

No. 1-13-3461

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 13530
	)	
KWESI ANDOH,	)	Honorable
	)	William J. Kunkle,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Justices HOFFMAN and DELORT concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Denial of defendant's post-conviction petition following an evidentiary hearing affirmed over defendant's contentions that counsel's deficient performance caused him to waive his right to a jury trial, and that the circuit court relied on personal knowledge and matters outside the record in finding him incredible.

¶ 2 Defendant Kwesi Andoh appeals from an order of the circuit court of Cook County denying his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) following an evidentiary hearing. He contends that the court's denial of his petition was manifestly erroneous where his claim that he relied on misinformation from his trial

counsel in waiving his right to a jury trial was not rebutted at the evidentiary hearing, and where the court's credibility determination was improperly based on its personal knowledge and evidence outside the record.

¶ 3 On July 18, 2005, defendant was sentenced to 10 years' imprisonment on his bench conviction of delivery of a controlled substance. Trial counsel subsequently filed a motion to vacate and modify the sentence, alleging that the sentence was imposed in violation of a promised sentence made at a meeting prior to trial which was requested by the court. During that meeting, the trial court told him that in exchange for a plea of guilty, it would sentence defendant as a Class 4 felon to a one year of imprisonment for the lesser offense of possession of a controlled substance. The State noted that the charges could not be reduced because of defendant's prior convictions and that if he was found guilty, he was eligible for mandatory Class X sentencing. The trial court replied that it would find defendant guilty of the lesser offense of possession and sentence him as a Class 4 felon. Counsel told the court that defendant would waive his right to a jury trial to facilitate the promise, and he accepted this disposition on behalf of defendant.

¶ 4 The trial court initially denied the motion as untimely, then noted that the statements in the motion were unsworn. After trial counsel refused the court's request to swear to them, the court addressed the allegations in the motion. The court stated that it never engaged in any such conversation with trial counsel and the State, but rather had explained the nature of the charges filed against defendant, and accepted a jury waiver from him, which defendant indicated he understood. The trial court also recalled that when trial counsel indicated that there was a possession charge, it corrected him on the record and stated that the only charge before it was delivery of a controlled substance. The court further noted that at no time during the proceedings

did trial counsel interrupt, assert that the acceptance of the jury waiver, or statement of the charges or potential penalties were incorrect or that there was a side agreement. Defendant indicated that he did not recall the details, and that certain events led him to "make that decision to do that." The court responded that a transcript had been provided to defendant and that the court was not responsible for representations made by his counsel.

¶ 5 In his direct appeal from the judgment of conviction, defendant solely challenged the propriety of certain monetary penalties assessed against him. This court issued a summary order affirming defendant's conviction, modifying the monetary portion of his sentence, and correcting the mittimus. *People v. Andoh*, No. 1-05-3426 (2007) (unpublished order under Supreme Court Rule 23).

¶ 6 On May 16, 2007, defendant filed a *pro se* post-conviction petition alleging that he was denied his right to effective assistance of counsel where he relied on the erroneous advice of trial counsel to waive his right to a jury trial because counsel and the trial court had a pre-trial agreement. Defendant alleged that he was prejudiced by counsel's deficient performance where the promise of an agreement never materialized and the court denied any knowledge of any kind of agreement with counsel. He further alleged that counsel did not tell him the details of the agreement, but only that there was a deal and he would be all right, and not to worry. In support of his petition, defendant attached the affidavit of his trial counsel who attested to the statements made in his post-trial motion to vacate the sentence regarding the alleged promise by the court.

¶ 7 Defendant also attached his own affidavit in which he averred that his trial counsel told him that he did not need a jury trial because of the agreement he reached with the court. When he asked counsel for details regarding the agreement, counsel refused to tell him, and simply stated that he would be all right and not to worry.

¶ 8 The circuit court advanced defendant's petition to the second stage of proceedings, and counsel was appointed to represent him. Counsel then filed an amended petition incorporating by reference and adopting the *pro se* petition, but the court ruled that the amended petition would supersede defendant's *pro se* petition. In the amended petition, defendant alleged that he was denied his right to the effective assistance of trial counsel, who told him to waive his right to a jury trial, assuring him that he had an agreement in place with the trial court. Defendant thus maintained that his jury waiver was not knowingly, intelligently and voluntarily made, and that his decision to do so was influenced by trial counsel's representation to him that a deal had been worked out which required him to waive a jury trial in exchange for a lesser sentence if he was found guilty after a bench trial. Defendant also alleged that he insisted on having a jury trial until trial counsel told him of the alleged deal; and further, that trial counsel was ineffective for causing him to waive a jury trial based on a non-existent deal that would have been improper even if it did exist. Defendant acknowledged his signature on the written jury waiver form, and that he had told the court he understood what a jury trial was and that he was giving up this right, but claimed there was no inquiry as to whether there were any promises made to him to get him to give up his right to a jury trial. Defendant argued that without such an inquiry, the jury waiver, standing alone, did not show the real reason he waived his jury trial, thus rendering the waiver involuntary.

