2015 IL App (4th) 130777-U

NO. 4-13-0777

FILED
August 5, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
CARLOS D. MIMS,	)	No. 06CF219
Defendant-Appellant.	)	
	)	Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Harris and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to make a substantial showing his trial counsel was ineffective for failing to present evidence of defendant's prior incarceration to impeach the State's witness's testimony as to when he met defendant.

¶ 2 In September 2013, the Livingston County circuit court dismissed the *pro se* postconviction petition of defendant, Carlos D. Mims, at the second stage of the proceedings. Defendant appeals, asserting his postconviction petition made a substantial showing of ineffective assistance of trial counsel based on counsel's failure to impeach the State's key witness, Keith Rogers. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On December 29, 2006, the State filed an information charging defendant for offenses alleged to have occurred on three separate occasions. The State alleged that, on November 28, 2006, defendant committed the offenses of unlawful delivery of a controlled

substance within 1,000 feet of a school (less than 1 gram) (720 ILCS 570/401(d)(i), 407(b)(2) (West 2006)) (count I) and unlawful delivery of a controlled substance within 1,000 feet of a public housing complex (less than 1 gram) (720 ILCS 570/401(d)(i), 407(b)(2) (West 2006)) (count II), both Class 1 felonies. Counts III and IV alleged that, on December 3, 2006, defendant again committed the offenses of unlawful delivery of a controlled substance within 1,000 feet of a school (less than 1 gram) (720 ILCS 570/401(d)(i), 407(b)(2) (West 2006)) (count III) and unlawful delivery of a controlled substance within 1,000 feet of a public housing complex (less than 1 gram) (720 ILCS 570/401(d)(i), 407(b)(2) (West 2006)) (count IV), both Class 1 felonies. Counts V and VI alleged defendant committed the offenses of unlawful delivery of a controlled substance within 1,000 feet of a school (1 gram or more but less than 15 grams) (720 ILCS 570/401(c)(2), 407(b)(1) (West 2006)) (count V) and unlawful delivery of a controlled substance within 1,000 feet of a public housing complex (1 gram or more but less than 15 grams) (720 ILCS 570/401(c)(2), 407(b)(1) (West 2006)) (count VI), both Class X felonies.

¶ 5 On April 12, 2007, the trial court commenced defendant's trial. The evidence relevant to the issue on appeal is set forth below. Inspector Mike Nolan testified he was involved with Inspector Mike Willis in a drug investigation of defendant. On November 28, 2006, Willis informed him a confidential source, later identified as Rogers, was going to attempt to purchase narcotics from defendant. Nolan's role was to conduct surveillance and video of the nighttime transaction.

¶ 6 Nolan observed Rogers's pickup truck in a parking lot and waited for defendant to arrive. Nolan parked 100 to 150 feet away to record the transaction. A few minutes later, Nolan saw a red car park for several minutes. A black male eventually exited the red car, entered the passenger side of Rogers's truck, exited the truck after a few seconds, and walked back to the red

car. Both vehicles then departed.

¶ 7 On December 3, 2006, Nolan conducted another nighttime surveillance of an alleged drug transaction between the defendant and Rogers. This time, a tan vehicle arrived, and a person exited the driver's side of the tan vehicle and got into the passenger side of the truck. The person later exited the passenger side of the truck and returned to the tan car.

¶ 8 On December 9, 2006, Nolan observed a daytime drug transaction. A black Ford Expedition arrived and parked next to Rogers's truck. The driver exited the Expedition, entered Rogers's truck, exited after a moment, and then got back into the Expedition. Nolan testified it was clearly defendant, who was in the driver's seat of the Expedition.

¶ 9 On each occasion, Nolan obtained the registration number of the vehicle the suspect arrived in and documented the information for Willis. None of the vehicles were registered to defendant. The Expedition was registered to Alinai Griffin, whom Nolan recognized as a woman sitting behind defendant at his trial. The videotapes taken by Nolan were played for the jury.

¶ 10 Rogers testified he was the confidential source working for Willis and charges against his girlfriend of four years, Patti Whittaker, were reduced as a result of his work as an informant in this case. On November 28, 2006, Rogers testified he and defendant agreed to meet so defendant could sell Rogers crack cocaine. Prior to the meeting, Willis searched Rogers's vehicle to make sure no money or drugs were in it. Willis gave Rogers money to purchase the drugs. Defendant arrived in a red car, exited the car, and entered Rogers's truck. Rogers gave defendant $100, and defendant handed him a package of crack cocaine. Rogers identified defendant in court as the man who sold him the crack cocaine.

