2016 IL App (3d) 140397-U

Order filed November 17, 2015
Modified Upon Denial of Rehearing January 7, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois.
Plaintiff-Appellant,	)	
	)	Appeal No. 3-14-0397
v.	)	Circuit No. 01-CF-174
	)	
WILBERT EDWARDS,	)	Honorable Sarah F. Jones,
Defendant-Appellee.	)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justice Schmidt specially concurred.
Justice Lytton dissented.

ORDER

¶ 1 *Held*: The trial court erred by granting defendant postconviction relief where the record does not contradict the trial judge's testimony that a court reporter was present during the court's *in camera* interviews with the child victims prior to their closed circuit television testimony.

¶ 2 The State appeals from an order entered by the court granting defendant Wilbert Edwards' petition for relief pursuant to the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2010). Following a third-stage evidentiary hearing under the Act, the court found

the trial court did not improperly conduct *in camera* interviews with the children. However, the court granted defendant's postconviction request for a new trial on the grounds that his trial counsel was ineffective for failing to require a court reporter to be present during the trial court's *in camera* interviews with the child sexual assault victims. The State argues that the court erred by granting relief because defendant's claim of ineffective assistance of counsel lacks merit. We reverse.

¶ 3 BACKGROUND

¶ 4 In January of 2001, the State charged defendant with six counts of predatory criminal sexual assault of a child. 720 ILCS 5/12-14.1(a)(1) (West 2000). Counts I and II alleged that defendant sexually assaulted S.S., who was under 13 years of age at the time of the offense, by placing his penis in S.S.'s anus and mouth, respectively. Counts III and IV alleged that defendant sexually assaulted, M.L., who was under 13 years of age at the time of the offense, in the same manner. Counts V and VI stated that defendant sexually assaulted a third victim, J.B.

¶ 5 Prior to trial, the State filed a motion to allow the victims to testify through closed circuit television under section 106B-5 of the Code of Criminal Procedure of 1963. 725 ILCS 5/106B-5 (West 2000). The trial judge conducted a hearing on the State's motion to allow the children to testify by closed circuit television on March 26, 2002, but reserved ruling on whether the three children would be allowed to testify during the bench trial via closed circuit television until after the adult witnesses testified for the prosecution. The court stated it would factor in relevant portions of the testimony of the adult witnesses before ruling on whether the children would be allowed to testify via closed circuit television later in the course of the bench trial. The record documents that the bench trial started that afternoon on March 26, 2002, and continued on various dates through May 20, 2002.

¶ 6 On May 2, 2002, after the trial testimony of the prosecution's adult witnesses, the trial judge received additional argument from the attorneys regarding whether the children should be allowed to testify by closed circuit television. Taking into account the relevant portions of testimony from the adult witnesses who already testified, the judge *sua sponte* stated he would like to conduct *in camera* interviews with the children before making his final determination. Neither the State nor defense counsel objected to the judge's plan to talk to the child victims *in camera*. The judge advised the parties that he would speak with each child on the morning of May 8, 2002. The court advised the parties that after the *in camera* interviews on May 8, 2002, the trial would resume on May 9, 2002.

¶ 7 After conducting the interviews on May 8, 2002, when the bench trial resumed, the judge found that J.B. did not qualify as a witness and would not be allowed to testify at all. He then determined that S.S. would be allowed to testify by closed circuit television, but reserved ruling on M.L. The judge stated that he needed to talk to M.L. again before continuing the trial the afternoon of May 9, 2002.

¶ 8 The record on appeal contains the transcript prepared by Annamarie Rimkevicius, the court reporter assigned to Judge White on May 9, 2002. This transcript documents that on May 9, 2002, after re-interviewing M.L., the judge explained to the parties on the record as follows:

> "Show the court has interviewed [M.L.] again. This morning. And show it is the Court's opinion that it would be in the best interest of the child under the circumstances, I think the transcript [if] the Appellate Court desires to view that would make that clear, but would be in the best interests of the child to testify

from the room. So the two of them will testify on the video. Okay. So now we are ready then to continue. Show that over the objection of the defense."

