



received ineffective assistance of counsel, and the resultant waiver was neither knowing nor voluntary. We reverse the ruling of the trial court based on our conclusion that denial of the petition was against the manifest weight of the evidence and that the jury waiver was not knowing and voluntary. For the reasons cited below, we reverse the order of the circuit court of Fayette County and remand for a new trial.

¶ 3 FACTS

¶ 4 The factual basis for the initial conviction is stated in the above-referenced decision of this court on direct appeal and need not be repeated here. We will, however, discuss the factual circumstances leading to the *instant* appeal.

¶ 5 Based on defense counsel's misapprehension of law, he convinced defendant to waive his right to trial by jury. This came to light at the bench trial. Defense counsel, prior to trial, had filed a bill of particulars in which he argued the State was required to file a new information concerning events occurring outside the dates in the information, the instrument charging alleged assaults taking place between September 1, 1998, and December 15, 1998. Defense counsel mistakenly thought, and acted on his determination, that defendant could not be convicted of any alleged assault if the evidence could not show beyond a reasonable doubt that the assaults took place between the above-mentioned dates. The State, on the other hand, argued that it was not required to prove the precise date of any offense, and even if they occurred after December 15, 1998, defendant could be found guilty. Defense counsel specifically requested the court to limit its consideration to the time frame alleged in the information. After argument, the court determined it was not bound by the dates stated in the information, September 1, 1998, to December 15, 1998, that discovery supplied to defense counsel indicated alleged occurrences past December 15, 1998, and counsel was charged with that knowledge. Defendant's motion to limit the scope of the evidence was denied and the bench trial proceeded.

¶ 6 After conviction and this court's disposition on direct appeal, defendant filed a postconviction petition on which an evidentiary hearing was held in October 2011. In that petition, defendant alleged ineffective assistance of counsel, specifically that trial counsel had advised him to waive his right to trial by jury on the basis that the filing of the bill of particulars would confine the scope of trial to the dates stated above. Both defendant and his fiancée testified at the hearing. His fiancée's testimony was that counsel told them that given the restricted time frame the State would be limited to by the bill of particulars, a judge would be more likely to consider only that time frame, while a jury would be likely to consider all alleged acts, regardless of whether they were included in the time frame alleged by the State. In a subsequent conversation, defendant was told that the judge would have to limit the guilt or innocence consideration to the time specified in the information because of the bill of particulars. Defense counsel also discussed his opinion that jurors were too emotional in such cases, and defendant expressed his concern about the accuser's family being connected politically in the county. At the time of execution of the jury waiver form, a similar discussion was had in which defense counsel claimed that "a judge, as a matter of law, would have to rule in our favor if there was no evidence in between that timeline of September 15th to December 15th." Defendant was then asked the following:

"Q. Would you have executed that document that day, (the jury trial waiver), had you known that \*\*\* your guilt or innocence would be decided by a judge considering all of the parameter of 300 accusations of 300 sexual assaults over a two-year period?

A. No, I would not.

Q. What would you have done?

A. I would have went to a jury trial."

¶ 7 Defendant's trial counsel also testified at the evidentiary hearing. He testified that it

was his belief at the time that the bill of particulars would require the State to confine its proof to the time frame of September 1, 1998, through December 15, 1998, as stated in the information, and that this belief was at the core of his theory for defense of his client. He also acknowledged both the initial conversation and the conversation on the day the jury waiver was signed. At one point in his testimony he said specifically: "I told him [the trial judge] would be required to find him within the dates charged, that I don't think he could go outside the dates charged. I know I said that." Defense counsel also indicated other jury waiver considerations were discussed and defendant's concern that his ex-wife's father had political influence and defense counsel's general view that jurors found it difficult to follow the law in sexual assault cases because of emotions and sympathies. Defense counsel also indicated his belief that the alleged victim in this case would have trouble pinpointing dates of alleged assaults within the time frame indicated by the information.