¶ 11 On December 3, 2006, Rogers had telephone contact with defendant. The

telephone call was recorded and played at trial. Rogers stated he recognized defendant's voice on the other end of the call. Rogers and defendant agreed to set up another meeting so defendant could sell Rogers more drugs. Rogers wore a wire to the meeting. Defendant arrived, exited the car, and entered the passenger side of Rogers's pickup truck. Defendant sold Rogers crack cocaine in exchange for $200 (given to Rogers by Willis). An audio recording of the drug transaction was played. Rogers identified the voice on the recording as defendant's voice. Rogers also identified defendant in court as the man who sold him the crack cocaine on December 3, 2006.

¶ 12 Rogers next had telephone contact with defendant on December 8, 2006. Rogers called defendant while Willis was present. Rogers and defendant could not arrange a meeting that day, but they did meet during the day on the following day, December 9, 2006.

¶ 13 On December 9, 2006, Rogers called defendant. Willis, who was with Rogers, listened as Rogers talked to defendant. Later, defendant called Rogers. Defendant told Rogers to call him when he got to the agreed-upon location for the drug sale, the same parking lot as the two previous sales.

¶ 14 Rogers, with the wire intact, went to the meeting place and called defendant to inform defendant he was there. Defendant arrived in a black sports utility vehicle with other people in the vehicle. Defendant exited the black vehicle and entered the passenger side of Rogers's truck. Rogers gave defendant the $200 Willis had provided, and defendant handed him the crack cocaine. Defendant exited the vehicle, and Rogers left to meet Willis. Rogers again identified defendant as the man that sold him the crack cocaine.

¶ 15 On cross-examination, Rogers testified he had met defendant before when defendant was selling drugs to Whittaker at the home Rogers shared with Whittaker. When

asked how long ago that was, Rogers responded, "That was I would say approximately two months prior to all this. It was after, it was right about May." Whittaker had told Rogers that defendant's name was "Los." Rogers also testified he got defendant's telephone number from James Fleming, from whom Rogers was purchasing heroin. On redirect, Rogers indicated the two months was before Whittaker's arrest because she was present when he met defendant.

¶ 16 Willis testified he was the case agent who organized this investigation. Willis monitored the events that were recorded on the "eavesdrop device" as they were taking place. He targeted defendant based on information provided by Rogers.

¶ 17 On November 28, 2006, Willis did not have overhear authority so that event was not recorded with a wire. Upon meeting with Rogers that night, Willis made sure Rogers did not have drugs or money on his person or in his truck. He also searched Rogers's truck and his person after the transaction. He did the same thing on December 3 and 9, 2006. Willis never found any contraband.

¶ 18 On November 28, 2006, Willis followed Rogers to the location where Rogers was to meet defendant. Willis kept in communication with Nolan so Nolan would know where and when the transaction would occur and could perform surveillance. Once the deal was done, Nolan was to contact Willis and inform him Rogers was departing so Willis could follow him back to a predetermined debriefing location. Once they got back to the debriefing location, Willis took the drugs from Rogers and secured them, searched Rogers and his vehicle, and then had Rogers tell him what happened during the transaction.

¶ 19 On December 3, 2006, Rogers and Willis followed the same procedure for another drug transaction between defendant and Rogers. However, this time Willis had authorization to use an eavesdropping device to listen to the conversation between Rogers and

defendant. Once Nolan could see Rogers, Willis went to a location where he could monitor the overhear. The eavesdropping device digitally recorded defendant's conversation with Rogers and also transmitted the conversation to a receiver on which Willis could listen.

¶ 20 On December 8, 2006, Willis was with Rogers when Rogers tried to arrange another purchase with defendant. Willis dialed the phone number and was by Rogers's side as Rogers talked to defendant. Willis did not use a wiretap. Instead, he used an open microphone on a digital recorder. As a result, Willis could only clearly hear Rogers's side of the conversation when he listened to it later. Rogers could not arrange a drug purchase for that night.

¶ 21 On December 9, 2006, Willis again dialed defendant's number and had Rogers set up a daytime meeting with defendant to purchase drugs. Willis searched Rogers's truck and person before the meeting. Again, once Nolan could see Rogers, Willis stopped following Rogers and went to a location where he could listen to the transaction between defendant and Rogers. As defendant drove away from the meeting, Willis "passed him actually face to face and viewed inside, and I noted that the driver was clearly Carlos Mims." Willis also stated he was familiar with defendant and his voice and identified defendant's voice on the recordings of the overhears. The digital recordings were also played for the jury.