¶ 9 Both S.S. and M.L. then testified by closed circuit television in accordance with the statutory guidelines. At the close of the bench trial on May 20, 2002, the court found defendant guilty of counts I, II, III, and IV of predatory criminal sexual assault of a child, the allegations involving M.L. and S.S. The court found defendant not guilty of counts V and VI involving J.B. After a sentencing hearing, the court sentenced defendant to a term of natural life in prison. Defendant filed a direct appeal arguing: (1) the trial court erred in allowing testimony regarding the victim's out of court hearsay statements as substantive evidence; (2) the trial court erred by denying defendant's motion to suppress his statements; and (3) the mandatory sentence imposed by the trial court was unconstitutional. This court affirmed defendant's convictions and sentences on appeal. *People v. Edwards*, No. 3-03-0254 (2005) (unpublished order under Supreme Court Rule 23).

¶ 10 In 2005, defendant filed a postconviction petition alleging: (1) his due process rights and his right to confer with counsel were violated because he was handcuffed and shackled during the bench trial; (2) counsel was ineffective for not objecting to the use of handcuffs and shackles; and (3) counsel was ineffective for failing to object to the *ex parte in camera* interviews between the victims and the trial court. The trial court summarily dismissed the petition at the first stage. Defendant filed a second appeal.

¶ 11 In the second appeal, on March 30, 2009, this court issued a mandate remanding the matter for second-stage postconviction proceedings. *People v. Edwards*, No. 3-05-0877 (2009) (unpublished order under Supreme Court Rule 23). The clerk of this court returned the eight-

volume record to the circuit clerk on April 13, 2009. However, the circuit clerk did not receive the record from this court until several months later.

¶ 12 Presumably, because the record was not available for defendant to review for purposes of preparing a postconviction petition, on June 26, 2009, Judge White entered an order directing the circuit clerk to provide the "trial transcripts" to the public defender's office for purposes of postconviction review. On October 29, 2009, postconviction counsel filed a written motion requesting the trial court to order Will County to pay for the transcripts to replace those that remained lost on that date without requiring the funds to be paid from the public defender's limited budget.

¶ 13 The records of this court reveal that the circuit clerk sent a receipt to this court indicating the circuit clerk received the record from this court on November 20, 2009, even though it was mailed from Ottawa on April 13, 2009. The second amended postconviction petition at issue in this appeal was filed by defense counsel with the circuit court on August 12, 2011.

¶ 14 Defendant's 2011 second amended postconviction petition alleged, among other things, that (1) his constitutional rights were violated when the trial court conducted *ex parte in camera* interviews with the child victims in the middle of trial, and (2) trial counsel was ineffective for failing to challenge the propriety of the "*ex parte*" communications with the child victims during trial. The State moved to dismiss the second amended postconviction petition filed after remand from this court in the second appeal, which the trial court denied.

¶ 15 On January 24, 2013, Judge Jones presided over the third-stage evidentiary hearing on the second amended postconviction petition. The State called Judge Stephen White as a witness. Judge White testified that he was a retired circuit court judge who presided over defendant's bench trial in the spring of 2002. Judge White recalled that the assistant state's attorney made a

motion to allow the children to testify by closed circuit television. According to Judge White, before allowing this request, he spoke with each child in a nearby jury room with a court reporter present.

¶ 16 Judge White explained to Judge Jones that the closed circuit television statute was new at that time, so he was posing questions to the children to determine whether they would be able to withstand testifying in the presence of defendant or if other arrangements needed to be made in the best interests of the children. Judge White could not recall whether defense counsel objected to his decision to personally interview each child, but testified that a court reporter was present. On cross-examination, Judge White agreed that even if defense counsel had objected to the procedure of conducting interviews *in camera*, he would have personally interviewed each child over the objection. During arguments, the prosecutor conceded there "appears to have been a mistake on [Judge] White's part, as it does not appear that there was a court reporter present during the conversations." On January 24, 2013, the court took the matter under advisement.