¶ 9 In support of the petition, defendant attached a notarized affidavit from trial counsel consistent with his prior affidavit. Trial counsel added that he informed defendant of his understanding, based on his conversation with the ASA and the trial court, that if defendant waived his right to a jury trial and was found guilty in a bench trial, he would only be found guilty of possession of a controlled substance, a Class 4 felony, and not delivery of a controlled

substance, which would result in a lower sentence. Counsel further averred that after he informed defendant of the deal reached between himself, the ASA and the trial court, defendant, who had previously insisted on a jury trial, changed his mind and decided to take a bench trial.

¶ 10 Defendant also attached his own affidavit, averring that the specifics of the promise/agreement were not made known to him in full detail. Defendant further averred that he waived his right to a jury trial based on the advice of trial counsel.

¶ 11 The State filed a motion to dismiss and a hearing was held on the matter before the circuit court judge who had presided at defendant's bench trial. Following that hearing, the court granted the State's motion to dismiss finding, *inter alia*, that she had clearly advised defendant of his right to jury trial, that he had failed to sustain his burden to show that he did not knowingly or intelligently understand the jury trial waiver or that someone forced him to give up that right, that *res judicata* would apply and there was no ineffective assistance of counsel. On appeal, this court reversed the order of dismissal and remanded the cause for an evidentiary hearing to determine whether defendant's waiver of his right to a jury trial resulted from ineffective assistance of trial counsel. *People v. Andoh*, 2012 IL App (1st) 101247-U, ¶65.

¶ 12 On remand, the case was assigned to a different judge, counsel was appointed to represent defendant, and an evidentiary hearing was held on September 20, 2013. At that hearing, the court granted defendant's request to use the affidavits of his trial counsel in lieu of his testimony because, after substantial efforts, he could not be located.

¶ 13 On direct examination, defendant acknowledged his pending case for home invasion, reviewed the particulars of his bench conviction of delivery of a controlled substance, and testified that he had told his trial counsel that he absolutely wanted a jury trial on that charge. On January 31, 2005, trial counsel told him that he had reached a deal between himself, the State and

the trial court in his case. Trial counsel did not explain or provide him with any details of the deal, but told him that to get it, he would have to waive his right to a jury trial, and not to worry, that "[h]e will be all right." When defendant asked counsel the details of the deal, counsel said it was "[j]ust an agreement he had with the Court," and the State. Defendant believed this meant that he was going to be all right.

¶ 14 Defendant further testified that when trial counsel told him he had a deal, he did not give him any specifics as to what would happen to that charge, what sentence he would get, or that the charge would be reduced or dismissed. He stated that none of that was going through his mind when his counsel told him that he had an agreement, however, he was "under the impression [he] was going to beat [his] case."

¶ 15 Defendant also testified that when it was time for trial, the court informed him of the charge, and of his right to a jury trial, and he signed a jury waiver. He did not question the trial court or his attorney about the alleged agreement in open court, and first raised the matter in his post-conviction petition. Defendant further testified that if the court had asked him if there had been any promises made to him to sign the jury waiver form, he did not know if he would have told the court that trial counsel had told him about a deal that had been made.

¶ 16 The parties stipulated that there was never an off-the-record or *ex parte* conversation between the court, the ASA and trial counsel, wherein trial counsel was promised that in exchange for defendant waiving his right to a jury trial, he would receive a plea agreement or a finding of guilty on a lesser included charge or a Class 4 possession of a controlled substance offense or that his sentencing range would be reduced in any way. Trial counsel's two affidavits, as set forth above, were then read into evidence.

¶ 17 In announcing its decision, the court noted that "[d]efendant was not a newbie," citing defendant's previous convictions in Case Nos. 92 CR 25993 (unlawful use of a weapon - one year probation), 93 CR 13457 (armed robbery – seven years' imprisonment), 93 CR 13458 (armed robbery – seven years' imprisonment) and 94 CF 134 (resisting a peace officer – 10 months' imprisonment). The court commented that defendant was "around the block more than a couple of times," knew what a jury and bench trial were, and what waiving a jury trial entailed without anybody needing to explain these concepts to him.