¶ 22 Defendant's only evidence was the parties' stipulation Whittaker had continuously been incarcerated since July 7, 2006.

¶ 23 The jury found defendant guilty of all six charges. Defendant filed a motion for a new trial and an amended motion for a new trial. At a joint hearing in May 2007, the trial court denied defendant's posttrial motions and proceeded to sentencing defendant on only counts II, IV, and VI because it found sentencing defendant on all of the counts would violate the one-act, one-crime rule (see *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 845 (1977)). The court

sentenced defendant to 25 years' imprisonment on count VI and 10 years' imprisonment on both counts II and IV, all to be served concurrently. Defendant filed a motion to reconsider his sentence, asserting his sentence was excessive. After a September 2007 hearing, the court denied defendant's motion to reconsider.

¶ 24 Defendant appealed, asserting (1) the trial court erroneously admitted certain evidence, namely the overhear audiotapes; and (2) his sentence was excessive. This court affirmed the trial court's judgment. *People v. Mims*, No. 4-07-0802 (Aug. 19, 2008) (unpublished order under Supreme Court Rule 23).

¶ 25 On May 20, 2010, defendant filed a *pro se* postconviction petition, alleging ineffective assistance of counsel based on (1) trial counsel's failure to impeach Rogers by failing to (a) interview Whittaker and (b) retrieve documents showing defendant was incarcerated during a certain period and (2) appellate counsel's failure to raise these issues on direct appeal. In his petition, defendant refers to an affidavit of Whittaker, but one is not attached to the petition in the record on appeal. On June 1, 2010, private counsel entered an appearance on defendant's behalf. Counsel requested additional time to file an amended petition and the trial court granted leave until August 1, 2010. On July 30, 2010, counsel filed a supplement to the postconviction petition. The supplement contained additional arguments to the *pro se* petition, namely that (1) Rogers's testimony was unfairly prejudicial because it portrayed defendant as a "drug dealer," and (2) the application for an order of interception of a private communication was not supported by probable cause as required by section 108B-5 of the Code of Criminal Procedure of 1963 (725 ILCS 5/108B-5 (West 2006)). The supplement included an affidavit from defendant, which stated, *inter alia*, defendant had been in the Livingston County jail from March 2006 to August 31, 2006. It also included a document signed by the Livingston County

clerk and entitled "Criminal Data History," which purportedly also showed the length of defendant incarceration in the Livingston County jail.

¶ 26 On November 1, 2010, the trial court entered a summary order dismissing defendant's petition. Defendant appealed, and this court reversed the summary reversal because it occurred more than 90-days after defendant filed his amended-postconviction petition. *People v. Mims*, 2012 IL App (4th) 100940-U, ¶ 12. We remanded the case for stage-two postconviction proceedings. *Mims*, 2012 IL App (4th) 100940-U, ¶ 12

¶ 27 On remand, defendant filed a supplement to his postconviction petition, which constituted a copy of his appellant brief in *Mims*, 2012 IL App (4th) 100940-U. In July 2013, the State filed its motion to dismiss defendant's postconviction petition and its supplements. On September 3, 2013, the trial court held a hearing on the State's motion to dismiss. After hearing the parties' arguments, the court made an oral ruling granting the State's motion to dismiss. The court made clear the oral ruling would stand as the order dismissing defendant's postconviction petition and its supplements.

¶ 28 On September 9, 2013, defendant filed a timely notice of appeal from the dismissal of his postconviction petition in sufficient compliance with Illinois Supreme Court Rule 606(d) (eff. Feb. 6, 2013). See Ill. S. Ct. R. 651(d) (eff. Feb. 6, 2013) (providing the supreme court rules governing criminal appeals apply to appeals in postconviction proceedings). Thus, this court has jurisdiction pursuant to Illinois Supreme Court Rule 651(a) (eff. Feb. 6, 2013).

¶ 29 II. ANALYSIS

¶ 30 A. Standard of Review

¶ 31 On appeal, defendant challenges the second-stage dismissal of his postconviction

petition. The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/art. 122 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). In cases not involving the death penalty, the Postconviction Act sets forth three stages of proceedings. *Pendleton*, 223 Ill. 2d at 471 72, 861 N.E.2d at 1007.