¶ 17 On November 25, 2013, the court made its ruling on the record regarding defendant's second amended postconviction petition, and an order was entered accordingly. The court granted postconviction relief based on defense counsel's failure to object to the procedures involving Judge White's *in camera* interviews. During her ruling in open court on November 25, 2013, Judge Jones stated:

> "That it is my finding that it wasn't so much the interview that Judge White had with the victims that I had a problem with. It was defense counsel's failure to object or make any record as to the nature of those proceedings that I did find that goes to such a level of constitutional error that I - - led to my granting of the post-conviction petition on that ground."

¶ 18 On December 19, 2013, the State filed a motion to reconsider the court's order granting defendant's petition for postconviction relief. After the court denied the State's motion to reconsider its ruling on May 20, 2014, the State filed a timely notice of appeal.

¶ 19 ANALYSIS

¶ 20 For purposes of defendant's postconviction petition, the court found the trial court did not act improperly by conducting an *in camera* interview with each purported victim of predatory criminal sexual abuse before deciding whether each child would be allowed to testify by closed circuit television. However, the court granted defendant's request for postconviction relief after finding that defense counsel was ineffective for failing to require the trial judge to have a court reporter present during the *in camera* interviews with the child sexual assault victims.

¶ 21 On appeal, the State argues that the court erred by granting relief because defendant's claim of ineffective assistance of counsel was unfounded. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a three-stage process by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). At the first stage, defendant need only present the gist of a constitutional claim to survive. At the second and third stages of a postconviction proceeding, the defendant bears a heavier burden and must make a "substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 22 This case progressed to a third-stage evidentiary hearing. During a third-stage evidentiary hearing, the court acts as the finder of fact, determining witness credibility and the weight to be given particular testimony and evidence, and resolves any conflicts in the evidence. *People v. Domagala*, 2013 IL 113688, ¶ 34. If a petition advances to a third-stage evidentiary

hearing involving fact-finding and credibility determinations, the decision is reviewed for manifest error. *Pendleton,* 223 Ill. 2d at 473. Manifest error is that which is "clearly evident, plain, and indisputable." *People v. Ruiz,* 177 Ill. 2d 368, 384-85 (1997).

¶ 23 The test for determining ineffective assistance of counsel has two prongs: deficiency and prejudice. *Strickland v. Washington,* 466 U.S. 668, 692-98 (1984); *People v. Albanese,* 104 Ill. 2d 504, 526-27 (1984). To obtain postconviction relief arising from ineffective assistance of defense counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome of the trial would have been different. *People v. White,* 322 Ill. App. 3d 982, 985 (2001). The primary concern underlying this test is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland,* 466 U.S. at 686. A defendant's failure to satisfy either prong of the *Strickland* test precludes a finding of ineffectiveness. *People v. Patterson,* 192 Ill. 2d 93, 107 (2000).

¶ 24 As noted by Justice Schmidt during oral arguments, defendant did not challenge the procedure used by Judge White during the *in camera* interviews on direct appeal. Consequently, defendant has forfeited any issue related to the procedures used by Judge White during *in camera* interviews.

¶ 25 In order to avoid the application of forfeiture for purposes of postconviction relief, the postconviction counsel claimed a new trial was required because, in part, defendant's trial counsel was ineffective for allowing Judge White to speak to the children without a court reporter present to document the entire conversation with each child. We begin our analysis by

reviewing whether the trial court's finding that Judge White spoke to each child without a court reporter present is supported by the evidence presented during the third-stage evidentiary hearing.

¶ 26 The record reveals that Judge White testified during the third-stage evidentiary hearing before Judge Jones. During his testimony, Judge White stated under oath that a court reporter was present during the *in camera* interviews. Neither party submitted the court reporter's affidavit, defense counsel's affidavit, or presented testimony to Judge Jones contradicting Judge White's in-court testimony.

¶ 27 In addition, the record submitted to this court for purposes of this appeal corroborates Judge White's recollection. Specifically, the transcript from May 9, 2002, documents that when Judge White and the parties were assembled together after the last *in camera* interview on May 9, 2002, Judge White made a record that contains his reference to the fact that a transcript of the interview would be available for future appellate review. Specifically, Judge White stated:

> "Show the court has interviewed [M.L.] again. This morning. And show it is the Court's opinion that it would be in the best interest of the child under the circumstances, I think the transcript [if] the Appellate Court desires to view that would make that clear, but would be in the best interests of the child to testify from the room. So the two of them will testify on the video. Okay. So now we are ready then to continue. Show that over the objection of the defense."