¶ 8 The trial judge took the petition under advisement and subsequently issued a written order denying the petition. The judge found that trial counsel had wrongfully advised defendant concerning the time frame, but that other factors were involved, specifically, concerns about the ex-wife's father's alleged political influence and defense attorney's opinion about juries in sexual abuse cases. Specifically, after reviewing these factors, the judge concluded:

"Based on the above, the court cannot find that there was a reasonable likelihood that the defendant would have waived his right to a jury trial but for trial counsel's mistake of law. The defendant's post-conviction petition is denied."

Defendant timely appealed.

¶ 9

#### ANALYSIS

¶ 10 On appeal, defendant argues that a reasonable probability exists that, but for trial counsel's erroneous advice, defendant would have exercised his right to trial by jury.

Accordingly, this advice so undermined defendant's decision-making process concerning whether or not to waive a jury trial that the waiver was not voluntarily, knowingly, or understandingly made and the trial court's finding to the contrary was against the manifest weight of the evidence. Defendant also argued that this was a structural error in that defendant's constitutional right to a trial by jury, guaranteed by both the United States and Illinois Constitutions, was impaired. He requests vacating of the jury waiver and the resulting guilty verdict in the bench trial and remand for a new trial, including a determination of whether a retrial would be bench or jury.

¶ 11 The State, in response, argues that defendant's jury waiver was knowingly and voluntarily made, and that defendant has failed to prove prejudice as a result of the waiver, arguing that there was no evidence that defense counsel would not have pursued his flawed defense strategy before a jury as he did in front of the bench. Additionally, the State argues that the other reasons urged by trial counsel to waive a jury and acknowledged by defendant as arguments made by defense counsel indicate that the trial court's disposition of the postconviction petition was not against the manifest weight of the evidence. The State further argues that defense counsel was not ineffective in his representation and, since this issue was not argued posttrial and on appeal, it was waived. We agree with defendant.

¶ 12 The State clearly admits that defense counsel's position was erroneous; its position is that no prejudice was shown and that there is no causal connection between the erroneous advice given to defendant and defendant's waiver of the right to jury trial, noting the other reasons given to defendant by counsel.

¶ 13 The right to trial by jury is enshrined in both the United States Constitution and the constitution of our state (U.S. Const., amend. VI, amend. XIV; Ill. Const. 1970, art. I, §§ 8, 13) and is fundamental to our nation's criminal justice system. *Duncan v. Louisiana*, 391 U.S. 145, 148-49 (1968). The situation indicated in the statement of facts of this case

indicates a clear structural error (see *Sullivan v. Louisiana*, 508 U.S. 275, 279-80 (1993)), and defendant need only show that he would have exercised his right to trial by jury had the legal advice given to him by defense counsel been accurate. *Lafler v. Cooper*, \_\_\_ U.S. \_\_\_, 132 S. Ct. 1376 (2012); *People v. Frey*, 103 Ill. 2d 327, 332, 469 N.E.2d 195, 197 (1984); *People v. Smith*, 326 Ill. App. 3d 831, 847-49, 761 N.E.2d 306, 321-23 (2001). Clients often seek advice and guidance from their counsel, but often do not listen to their lawyers or act on their advice. In the *instant* case, defendant did exactly what his trial counsel advised, and the primary motivation for acting exactly as his trial counsel advised was the legally erroneous advice given to him by his trial counsel. We note, and the State admits, that this erroneous advice was acted upon not only in defendant's waiver of his right to trial by jury, but was carried through to the subsequent bench trial and permeated that trial process. While other reasons were given for waiving his right to jury trial, the record clearly indicates that the direct cause of defendant's jury waiver was the erroneous advice given by his trial counsel. The trial court's conclusion to the contrary is against the manifest weight of the evidence.