¶ 32 At the first stage, the trial court independently reviews the defendant's postconviction petition and determines whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). If it finds the petition is frivolous or patently without merit, the court must dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010). If the court does not dismiss the petition, it proceeds to the second stage, where, if necessary, the court appoints the defendant counsel. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Defense counsel may amend the defendant's petition to ensure his or her contentions are adequately presented. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1007. Also, at the second stage, the State may file a motion to dismiss the defendant's petition or an answer to it. *Pendleton*, 223 Ill. 2d at 472, 861 N.E.2d at 1008. If the State does not file a motion to dismiss or the court denies such a motion, the petition advances to the third stage, wherein the court holds a hearing at which the defendant may present evidence in support of his or her petition. *Pendleton*, 223 Ill. 2d at 472-73, 861 N.E.2d at 1008. In this case, the State did file a motion to dismiss, and the court granted that motion.

¶ 33 With the second stage of the postconviction proceedings, the trial court is concerned only with determining whether the petition's allegations sufficiently show a constitutional infirmity that would necessitate relief under the Postconviction Act. *People v. Coleman*, 183 Ill. 2d 366, 380, 701 N.E.2d 1063, 1071 (1998). At this stage, "the defendant

bears the burden of making a substantial showing of a constitutional violation" and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. The court reviews the petition's factual sufficiency as well as its legal sufficiency in light of the trial court record and applicable law. *People v. Alberts*, 383 Ill. App. 3d 374, 377, 890 N.E.2d 1208, 1212 (2008). However, at a dismissal hearing, the court is prohibited from engaging in any fact finding. *Coleman*, 183 Ill. 2d at 380-81, 701 N.E.2d at 1071. Thus, the dismissal of a postconviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 382, 701 N.E.2d at 1072. We review *de novo* the trial court's dismissal of a postconviction petition at the second stage. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. Additionally, a reviewing court may affirm a trial court's dismissal of a postconviction petition at the second stage of the proceedings on any grounds substantiated by the record, regardless of the trial court's reasoning. *People v. Demitro*, 406 Ill. App. 3d 954, 956, 942 N.E.2d 20, 22 (2010).

¶ 34 B. Ineffective Assistance of Counsel

¶ 35 Defendant asserts he did make a substantial showing of ineffective assistance of trial counsel based on counsel's failure to impeach Rogers with information defendant and Rogers could not have met in May 2006 during a drug buy at Rogers's home because defendant was in the Livingston County jail. The State disagrees defendant has made a substantial showing of ineffective assistance of counsel. This court analyzes ineffective-assistance-of-counsel claims under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999).

¶ 36 To obtain reversal under *Strickland*, a defendant must prove (1) his counsel's performance failed to meet an objective standard of competence and (2) counsel's deficient performance resulted in prejudice to the defendant. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the deficiency prong of *Strickland*, the defendant must demonstrate counsel made errors so serious and counsel's performance was so deficient that counsel was not functioning as "counsel" guaranteed by the sixth amendment (U.S. Const., amend. VI). *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. Further, the defendant must overcome the strong presumption the challenged action or inaction could have been the product of sound trial strategy. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163. To satisfy the prejudice prong, the defendant must prove a reasonable probability exists that, but for counsel's unprofessional errors, the proceeding's result would have been different. *Evans*, 186 Ill. 2d at 93, 708 N.E.2d at 1163-64. Additionally, the *Strickland* Court noted that, when a case is more easily decided on the ground of lack of sufficient prejudice rather than that counsel's representation was constitutionally deficient, the court should do so. *Strickland*, 466 U.S. at 697.

¶ 37 The cross-examination and impeachment of a witness are generally considered to be matters of trial strategy, which do not support an ineffective-assistance-of-counsel claim. *People v. Smith*, 177 Ill. 2d 53, 92, 685 N.E.2d 880, 897 (1997). "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27, 677 N.E.2d 875, 891 (1997). In support of his argument defense counsel's failure to impeach Rogers's testimony with evidence defendant was incarcerated at the time Rogers allegedly met him was ineffective assistance of counsel, defendant cites the decisions in *People v. Salgado*,

263 Ill. App. 3d 238, 635 N.E.2d 1367 (1994), and *People v. Baines*, 399 Ill. App. 3d 881, 927 N.E.2d 158 (2010).

¶ 38 In *Salgado*, 263 Ill. App. 3d at 246-47, 635 N.E.2d at 1373-74, the court found trial counsel was deficient for either failing to (1) impeach the only witness to testify he saw the defendant shoot the victim with the witness's testimony at a codefendant's earlier trial he did not see the defendant shoot anyone on the night of the murder or (2) investigate whether the transcript from the codefendant's trial held some useful impeachment evidence. The *Salgado* court noted "the complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy." *Salgado*, 263 Ill. App. 3d at 246-47, 635 N.E.2d at 1373. In finding the prejudice prong had also been established, the court explained "the impeachment value of directly contradictory testimony made under oath at a prior trial by the State's premier eyewitness can hardly be overestimated." *Salgado*, 263 Ill. App. 3d at 247, 635 N.E.2d at 1374. However, the *Salgado* court also found counsel's performance was deficient on another basis and noted counsel made "two crucial errors" in the case. *Salgado*, 263 Ill. App. 3d at 244, 247, 635 N.E.2d at 1372, 1374. Thus, we do not know whether the impeachment issue alone warranted reversal.