¶ 28 We recognize that the transcripts of the *in camera* interviews were not available during the third-stage evidentiary hearing in 2013. However, we simply do not know the reason defendant failed to introduce the transcripts of the *in camera* interviews to Judge Jones in 2013. If relevant, defendant had the burden of introducing substantial proof showing the transcripts

could not be prepared because a court reporter was not present on May 8 or May 9, 2002 when the interviews took place.

¶ 29 We must emphasize that after the third-stage evidentiary hearing, the trial court carefully stated as follows: "[I]t wasn't so much the interview that Judge White had with the victims that I had a problem with." This statement could not have been made unless Judge Jones concluded the pre-announced *in camera* interviews did not constitute ethically prohibited and improper *ex parte* communications by the court.

¶ 30 Absent the testimony of Judge White's court reporter, or her sworn affidavit, the reason why a transcript of those conversations was not prepared and then submitted to Judge Jones eleven years after the *in camera* interviews involves pure speculation. By statute, a court reporter must maintain stenographic notes for 10 years beyond the date of the recorded proceeding (68 IL ADC 1200.90(g)(2014)). Perhaps the stenographic notes were lost or destroyed or perhaps the court reporter was not requested by the parties to transcribe her notes at all.

¶ 31 We are mindful that both during the arguments before Judge Jones and the arguments before this court, the prosecution embraced the defense's theory that Judge White may have been "mistaken" about the presence of his court reporter in 2002. Recently, our supreme court provided valuable guidance by stating, once again, that a court of review is not bound by concessions of error. *People v. Carter*, 2015 IL 117709, ¶ 22; *Beacham v. Walker*, 231 Ill. 2d 51, 60-61 (2008). Moreover, in a post-trial procedural context, the *Carter* court's unanimous decision discourages reviewing courts from relying on defense theories about the contents of the record which are premised on a mere "assumption" of fact. *Id.* at ¶¶ 18-19. To borrow the

language used by the court in *Carter*, "Irrespective of the parties' arguments, the record is what it is, and, in our view, it is insufficient." *Id.* at ¶ 22.

¶ 32 Importantly, in this case defendant has not provided any facts supporting the assumption that a court reporter did not record the *in camera* interviews. Instead, the record shows Judge White testified before Judge Jones and stated, under oath, that his court reporter was present during the 2002 *in camera* interviews. The record now before us shows neither party attacked or attempted to impeach Judge White's credibility. Therefore, the record contains only the *unimpeached* testimony of an experienced jurist, stating under oath, that his court reporter was present during the *in camera* interviews in 2002.

¶ 33 Accordingly, we conclude Judge Jones' decision to vacate the convictions because defense counsel did not take steps to insure a court reporter was present to witness and record the content of the *in camera* interviews was manifestly erroneous. For this reason, we reverse the trial court's decision vacating defendant's convictions due to the ineffective assistance of trial counsel.

¶ 34 CONCLUSION

¶ 35 The judgment of the circuit court of Will County granting defendant's postconviction request to vacate his convictions and grant a new trial is reversed.

¶ 36 Reversed.

¶ 37 JUSTICE SCHMIDT, specially concurring.

¶ 38 The dissent says there is nothing in the record and that "[a] review of the docket shows that a court reporter was not present." *Infra* ¶ 46. Not true. It is unclear what the dissent expected to find in the "docket." If a trial judge has a reporter present for some aspect of the

proceedings, the reporter's notes are the record. I would not expect that a trial judge would feel the need to confirm elsewhere that the reporter was present, even though it seems this judge did.

¶ 39 The defendant did not establish a right to postconviction relief.

¶ 40 JUSTICE LYTTON, dissenting.

