2015 IL App (2d) 131046-U
No. 2-13-1046
Order filed August 13, 2015



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee,<br><br>v.<br><br>MANUEL J. GUERRERO,<br><br>Petitioner-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Kane County.<br><br><br>No. 03-CF-1762<br><br><br>Honorable William J. Parkhurst, Judge, Presiding. |

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held*: Trial court properly dismissed defendant's second-stage postconviction petition for failing to make a substantial showing that defendant was denied the effective assistance of trial counsel; affirmed.

¶ 2 Following a jury trial, defendant, Manuel J. Guerrero, was convicted of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2002)), and sentenced to 60 years' imprisonment. The sentence consisted of a 35-year sentence for the murder, and a 25-year add-on based on defendant's use of a firearm to commit the offense. Defendant's sentence and conviction were affirmed on direct appeal. *People v. Guerrero*, No. 2-05-0369 (2007) (unpublished order under

Supreme Court Rule 23) (*Guerrero I*). Defendant filed a *pro se* postconviction petition, which advanced to the second stage. Defendant filed an amended postconviction petition alleging ineffective representation by trial counsel and the trial court dismissed the petition. On appeal, defendant contends that the judgment dismissing his postconviction petition at stage two should be reversed and the cause should be remanded for a third-stage hearing because his trial counsel was ineffective for failing to investigate any mitigating evidence at sentencing. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At the sentencing hearing, defendant's trial attorney, David Kliment, offered no mitigation on defendant's behalf. In fashioning a sentence, the judge considered defendant's history of prior delinquency, which included "the possession of guns, the use of guns to threaten, the discharge of guns and their use in connection with gang activities." The judge further considered that defendant had committed a senseless crime.

¶ 5 On direct appeal, defendant contended that the evidence presented at trial supported only a conviction for involuntary manslaughter and that the statute providing for an enhanced sentence of the use of a firearm was unconstitutional. We rejected both contentions and affirmed defendant's conviction and sentence. *Guerrero I*, slip op. at 7, 8.

¶ 6 In his amended postconviction petition, defendant claims that his trial counsel was ineffective for failing to investigate and present mitigation witnesses for his sentencing hearing. The postconviction petition presented two issues and four letters from individuals purporting to be potential mitigation witnesses. The court granted the State's motion to dismiss.

¶ 7 Defendant timely appeals from the dismissal of his amended postconviction petition. In the present appeal, defendant only argues that the substantial showing of ineffective assistance

for failing to investigate and present mitigation evidence is based on two letters, supported by affidavits from Laurie and Grace Contreras.

¶ 8 II. ANALYSIS

¶ 9 The Illinois Supreme Court has found that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Under the two-prong *Strickland* test for determining whether assistance of counsel has been ineffective, a defendant must show both that (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Id*. at 687.

¶ 10 Under the first prong of the *Strickland* test, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness "under prevailing professional norms." *People v. Colon*, 225 Ill. 2d 125, 135 (2007). With regard to the second prong of *Strickland*—the prejudice prong—a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). The prejudice prong of the *Strickland* test can be satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 11 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135. "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient."

*People v. Graham*, 206 Ill. 2d 465, 476 (2003). We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied. *Id*. at 476.

¶ 12 In the present case, defendant asserts that trial counsel's failure to seek out and present the testimony of Laurie and Grace at defendant's sentencing hearing constituted deficient performance by him and he was prejudiced by this deficiency. The affidavits and letters from the two proposed witnesses included with defendant's postconviction petition stated, essentially, that they had known defendant since he was about 13 years old, that he had a troubled and turbulent childhood and adolescence, that he had never known his father, and that he had many problems with his mother, all of which deeply affected him. Laurie and Grace averred that they were not contacted by anyone on behalf of defendant before he was sentenced, and both attested that they would have been willing to testify on defendant's behalf at the sentencing hearing. We do not find this claim arguably demonstrates ineffective assistance of counsel.

¶ 13 First, there is nothing in the postconviction petition that defendant's trial counsel was aware of these witnesses. Neither defendant's affidavit nor Laurie's or Grace's affidavits indicated that their potential testimony was made known to counsel. Defendant's argument as to whether his counsel was aware of these potential witnesses is contained in one sentence of his appellate brief where he states that counsel's awareness of defendant's difficult upbringing should have led counsel to investigate the availability of witnesses to testify regarding these facts. That counsel should have been aware of those witnesses is speculative unless someone, presumably defendant, would have told him about the witnesses.

¶ 14 Second, defendant's presentence investigation report contained similar information about defendant's personal history, including growing up without a father, his non-existent and, at times, abusive relationship with his mother, and that he spent most of his time on the streets,

which he blamed for "making me the way I am." Thus, as the presentence investigation report was considered by the trial court in sentencing defendant, the additional testimony of Laurie and Grace would have been essentially cumulative and defendant can show no prejudice on this basis. "Defendant cannot make out a claim of ineffectiveness where the testimony he claims should have been offered was cumulative to evidence already in the record." *People v. Phyfiher*, 361 Ill. App. 3d 881, 886 (2005). See also *People v. Griffin*, 178 Ill. 2d 65, 88 (1997) (no prejudice where testimony from defendant's family members as to defendant's troubled childhood would have been cumulative, as information was already presented through presentence investigation report); and *People v. Simon*, 2014 IL App (1st) 130567, ¶ 71. This distinguishes defendant's case from *People v. Town*, 182 Ill. 2d 491, 521 (1998), and *People v. Ruiz*, 132 Ill. 2d 1, 26 (1989), where it was clear that the proposed evidence was not cumulative to anything presented in the trial court.

¶ 15 Moreover, prejudice must be assessed in a realistic manner based on the totality of the evidence. Therefore, it is improper to focus solely on the potential mitigating evidence. *People v. Coleman*, 168 Ill. 2d 509, 538 (1995); *Simon*, 2014 IL App (1st) 130567, ¶ 72. Instead, "the nature and extent of the evidence in aggravation must also be considered." *Coleman*, 168 Ill. 2d at 538. Here, the trial court placed the most weight on the fact that defendant had prior criminal activity, used guns in many instances to intimidate, was involved in gang activity, and that the murder was senseless because the victim refused to shift his hat to another side. The trial court found the aggravating evidence was overwhelming and supported the sentence imposed.

¶ 16 Defendant maintains the record shows that the trial court did not give any weight to the information in the presentence investigation report regarding his childhood. The court need not recite each factor it considers, and where mitigating evidence is before the court, it is presumed

that the sentencing judge considered the evidence, absent some indication, other than the length of the sentence imposed, to the contrary. *People v. Hill*, 408 Ill. App. 3d 23, 30 (2011).

¶ 17 Defendant argues that it is likely that the trial court did not give the information in the presentence investigation report as much weight as it would have had the evidence come from someone other than defendant. Defendant's argument is completely based on conjecture. While Laurie's and Grace's testimony would have added some detail to the information in the presentence investigative report, it would have been essentially cumulative and, based on the substantial evidence in aggravation, would not have changed the sentencing outcome.

¶ 18 III. CONCLUSION

¶ 19 For the preceding reasons, we affirm the judgment of the circuit court of Kane County dismissing defendant's postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 20 Affirmed.