¶ 39 In *Baines*, 399 Ill. App. 3d at 897, 927 N.E.2d at 171, the reviewing court found the deficiency prong was met "because defense counsel's conduct of the trial was so unprofessional that it clearly did not meet an objective standard of reasonableness." Specifically, "[d]efense counsel manifested a lack of knowledge about fundamental facts of the case, and a lack of knowledge of basic principles of trial procedure." *Baines*, 399 Ill. App. 3d at 897, 927 N.E.2d at 171. As noted by defendant, one of counsel's many errors was failing to clearly impeach the victim and sole eyewitness with the fact the police had exonerated a man, whom the

victim had identified with 100% certainty as being involved in the attack. *Baines*, 399 Ill. App. 3d at 895, 927 N.E.2d at 170. As to prejudice, the *Baines* court found the State's evidence of the defendant's guilt was weak, and yet, "defense counsel failed to adequately bring out available evidence to impeach the victim *** who was the sole eyewitness; did not properly prepare to examine his own client; was unfamiliar with crucial facts; and elicited evidence that incriminated his own client." *Baines*, 399 Ill. App. 3d at 899, 927 N.E.2d at 173. Based upon all of those factors, the court concluded defense counsel's deficient performance caused substantial prejudice to the defendant. *Baines*, 399 Ill. App. 3d at 899, 927 N.E.2d at 173.

¶ 40 The facts of this case are clearly distinguishable from *Salgado* and *Baines*. Here, the record shows defense counsel did not completely fail to impeach one of the State's main witnesses. Defense counsel's main form of impeachment of Rogers was to try to get the jury to believe Rogers would do anything to help his girlfriend, including planting the crack cocaine on his person to frame defendant. Counsel asked questions about the extent of Willis's search of Rogers's person and vehicle. Counsel then argued Willis did not search everywhere. Counsel also thoroughly questioned Rogers about his desire to help Whittaker, how he could help by working with the police, and the break she received as a result of his work. Moreover, counsel did attempt to impeach Rogers's version of how he met defendant by showing Whittaker was in jail two months before the drug buys at issue. While the prosecutor tried to make clear Rogers meant the two months before Whittaker's arrest, the jury did not have to believe that assertion. Further, whether or not defendant met Rogers in May 2006 did not relate to the drug transactions themselves and thus was not a major substantive point in the case. Last, the impeachment evidence showed defendant was in jail for some other offense. Thus, unlike the cases cited by defendant, the impeachment evidence did have potential negative impact.

¶ 41 On the facts of this case, we find defense counsel's failure to use defendant's incarceration in the Livingston County jail from March through August 2006 as evidence to impeach Rogers's testimony about when he first met defendant was trial strategy. Thus, defendant failed to make a substantial showing on the deficiency prong of the *Strickland* test.

¶ 42 Even if defendant did make a substantial showing on the deficiency prong, he failed to make a substantial showing as to the prejudice prong as well. In both of the cases cited by defendant, the finding of prejudice was not based solely on the impeachment error. Moreover, in those cases, the impeachment error related to the facts surrounding the crime itself, not an ancillary matter as in this case. Here, the evidence of defendant's guilt was strong, and the impeachment evidence would have had little impact on Rogers's identification testimony because Rogers's identification of defendant was corroborated by Willis and Nolan. We disagree with defendant claims Willis's and Nolan's identifications must be deemed unreliable because of their nature. Both Willis and Nolan indicated they were familiar with defendant and both described how they were able to clearly see him in the driver's seat of the Expedition on the day of the third drug transaction. Moreover, defense counsel had shown Rogers's bias for wanting to produce a drug dealer for the police and had attacked his credibility about his initial statement of when the meeting occurred. The evidence of defendant's incarceration provided little additional impact on defendant's credibility and had a potential negative impact as well. Thus, we find the impeachment evidence of defendant's incarceration would not have affected the outcome of defendant's case.

¶ 43 Accordingly, we find the trial court properly dismissed defendant's ineffective-assistance-of-trial-counsel claim at the second stage of the proceedings.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we affirm the judgment of the Livingston County circuit court. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 46 Affirmed.