

No. 1-14-3427

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 95 CR 26313
)	
ALBERT CLEVELAND,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The petitioner's conviction is reversed and the cause remanded for a new trial, because defense counsel labored under a *per se* conflict of interest arising from his prior representation of one of the victims in this case. We reject the petitioner's argument that retrial should be barred based upon concerns of double jeopardy, and his requests that we appoint a new judge to preside over the retrial and bar his defense counsel from testifying.

¶ 2 The petitioner, Albert Cleveland, appeals from the third-stage dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He argues, *inter alia*, that the circuit court erred in rejecting his claim that his trial counsel labored

under a *per se* conflict of interest based upon his prior representation of one of the victims in this case. For the reasons that follow, we reverse and remand for a new trial.

¶ 3 This case is before us for the third time, following the petitioner's direct appeal (*People v. Cleveland*, No. 1-98-6-4327, 293 Ill. App. 3d 1127 (1997) (unpublished order under Supreme Court Rule 23) (*Cleveland I*), and his appeal from the second-stage dismissal of his postconviction petition. *People v. Cleveland*, 2012 IL App. (1st) 101631 (*Cleveland II*). The facts and procedural history of this case have been detailed in our opinion in *Cleveland II*. We restate below only those facts necessary for an understanding of the issues in this appeal.

¶ 4 In 1996, a jury convicted the petitioner of the murder of Magellan Steward and the attempted murder of Martin Amos during a gang-related shooting near the Trumbull Park housing complex. At trial, the State relied upon the testimony of only one eyewitness, 15-year-old Sherocco Allen. Allen testified that, about 1:30 a.m. on the night of the shooting, she saw the petitioner, Amos, Steward and two other men engaged in an argument down the street about half a block away. At one point, Allen saw the petitioner fire three or four shots into a gangway into which Steward had walked. Allen could not see Steward in the gangway because her view was obstructed. However, she knew that the petitioner was not close enough to Steward during the shooting to "put the gun on" him. Allen testified that she ran home immediately after the shooting.

¶ 5 On direct appeal, the petitioner asserted that he was not proven guilty beyond a reasonable doubt; the prosecutor engaged in improper argument; and his trial counsel was ineffective for failing to object to the prosecutor's argument. We affirmed the petitioner's conviction. *Cleveland I*, No. 1-98-6-4327, 293 Ill. App. 3d 1127 (1997) (unpublished order under Supreme Court Rule 23).

¶ 6 On November 24, 1998, the petitioner filed a *pro se* postconviction petition claiming that his private trial counsel, Richard Dickinson, had labored under a conflict of interest because he had previously represented the murder victim, Steward. In his attached affidavit, the petitioner averred that Dickinson did not inform him of this conflict until after his trial and sentencing. The petition also claimed his counsel was ineffective for failing to contact a potential alibi witness, Willanika Wheaton, who was the mother of the petitioner's children and was prepared to testify that he was at her house at the time of the shooting.

¶ 7 On February 17, 1999, the circuit court advanced the postconviction petition to the second stage and appointed the Cook County public defender's office to represent the petitioner. Over the course of seven years, at least five different assistant public defenders appeared on behalf of the petitioner, but little or no action was taken on the petition.

¶ 8 On May 29, 2009, a decade after the original petition was filed, the petitioner filed an amended petition for postconviction relief, reasserting the claim that his trial counsel had a *per se* conflict of interest based on his prior representation of Steward. The amended petition also claimed that trial counsel was ineffective for failing to call Wheaton and the petitioner's sister Victoria Cleveland as witnesses.

¶ 9 On July 15, 2009, the petitioner filed a supplemental postconviction petition, attaching an appearance form filed by defense attorney Dickinson on behalf of "Magellah Steward" in criminal case number 88168478. The supplemental petition also added the claims that Dickinson should have called Tojuna Williams and another individual as defense witnesses, and that he refused to allow the petitioner to testify at trial. Affidavits substantiating these claims were attached to the petition.

¶ 10 On September 14, 2009, the petition was again supplemented with a series of documents including, in relevant part, the transcript of the preliminary hearing in the May 1988 narcotics case in which Dickinson had appeared on behalf of Steward. At the preliminary hearing, Dickinson cross-examined the police officer who claimed Steward possessed a controlled substance. The supplemental petition also included an affidavit from the petitioner claiming that, sometime in 1993, Steward introduced him to a man named Roosevelt Dikes. The petitioner later learned Steward and Dikes were brothers. Another document in the group was an “information indictment return sheet” indicating that Steward, Dikes, and a man named Fred Couch were indicted in case number 92 CR 12855; finally, there was an appearance form showing that Dickinson appeared on behalf of Dikes and Couch in case number 92 CR 12855.