¶ 18 The court also commented that, "[h]e knew that back room deals with Judges in 2004 and not even frankly in 1992 didn't exist." He knew from dozens perhaps hundreds of court appearances, that when he is in front of the judge, the judge may cut him off and make him speak later, but he knows he can always speak up, particularly at a sentencing hearing, and where, as here, the court had directly conversed with him. The court then noted that when the court discussed trial counsel's motion to vacate sentence with defendant and referred to his jury trial waiver, defendant never stated that he was "cheated," that the court "welched [*sic.*] on the agreement," or that his lawyer lied to him. Defendant never said that he only waived his jury trial because his attorney told him he was going to be convicted of a Class 4 offense. The court concluded that defendant was incredible, especially where he was invited to speak and say something, but said nothing about being "cheated or lied to, to get him to waive his right to a Jury trial."

¶ 19 The court noted that trial counsel was no longer practicing law and could not be located, and that counsel's affidavits were not entirely consistent. The court observed that counsel never stated there was a violation of the agreement, and that defendant waived his right to a jury trial because he made him a promise about what the court would do. The court stated that it did not

believe the allegations in the post-conviction petition, and concluded that defendant knowingly and with proper admonishments and while represented by counsel, waived his right to a jury trial. Finding no basis upon which to grant post-conviction relief, the court denied defendant's petition.

¶ 20 On appeal, defendant contends that the court's ruling was manifestly erroneous where his claim that he relied on misinformation from trial counsel was not rebutted at the evidentiary hearing, and the court's credibility determination was based on personal knowledge and evidence outside the record. He specifically contends that the post-conviction court substituted its own personal knowledge for that of defendant's when it stated that defendant knew back room deals with judges in 2004 and 1992 did not exist.

¶ 21 Where, as here, an evidentiary hearing was held, and factual findings and credibility determinations were made, the circuit court's decision will not be reversed unless it is manifestly erroneous, *i.e.*, error that is "clearly evident, plain, and indisputable." *People v. Beaman*, 229 Ill. 2d 56, 72-73 (2008), and cases cited therein. This deferential standard reflects the understanding that the circuit court is in the best position to observe and weigh the credibility of the witnesses. *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998).

¶ 22 Defendant contends that where the issue is one of ineffective assistance of counsel, reviewing courts use a hybrid standard of review, and review *de novo* whether counsel's omission supports an ineffective assistance claim, citing *People v. Coleman*, 2015 IL App (4th) 131045, ¶66. In that case, the Fourth District held that whether trial counsel provided effective assistance is a mixed question of fact and law, and thus deferred to the court's finding of facts, but made an independent judgment about the ultimate legal issue as to whether counsel's

omission supported an ineffective assistance claim. *Coleman*, 2015 IL App (4th) 131045, ¶66.

We find that hybrid standard of review inappropriate in this case.

¶ 23 In those cases where no new evidence is presented at the evidentiary hearing and the issues are pure questions of law, the reviewing court will apply a *de novo* standard of review, unless the judge presiding over the proceedings has some special expertise or familiarity with the trial or sentencing of defendant and that familiarity has some bearing on the disposition of the post-conviction petition. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In this case, where the circuit court conducted an evidentiary hearing on defendant's ineffective assistance of counsel claim and made credibility determinations, we review for manifest error. *Beaman*, 229 Ill. 2d at 72.

¶ 24 As noted, defendant's case was remanded to the circuit court for an evidentiary hearing to determine whether his jury waiver resulted from ineffective assistance of his trial counsel. The circuit court found that it was not, and in this appeal, defendant claims that his reliance on misinformation from his trial counsel to waive a jury trial was not rebutted at the evidentiary hearing. He maintains that counsel did not tell him the details of the deal with the court and the ASA, but that he relied on counsel's assurances in waiving his right to a jury trial.

¶ 25 When defendant's challenge to a jury waiver is predicated on a claim of ineffective assistance of counsel, the court must determine whether counsel's performance was deficient and whether there exists a reasonable likelihood that defendant would not have waived his right to a jury trial in the absence of the alleged error. *People v. Batrez*, 334 Ill. App. 3d 772, 782 (2002), citing *People v. Maxwell*, 148 Ill. 2d 116, 142-43 (1992), which cites *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 26 In support of his claim, defendant points to his unrebutted testimony at the hearing that he absolutely wanted a jury trial, then, relying on the misinformation from trial counsel that a deal had been reached and all he had to do was to waive his right to a jury trial, he signed the jury waiver. He also points to his testimony that counsel never told him the details of the deal, and that everything would be all right.

¶ 27 The circuit court found defendant's representations incredible given his criminal history. In addition, the court cited defendant's acknowledgment of the jury trial admonishments given to him by the trial court, his understanding of them, his written jury waiver, and failure to raise questions about any alleged agreement. Moreover, the parties stipulated at the hearing that there was no *ex parte* conversation about a plea agreement or reduced sentencing proposed in his case.