¶ 14 The State argues that defendant fails to prove prejudice in that there is no indication that defense counsel would not have pursued the same flawed strategy, and did in fact pursue that strategy in the bench trial. The State also argues that defendant mixes the question of a knowing and voluntary waiver and the question of whether the jury waiver was wise. We disagree. We conclude that the consistent position of defense counsel in pursuing an admittedly erroneous legal strategy reinforces defendant's argument that but for the erroneous strategy and advice, defendant would not have waived his right to trial by jury and that due to this erroneous strategy, defendant's waiver of that right was not knowing or voluntary and was prejudicial. See *People v. McCarter*, 385 Ill. App. 3d 919, 897 N.E.2d 265 (2008) (presumption of prejudice since denial of defendant's right to choose bench or jury trial is

structural defect).

¶ 15 Defendant's waiver of his right to trial by jury was fatally tainted by his counsel's actions and advice. Our supreme court in *People v. Maxwell*, 148 Ill. 2d 116, 592 N.E.2d 960 (1992), involved waiver of the right to trial by jury as to capital sentencing. Defendant's counsel had advised incorrectly that evidence of the defendant's involvement in offenses of which he had not yet been convicted could not be introduced at the sentencing hearing. The waiver took place before trial but after the trial judge had ruled the State could introduce evidence of the defendant's involvement in these offenses. The defendant's counsel advised incorrectly that this evidence would be inadmissible. During the course of the trial court considering the defendant's waiver, counsel stated:

" 'Your Honor, in addition to that the jury hearing about Witherspoon will make them more inclined to find him guilty of murder if they are aware that this business—this issue of the death penalty is in the case at all, Judge, for one thing.

For another thing the State's Attorney has indicated that they are going to introduce robberies and a burglary in addition to trying this man for murder. And that these—he's not convicted of the robberies. He's not convicted in the burglary, and those would be inadmissible in an aggravation hearing, but the jury is going to hear about it anyway. So for those reasons we would ask—Mr. Maxwell has decided to ask the Court to hear the issue of the death penalty and will waive his jury to the death penalty at this time, Judge.' " *Maxwell*, 148 Ill. 2d at 141-42, 592 N.E.2d at 972.

Our supreme court, after explaining the requirements for a determination of ineffective assistance of counsel, proceeded to find that defense counsel's belief and her subsequent advice were incorrect, as the evidence of participation in unconvicted criminal acts would be admissible, but concluded that counsel did not render ineffective assistance of counsel in advising the defendant to waive a jury for two independent reasons. Counsel had advised

that the judge would be more likely to be lenient to the defendant than a jury would be and counsel wished to avoid death qualification of the jury that would try the guilt phase of the proceedings. Our supreme court concluded that these other reasons constituted a valid basis for choosing to waive a sentencing jury. Our supreme court, however, went on to note the following:

"A different question would be presented if, after the judge ruled that the other-crimes evidence would be admissible at trial, counsel had then advised the defendant to waive a jury for the guilt phase but not the sentencing phase, believing that the evidence could not be introduced at sentencing. A different question would also be presented if the judge had excluded the evidence at trial and defense counsel, acting on her belief that the evidence would be inadmissible at the sentencing hearing as well, had then advised the defendant to submit the sentencing decision to a jury. In those instances, the defendant's waiver or nonwaiver of a jury would be tied to counsel's erroneous belief that the other-crimes evidence could not be introduced at the sentencing hearing. In the present case, however, the judge's pretrial ruling effectively spared defense counsel from opting for a jury at sentencing on the basis of her mistaken belief and then learning, too late, of her error." *Maxwell*, 148 Ill. 2d at 144-45, 592 N.E.2d at 973-74.

Upon our careful review of the record in this case, we conclude that the situation in the *instant* case fits squarely under the situation posed by the supreme court as stated above. In the *instant* case, defendant's waiver of his right to trial by jury was tied to counsel's erroneous advice.

