not dispute he was allowed to make the phone calls, but defendant believed DOC staff interfered with his making the calls. The court found defendant's belief conclusory, because he could not see what number was dialed; defendant simply concluded "the staff was messing with him." Regarding Smith's testimony, the court found Smith had no reason to lie. The court, focusing on the report

made by Smith, noted defendant made at least seven telephone calls after the September 2007 order and at least three or four more phone calls after the October 2007 order. The court believed, based on Smith's testimony, defendant received his telephone calls. The court further found Morgan had no reason to lie and his testimony was credible.

¶ 30 After his petition was dismissed, defendant moved to reconsider the dismissal, arguing Smith's report was improperly admitted. The trial court denied the motion.

¶ 31 This appeal followed.

¶ 32

II. ANALYSIS

¶ 33

A. Postconviction Proceedings

¶ 34 The Post-Conviction Hearing Act sets forth a three-stage process by which a defendant may obtain postconviction review of a claim that a substantial denial of his constitutional rights resulted in his conviction. *People v. Dopson*, 2011 IL App. (4th) 100014, ¶17, 958 N.E.2d 367, 372 (2011). At the first stage in this process, the trial court reviews the petition and ascertains whether it is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658-59, 936 N.E.2d 648 (2010). Any petition deemed frivolous and patently without merit should be dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2008). When a petition survives the first stage, it advances to the second, allowing the appointment of counsel. *Andrews*, 403 Ill. App. 3d at 659, 936 N.E.2d at 653. At this stage, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2008). If the State answers the petition or the trial court denies the State's motion to dismiss, the proceeding advances to the third stage, in which the defendant may present evidence to support his claim. *Andrews*, 403 Ill. App. 3d at 659, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2008). Here, defendant has "the burden of making a substantial showing of

a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 35 This case comes before us on appeal from the denial of a postconviction petition following the third-stage evidentiary hearing. Because the third-stage involves an evidentiary hearing, in which the trial court makes credibility and fact-finding determinations, we will not reverse a trial court's decision unless it is manifestly erroneous. *Id.* A decision is against the manifest weight of the evidence only when the opposite conclusion is clearly evident or when the findings of the trial court are unreasonable, arbitrary, or not based on the evidence. *In re Marriage of Dorfman*, 2011 IL App (3d) 110099, ¶ 46, 956 N.E.2d 1040.

¶ 36 B. Defendant's Arguments

¶ 37 Defendant argues, at his trial, he was denied his constitutional rights to counsel of his choosing and to the effective assistance of counsel for counsel's failure to seek a continuance that would have allowed defendant to hire counsel. Defendant maintains the trial court committed manifest error by denying his petition, because the State's evidence did not disprove his claim DOC staff prevented him from speaking via telephone with his family for the purpose of hiring an attorney and the evidence shows his counsel improperly denied his request to seek a continuance. Defendant further argues the court improperly admitted and considered the report authored by Smith, as the report contained hearsay and did not comply with the best-evidence rule.

¶ 38 We find no error. As stated above, defendant bears "the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The crux of defendant's argument is that he was denied his right to choose counsel by DOC staff, who allegedly intentionally misdialed telephone numbers and prevented him from

speaking to family regarding hiring private counsel. The trial court found defendant's testimony did not establish calls were misdialed. The court concluded defendant's testimony was conclusory, in that defendant was not able to see DOC staff dialing the telephone and thus could not testify DOC staff actually intentionally dialed wrong numbers.

¶ 39 Defendant, on appeal, has not shown the decision of the trial court in finding his statements conclusory is against the manifest weight of the evidence. Our review of the record reveals the decision is not "unreasonable, arbitrary or not based on the evidence" (*Dorfman*, 2011 IL App (3d) 110099, ¶ 46, 956 N.E.2d 1040). Other than his testimony the calls to family were not completed, defendant did not present any other evidence to prove his claim. He did not present evidence showing the numbers defendant provided were correct and relatives were available to receive the calls, but did not due to the actions of DOC staff. Defendant's testimony simply did not substantially show DOC staff committed any wrongdoing. In fact, his testimony established his calls to counsel on other matters were completed. Without establishing the key fact, defendant did not meet his burden of making a substantial showing of a constitutional violation. The decision of the trial court in finding no constitutional violation was proven is not manifestly erroneous.

¶ 40 Defendant's ineffective-assistance-of-counsel claim also fails. To prove an ineffective-assistance-of-counsel claim in third-stage proceedings under the Act, a defendant must make a substantial showing (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced. See *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009) (providing the two prongs of the effectiveness-of-counsel test); *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008 (stating the defendant bears the burden of

making a substantial showing a constitutional violation occurred). When, however, a postconviction petition raises an issue of whether a defendant was denied the right to choose counsel, proof of prejudice is presumed. *People v. Bingham*, 364 Ill. App. 3d 642, 649-50, 847 N.E.2d 903, 910 (2006).

¶ 41 At the evidentiary hearing, Morgan testified defendant did not ask him in December 2007 to seek a continuance. Defendant testified to the contrary. The trial court explicitly found Morgan's testimony credible. When testimony conflicts, a court of review should not disturb a trial court's findings unless they are against the manifest weight of the evidence. *Flynn v. Cohn*, 154 Ill. 2d 160, 166-67, 607 N.E.2d 1236, 1239 (1992).

¶ 42 Defendant argues the fact Morgan could not recall how long he spoke with defendant before trial undermines Morgan's testimony defendant did not ask him to seek a continuance. This fact, however, is insufficient to support a finding the trial court's decision is against the manifest weight of the evidence. The trial court viewed both witnesses as they testified. The court decided to believe Morgan and not defendant. The record does not establish this decision was manifestly erroneous.

¶ 43 III. CONCLUSION

¶ 44 We affirm the trial court's judgment. We grant the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 45 Affirmed.