¶ 28 Furthermore, trial counsel indicated in one of his two affidavits that he had told defendant that the deal involved a finding of guilty entered on the lesser-included offense of possession of a controlled substance, which would result in a lesser sentence than the charged offense of delivery, thereby calling defendant's testimony that he was not apprised of the proposed agreement into question. In fact, the circuit court found defendant's representations incredible. The court noted that defendant was not a "newbie," that he had several cases behind him with numerous court appearances, and was thus familiar with the criminal justice system, but said nothing. The court also found that trial counsel's affidavits were not entirely consistent, and that it did not believe the allegations set forth in the petition. The court thus concluded that defendant knowingly and with proper admonishments and while represented by counsel, waived his right to a jury trial, and that there was no basis on which to grant post-conviction relief.

¶ 29 Defendant, nonetheless, contends that the statement by the circuit court that he knew there were no back room deals was based on its personal knowledge and evidence outside the

record. We disagree. The court's statement was clearly based on defendant's criminal history which reflects his familiarity with the criminal justice system. The comment that he had been "around the block," also stemmed from that record and supports the inference that defendant knew the legal system and courtroom procedures, the difference between jury and bench trials, and the results of waiving a jury trial. We, therefore, find no error or basis of reversal from the court's comments in that regard which were clearly made on the basis of the information before it at the hearing. See *e.g. People v. DeRossett*, 262 Ill. App. 3d 541, 544 (1994) (defendant's familiarity with criminal justice system supports the inference that he knows how to manipulate the system); *cf. People v. Jackson*, 409 Ill. App. 3d 631, 650 (2011) (trial court relied on personal feelings toward IQ testing and the relevance of IQ testing, which showed that it relied upon its own private knowledge); *People v. Kent*, 111 Ill. App. 3d 733, 739-40 (1982) (trial court relied on personal knowledge of the coroner's office in assessing the credentials and credibility of a testifying doctor).

¶ 30 Defendant, however, maintains that nothing rebutted his testimony at the evidentiary hearing that he relied on the assurances of his trial counsel that there was a deal in waiving his right to a jury trial, and therefore his testimony must be taken as true, citing *People v. Anderson*, 303 Ill. App. 3d 1050, 1056-57 (1999), *People v. Peck*, 18 Ill. App. 3d 112, 115-16 (1974), and *Haynes v. Washington*, 373 U.S. 503, 507-15 (1963). We find these cases unpersuasive.

¶ 31 *Anderson* was a direct appeal, and, on appeal, this court found defendant's testimony reasonable and therefore took his testimony as true. *Anderson*, 303 Ill. App. 3d at 1056-57. Here, defendant's testimony was given at a post-conviction evidentiary hearing, and found incredible by the circuit court given defendant's familiarity with the criminal justice system, his acknowledgment of the admonishments given to him by the trial court, and his written jury

waiver. In addition, the post-conviction court noted the inconsistencies in counsel's affidavits, and there were also inconsistencies in defendant's representations regarding the context of the alleged agreement. *People v. Wease*, 44 Ill. 2d 453, 457 (1970) (entire record may be considered in addition to evidentiary hearing in evaluating defendant's post-conviction claims). Accordingly, we find that *Anderson* does not support a contrary conclusion.

¶ 32 We have also considered *Peck*, and find it is inapplicable as *Peck* involved defendant's uncontroverted testimony at a suppression hearing that his statement was the result of physical or mental coercion. *Peck*, 18 Ill. App. 3d at 115-16. While here, by contrast, defendant's testimony was found incredible by the court after a post-conviction evidentiary hearing, and rebutted by the trial record and his criminal history. We also find *Haynes*, 373 U.S. at 507-15, inapplicable as it involved defendant's uncontroverted trial testimony that his confession was involuntary, whereas here, defendant's post-conviction evidentiary hearing testimony was contradicted by the trial record and his criminal record. As such, the record supports the circuit court's conclusion that defendant's late assertions that he relied on counsel's bare representations of a "deal" to waive his right to a jury trial was incredible. *People v. Rovito*, 327 Ill. App. 3d 164, 172 (2001); *DeRossett*, 262 Ill. App. 3d at 544.

¶ 33 Defendant further contends that trial counsel's disciplinary history was relevant to whether he relied on the false information from counsel. However, as the post-conviction court noted, defendant was not a "newbie," he had been "around the block," knew the differences between jury and bench trials and a jury waiver, and understood these concepts.

¶ 34 Under the circumstances reflected in the record of this case, we find that defendant has not established a reasonable likelihood that he would not have waived his right to a jury trial even in the absence of the alleged error, and, therefore, that he failed to establish ineffective

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assistance of counsel to negate the validity of his jury waiver. *Strickland*, 466 U.S. 668; *Batrez*, 334 Ill. App. 3d at 782. Accordingly, we conclude that the denial of defendant's post-conviction petition was not manifestly erroneous, and we affirm the order of the circuit court of Cook County denying defendant's post-conviction petition after a third stage evidentiary hearing.

¶ 35 Affirmed.