¶ 16 The defendant in *People v. Smith*, 326 Ill. App. 3d 831, 761 N.E.2d 306 (2001), appealed a summary dismissal of his postconviction petition attacking his conviction for first-degree murder and sentence of 20 years. The court noted that the waiver rule may be

relaxed where fundamental fairness requires. *Smith*, 326 Ill. App. 3d at 840, 761 N.E.2d at 316. Given the constitutional importance of an individual's right to trial by jury, we conclude that in this case fundamental fairness does require relaxation of waiver. The *Smith* court considered trial counsel's ineffectiveness as one aspect for causing defendant Smith to waive his right to testify in that the basis of his advice was incorrect. Specifically, Smith was told that if he testified, his gang involvement would be brought out, but the involvement would not be exposed if he failed to testify. The advice was incorrect and gang affiliation was introduced despite his failure to testify. The *Smith* court concluded that the erroneous advice failed to meet the standard of reasonableness required in the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), and as to the second prong, the record did not reflect the reasonable likelihood that the defendant would not have waived his right to testify without the erroneous advice. *Smith*, 326 Ill. App. 3d at 846, 761 N.E.2d at 320. The *Smith* defendant also waived his right to trial by jury and in his postconviction proceeding argued that counsel advised him that the trial judge owed trial counsel a favor and that the judge in this proceeding would have information that would not be available to a jury. This issue was deemed waived by the defendant's failure to raise it on direct appeal. The court, however, noted, "We are mindful of the importance of the right to a jury trial, and fundamental fairness further supports our decision to review defendant's claim. [Citation.]" *Smith*, 326 Ill. App. 3d at 847, 761 N.E.2d at 321. On further analysis, the *Smith* court determined that the advice received by the defendant fell below an objective standard of reasonableness as required by *Strickland* and, in its analysis of whether, under the second *Strickland* prong, there existed a reasonable likelihood that the defendant would not have waived his right to a trial by jury in the absence of counsel's alleged error. The court noted the right to a trial by jury is fundamental in the American criminal justice system:

"The right to a trial by jury is fundamental to the American criminal justice

system. *Duncan v. Louisiana*, 391 U.S. 145, 149, 20 L. Ed. 2d 491, 496, 88 S. Ct. 1444, 1447 (1968). Both the United States Constitution and the Illinois Constitution provide for jury trials in criminal cases. U.S. Const. amends. VI, XIV; Ill. Const. 1970, art. I, §§ 8, 13. Section 103-6 of the Code of Criminal Procedure provides that every person accused of a crime has the right to a jury trial unless that right is 'understandingly waived by the defendant in open court.' 725 ILCS 5/103-6 (West 1998). The determination of whether this right has been validly waived does not rest on any precise formula but, rather, turns on the facts of each particular case. *People v. Frey*, 103 Ill. 2d 327, 332 (1984). Ultimately, the decision whether to waive a jury trial belongs to the defendant. *People v. Segoviano*, 189 Ill. 2d 228, 240 (2000)."  
*Smith*, 326 Ill. App. 3d at 847-48, 761 N.E.2d at 321-22.

The *Smith* court concluded that the defendant had sufficiently alleged facts meeting both prongs of the *Strickland* test. The court further concluded that the reasons given by trial counsel for jury waiver constituted acting in a professionally unreasonable manner and deficient performance under the first *Strickland* prong. The court found, as to the second prong, a reasonable likelihood that the defendant would not have waived his right to trial by jury in the absence of this deficient performance and advice, citing *Maxwell*, 148 Ill. 2d at 142, 592 N.E.2d at 972-73. The *Smith* court summarized as follows:

"In the context of the ineffective assistance claim, the issue to be determined is whether the advice given defendant prevented defendant from waiving his constitutional right to a jury trial voluntarily, knowingly, and understandingly. Defendant's allegations that trial counsel persuaded him to take a bench trial by promising that he had influence over the judge because the judge owed him a favor and that the judge would have more information in a bench trial are not rebutted by the record. Those allegations are neither frivolous nor patently without merit. While

we take no position on defendant's ability to prove his ineffective assistance claim, we find his petition should advance to the second stage of the postconviction process." *Smith*, 326 Ill. App. 3d at 849, 761 N.E.2d at 322-23.