¶ 41 I dissent. The court docket sheets do not indicate that a court reporter was present during the *in camera* interviews on May 8 or May 9. Nothing in the trial transcripts or common law record indicates the presence of a court reporter during the *in camera* conversations. Moreover, in its brief on postconviction appeal and at oral argument, the State conceded that Judge White was mistaken on this point and that a court reporter was not present. Accordingly, I would find that the postconviction court's conclusion that defense counsel erred in failing to object to the trial court's *ex parte* communication with the victims was not against the manifest weight of the evidence.

¶ 42 The judiciary is bound to maintain a favorable impression that all parties receive an impartial trial and that justice is administered fairly. Ill. S. Ct. R. 62(A) (eff. Jan. 1, 1987) (Canon 2 of the Code of Judicial Conduct). *Ex parte* communications infringe on a defendant's right to due process, his or her right to confront and cross examine witnesses, and his or her right to a public trial. *People v. Rivers,* 410 Ill. 410, 416-19 (1951). They can leave an indelible taint on the proceedings and fatally compromise the integrity of the process. *People v. Montgomery,* 192 Ill. 2d 642 (2000). As a result, Illinois courts have consistently overturned convictions and ordered new trials where trial judges engaged in *ex parte* conversations with the victims or the victims' families. See *People v. Thunberg,* 412 Ill. 565 (1952); *People v. Mote,* 255 Ill. App. 3d 757 (1994); *People v. Bradshaw,* 171 Ill. App. 3d 971 (1988).

¶ 43 In *Thunberg*, the Illinois Supreme Court overturned a rape conviction, in part, because the trial court interviewed the victim and her parents outside the presence of defendant and his counsel before arriving at a verdict in a bench trial. *Thunberg*, 412 Ill. at 566-67. The court concluded:

> "The defendant in any criminal proceeding has an inherent and constitutional right that all proceedings against him shall be open and notorious and in his presence, and any inquiry or any acquisition of information or evidence outside of open court and outside the presence of the defendant is prejudicial error. The defendant cannot be expected to know the scope and extent of any private inquiry made by the court outside of open court and he is not required to inquire into such matter and to resort to extraneous proof to show that he has been prejudiced." *Thunberg*, 412 Ill. at 567.

¶ 44 In this case, trial counsel did not object to the trial court's decision to interview the child victims in a separate jury room in the middle of the trial without defense counsel or the prosecutor or a guardian *ad litem* or a court reporter present. Following *Thunberg*, the court's *ex parte* communications violated defendant's constitutional rights.

¶ 45 Furthermore, the State's argument that the interview procedure employed in this case was proper does not reflect the federal guidelines regarding child victim testimony. The federal system specifically provides that in determining whether a child victim should testify by closed circuit television "the court may question the minor in chambers, or at some other comfortable place other than the courtroom, on the record for a reasonable period of time with the child attendant, the prosecutor, the child's attorney, the guardian ad litem, and the defense counsel present." 18 U.S.C. § 3509(b)(1)(C) (2009). Moreover, it is widely accepted that a child's *in*

camera testimony must be recorded and that the attorneys should be present during the interview or given the opportunity to submit questions to the trial court. Unrecorded testimony of a child raises serious concerns regarding procedural safeguards afforded to the defendant. See L. D'Ambra, *The Importance of Conducting In-Camera Testimony of Child Witnesses in Court Proceedings: A Comparative Legal Analysis of Relevant Domestic Relations, Juvenile Justice and Criminal Cases*, 19 Roger Williams University Law Review 323 (2014). In this case, counsel's failure to object to the unrecorded interviews fell below an objective standard of reasonableness.

¶ 46 Judge Jones found that the interviews were conducted in private and concluded that defense counsel was ineffective for failing to object to the *ex parte* communications. The majority argues the absence of transcripts and claims it does not support an inference that a court reporter was not present. I believe the opposite is true, but an inference is unnecessary here. A review of the docket shows that a court reporter was not present and did not take stenographic notes of the interviews. Judge Jones' finding was not against the manifest weight of the evidence.

¶ 47 Because counsel erred in failing to object to the trial court's decision to interview the victims in private, I would affirm the postconviction court's order granting defendant's petition on that basis and remand for further proceedings.