¶ 11 On May 26, 2010, the court granted the State's motion to dismiss the petitioner's postconviction petition. The court concluded that Dickinson's prior representation of Steward did not create a *per se* conflict of interest, because the representation occurred seven years prior to the shooting in this case and was limited to a preliminary hearing. The court therefore ruled that the petitioner failed to establish that Dickinson “had a prior or contemporaneous professional relationship” with Steward. The court also rejected the petitioner's claim that counsel was ineffective for failing to call his alibi witnesses, finding that it amounted to reasonable trial strategy.

¶ 12 The petitioner appealed the dismissal, and this court reversed and remanded this case for a third-stage evidentiary hearing on both the conflict of interest claim and the claims of ineffective assistance based upon Dickinson's failure to call potentially exonerating witnesses. *Cleveland II*, 2012 IL App. (1st) 101631. With regard to the conflict of interest claim, we held that, under *People v. Hernandez*, 231 Ill. 2d 134 (2008), the petitioner had made a substantial

showing that his attorney labored under a *per se* conflict interest by his prior representation of Steward. *Cleveland II*, 2012 IL App. (1st) 101631 ¶ 42. We stopped short of finding that the petitioner had proven a *per se* conflict as a matter of law, noting that potential factual disputes remained, including the central issue of whether Dickinson had actually represented Steward in the past. *Id.*, ¶ 52. We concluded, however, that counsel's potential representation of the murder victim "raises the specter that something other than trial tactics were involved in the decision not to call the numerous witnesses the petitioner contends were made known to counsel in the course of preparing for trial." *Id.*

¶ 13 On remand, the circuit court conducted an evidentiary hearing as directed under the mandate. The petitioner presented testimony of ineffective assistance of counsel based both upon Dickinson's alleged *per se* conflict of interest and his unreasonable representation under *Strickland v. Washington*, 466 U.S. 668 (1984). In support of the *Strickland* claim, the petitioner offered the testimony of several witnesses, who allegedly had been disregarded by Dickinson, purporting to establish that he was not at the scene at the time of the shooting or to otherwise cast doubt upon his involvement in the occurrence.

¶ 14 Victoria Cleveland, the petitioner's sister, testified that she retained Dickinson to represent the petitioner after he was arrested in September 1995. Victoria stated that she learned about Dickinson because someone told her father, Albert Simmons, about him. In November 1995, Victoria and Simmons had a meeting with Dickinson, during which Victoria told Dickinson that the petitioner could not have committed the murder because she had picked him up that night and dropped him off at Wheaton's home. However, she testified that Dickinson interrupted her and said that she did not need to discuss the details of the occurrence with him at

that point and that he would speak with the petitioner himself. Victoria denied that Dickinson ever told her or her parents that he had previously represented Steward.

¶ 15 Dickinson testified that he was retained by the petitioner's family and represented the petitioner throughout trial and sentencing in the instant case. Dickinson stated that he also had represented Steward on May 11, 1988, for a preliminary hearing in a narcotics case. According to Dickinson, he sought to obtain a date for arraignment and planned to represent Steward at least through that period; however, at some point, he was replaced as Steward's counsel by another attorney. Dickinson testified that, beyond his representation in May of 1988, he felt a "continuing duty of loyalty" to Steward not to disclose confidential information or engage in conduct that would be considered a conflict. Dickinson testified that he did not recall ever having a conversation with the petitioner in which he disclosed his past representation of Steward. However, he stated he was "pretty sure" the petitioner knew about it.

¶ 16 When asked about Amos, Dickinson denied ever knowing him. Dickinson testified that he had represented Dikes in multiple cases, but denied any recollection of a case in which Dikes and Amos were codefendants. Dickinson then identified an indictment charging Dikes and Amos as codefendants. He denied ever discussing that case with the petitioner.

¶ 17 Dickinson acknowledged acting as defense counsel in a 1992 armed robbery case in which Steward, Fred Couch and Dikes were codefendants; however, Dickinson represented only Dikes and Couch in that case. Dickinson could not recall affirmatively discussing the case with the petitioner, but believed he knew about it because he was in the same "group" as Dikes, Couch and Steward. According to Dickinson, the petitioner was aware that, in the late 1980s and early 1990s, he had represented many of the petitioner's "associates;" that is how he came to know all of these individuals, and how the petitioner came to him in the instant case.

¶ 18 Dickinson also testified to defending Dikes in 1994, when he was being prosecuted for the murder of Couch. Dickinson denied ever having a discussion with the petitioner regarding his representation of Dikes in the Couch murder. The case against Dikes was ultimately settled under a plea agreement with the State.