¶ 17 In our consideration of the *instant* case, we determine that *Maxwell* and *Smith* are on point. We reject the State's argument of waiver given these authorities' consideration of fundamental fairness in determining the voluntariness of waiver of such an important constitutional right. We further determine, after careful review of this record and the authorities cited above, that the persistent erroneous advice given by defendant's trial counsel in the *instant* case fatally impaired the ability of this defendant to knowingly and voluntarily make an effective waiver of his right to trial by jury, just as this ability was fatally impaired in *Smith*. We conclude that the facts in the *instant* case fall squarely under the direction of our supreme court in *People v. Maxwell*, noting that a different question would have been presented to them under different circumstances which describe the *instant* case. We further note the consistent testimony as to this erroneous advice and its resultant waiver of the right to trial by jury in the testimony given by both defendant and his fiancée. Defendant has shown, and we recognize, that his ability to knowingly and voluntarily waive his right to trial by jury was fatally impaired by the advice and actions of his counsel, and accordingly, his waiver of his right to trial by jury was not effective.

¶ 18 We, therefore, determine that the erroneous advice given by defendant's trial counsel precluded defendant from knowingly and intelligently waiving his right to trial by jury and that but for this advice, a reasonable probability existed that defendant would not have so waived. Accordingly, defendant's right to trial by jury guaranteed under the United States Constitution and under the Illinois Constitution was denied.

¶ 19 Accordingly, we reverse the decision of the circuit court of Fayette County and remand with directions to grant defendant a new trial, specifically including prior to trial a

determination by defendant, upon advice of counsel, as to whether the retrial should be before a jury or before a judge without a jury.

¶ 20 Reversed and remanded with directions.

¶ 21 JUSTICE SPOMER, dissenting:

¶ 22 I respectfully dissent. This court reviews a trial court's denial of a postconviction petition following an evidentiary hearing for manifest error. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1034 (2011). " 'Manifest error' is error that is clearly plain, evident, and indisputable." *Id.* (citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2004)). We must be mindful as we review a trial court's decision on a postconviction petition following an evidentiary hearing that "it is the function of the trial court to determine the credibility of witnesses, decide the weight to be given their testimony, and resolve any conflicts in the evidence." *People v. Chatman*, 357 Ill. App. 3d 695, 704 (2005). A reviewing court "may not substitute its judgment for that of the trial court." *Id.*

¶ 23 As the majority recounts, testimony adduced at the evidentiary hearing points to multiple factors that motivated the defendant's jury waiver. These factors included not only the advice given by counsel, but also concern that in a sexual assault case such as this one, jurors would base their verdict on emotion rather than the facts and the law, and concern that the accuser's family's political connections in Fayette County would taint jurors. Although my colleagues conclude that Judge Lolie's denial of the defendant's postconviction petition was manifestly erroneous because "the record clearly indicates that the direct cause of defendant's jury waiver was the erroneous advice given by his trial counsel" (*supra* ¶ 13), my review of the transcript of that hearing does not lead me to such a clear-cut conclusion. Also, nor did the evidence—presented to Judge Lolie not on paper, but in person—lead Judge Lolie

to that conclusion. I recognize, as should my colleagues, that Judge Lolie was in a superior position to this court to judge the credibility of the witnesses who testified and to determine the weight to be given to the testimony of each witness. Following the hearing, he took this matter under advisement and approximately three weeks later issued a detailed, informed, and articulate decision in which he ruled that he could not find a reasonable likelihood that the defendant would have exercised his right to trial by jury "but for trial counsel's mistake of law." As explained above, there was sufficient evidence before the judge to support this conclusion. Because I find no plain, evident, and indisputable error in his ruling, I respectfully dissent from my colleagues' decision to reverse it.