¶ 19 Dickinson testified that his theory of defense in the petitioner's trial was that the testimony of the State's sole eyewitness, Allen, was not credible; therefore, he did not call any witnesses on the petitioner's behalf. According to Dickinson, the petitioner told him that he was present at the scene on the night of the shooting. He also testified that he was not aware of the existence of many of the petitioner's alleged exonerating witnesses until after trial. On cross-examination, Dickinson testified that 90% of his practice is criminal defense and that he is familiar with the neighborhood of Trumbull Park from his activity as a lawyer in that area. He believed that his 1998 representation of Steward had ended with the preliminary hearing.

¶ 20 The petitioner testified that, in July 1995, he was a gang member and sold drugs in the Trumbull Park area. He denied being involved in, or present at, the shooting of Steward and Amos. Instead, he left the area around 11 p.m. when Victoria came to pick him up to drive him to Wheaton's residence. The petitioner denied leaving Wheaton's home until the next morning.

¶ 21 The petitioner testified that, prior to the shooting, he had known Steward for many years as a friend of his family. He denied having any knowledge, at the time of his trial, of Dickinson's prior representation of Steward, or his defense of Dikes in the murder of Couch. According to the petitioner, it was not until after his sentencing that a friend informed him that Dickinson may have had some connection to Steward. The petitioner then contacted Dickinson, who admitted that he had represented Steward. The petitioner stated that he terminated Dickinson's representation of him at that time.

¶ 22 According to the petitioner, he had never heard of Dickinson prior to his trial in the instant case; rather, Dickinson had been retained for him by his brother, McCall Cleveland. The petitioner testified that he had provided Dickinson with the names of numerous potential witnesses on his behalf, including alibi witness Wheaton who could have established that he was at her home at the time of the shooting. However, Dickinson never contacted these witnesses. Dickinson explained to the petitioner that he would not be calling any witnesses, because there was "no way" the jury would convict him based solely upon the testimony of Allen. The petitioner testified that he commented to Dickinson during his sentencing that it was a shame he was going to prison, to which Dickinson replied "the shame was that a good man was dead [.]"

¶ 23 Following arguments, the circuit court determined that the petitioner failed to establish either a *per se* or actual conflict of interest based upon Dickinson's prior representation of Steward. Essentially reiterating its findings at the second-stage proceedings, the court stated that Dickinson's representation of Steward was "*de minimus* [sic]," confined to one preliminary hearing in May of 1988, which was unrelated to the instant case and which terminated after a finding of probable cause. The court also found that the fact that Steward was now deceased removed any further obligation on the part of Dickinson on his behalf. Finally, the court rejected the petitioner's claim under *Strickland* that Dickinson provided ineffective assistance for failing to call alibi or exculpatory witnesses on his behalf. It found Dickinson's testimony on this issue to be the most credible, noting that he could not properly have called alleged alibi witnesses in light of the petitioner's statement to him that he was in fact present at the scene on the night of the shooting. The court also found the accounts of the exonerating witnesses to be lacking in credibility. Accordingly, it dismissed the petition. The instant appeal followed.

¶ 24 When a postconviction petition is advanced to a third-stage evidentiary hearing, the petitioner bears the burden of showing a substantial deprivation of his constitutional rights. *People v. Coleman*, 206 Ill. 2d 261, 277 (2002). Under the sixth and fourteenth amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel. U.S. Const., amend. VI, XIV; *Cuyler v. Sullivan*, 446 U.S. 335, 343-44 (1980); *People v. Taylor*, 237 Ill. 2d 356, 374 (2010). This includes the right to conflict-free representation, meaning assistance by an attorney whose loyalty is undiluted by conflicting interests or inconsistent obligations. *People v. Hernandez*, 231 Ill. 2d 134, 142 (2008). In order to prove ineffective assistance based upon a conflict of interest, the defendant bears the burden of showing that his attorney labored under either a *per se* or an actual conflict. *Id.* at 142-44. Where a *per se* conflict is found to be present, the petitioner need not prove that he was prejudiced by the conflict or that his attorney's performance was in any manner affected by its existence; automatic reversal is warranted, unless the defendant waived his right to conflict-free representation. See *id.* at 143 (citing cases).

¶ 25 The petitioner first argues that the supreme court's decision in *Hernandez* compels the reversal of this case based upon a *per se* conflict of interest on Dickinson's part. We agree.

¶ 26 In *Hernandez*, the court identified three situations where a *per se* conflict of interest exists: (1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; or (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of the petitioner. *Hernandez*, 231 Ill. 2d at 143-44. The question of whether a *per se* conflict exists is generally a legal one. *Cleveland II*, ¶ 53. Where fact-finding and credibility determinations have been made by the circuit court in a third-

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stage proceeding, we will not disturb its decision unless it is manifestly erroneous. *People v. Childress*, 191 Ill. 2d 168, 174 (2000). However, where, as here, the record shows that the underlying facts are undisputed, we employ a *de novo* standard of review. *People v. Fields*, 2012 IL 112438, ¶ 19.

¶ 27 In this case, there is no dispute regarding Dickinson's prior representation of the murder victim, Steward, in a preliminary hearing in May 1988. Nor is there any question, as the circuit court found, that the petitioner never properly agreed to waive his right to conflict-free representation. Accordingly, this case is encompassed squarely within the first conflict situation identified in *Hernandez*, 231 Ill. 2d at 143, in that Dickinson "has a prior or contemporaneous association with the victim."

¶ 28 Echoing the rationale of the circuit court, the State seeks to distinguish this case from *Hernandez* on the bases that the representation of Steward was "*de minimis*" and remote, having terminated seven years prior to the offense at bar. However, this position ignores the clear language of the supreme court's holding. Although *Hernandez* involved a contemporaneous, though dormant, representation, the court nonetheless reaffirmed the established rule that both prior and contemporaneous representation, regardless of extent, may form the basis of finding of a *per se* conflict. *Cleveland II*, 2012 IL App (1st) 101631, ¶ 50. The court noted the broad application of the *per se* rule, that the prior representation need not be active, as long as defense counsel has some association, relationship, professional connection or tie to the victim. *Hernandez*, 231 Ill. 2d at 151. Further, the very nature of a *per se* conflict rule precludes any inquiry into the facts of the particular case; it is the mere fact of the representation of the victim that dictates the rule's application. *Id.* at 150.

¶ 29 As the above language makes clear, a *per se* conflict of interest arose as a result of Dickinson's representation of Steward. Accordingly, the petitioner's conviction must be reversed and remanded for a new trial. Based upon our holding, we need not reach the petitioner's alternative argument, that Dickinson provided ineffective assistance under *Strickland*, 466 U.S. 668, by failing to interview and call alibi and exculpatory witnesses on his behalf.

¶ 30 The petitioner argues that the State should be barred from retrying him based upon principles of double jeopardy, because the evidence is insufficient to sustain a finding of guilt.

¶ 31 The petitioner admits that this court has already considered and rejected his challenge to the sufficiency of the evidence in his direct appeal. However, he argues that we failed to take into account several aspects undermining the credibility of Allen's trial testimony. Specifically, the petitioner refers to the "impossibility" of Allen's statement that Steward was shot from a distance of up to 15 feet away, when the autopsy disclosed he was shot at close range. He also points to inconsistencies in Allen's account, including the fact that she testified to having run home after the shooting, while telling a police officer that she remained at the scene long enough to see Steward's body.

¶ 32 Before remanding this case for retrial under the Act, this court has examined the evidence underlying the petitioner's conviction to determine whether it is sufficient to sustain a finding of guilt. See *People v. Davis*, 377 Ill. App. 3d 735, 747 (2007) (prohibition against double jeopardy forbids second trial if the evidence was insufficient to prove the defendant guilty beyond a reasonable doubt in the initial proceeding) (citing *People v. Taylor*, 76 Ill. 2d 289, 309 (1979); *People v. Hampton*, 363 Ill.App.3d 293, 301 (2005)).

¶ 33 We have reviewed the record and find that each of the inconsistencies asserted by the petitioner was argued before the jury and that the issue of Allen's credibility was thoroughly

analyzed by this court on direct appeal. Despite the alleged inconsistencies in her testimony, the jury accepted Allen's version of events and found the petitioner guilty. See *Davis*, 377 Ill. App. 3d at 747-48. We agree that there is sufficient evidence in this case to sustain a finding of guilt beyond a reasonable doubt, and no concern regarding double jeopardy.

¶ 34 Alternatively, the petitioner requests that, upon remand, we order this case reassigned to a new circuit court judge for trial. According to the petitioner, the court has prejudged his guilt, as evidenced by its improper interpretation of both the law and the facts during postconviction proceedings.

¶ 35 Although we are vested with authority under Supreme Court Rule 366(a)(5) (eff. February 1, 1994) to order a reassignment of judges, this is not a matter to be taken lightly. *Eychaner v. Gross*, 202 Ill. 2d 228, 279-80 (2002). A trial judge "is presumed to be impartial," and the burden of rebutting this presumption lies with the party claiming bias. *Id.* at 280. Alleged erroneous rulings on questions of fact or law "are insufficient reasons to believe that the court has a personal bias for or against a litigant." *Id.* Further, even an adverse ruling by the trial court in a prior case is not typically sufficient to justify disqualifying that judge from sitting in a subsequent case. *People v. Vance*, 76 Ill. 2d 171, 178 (1979).

¶ 36 As evidence of the claimed bias, the petitioner points to the fact that the court has twice erred in its determination that there was no *per se* conflict of interest in this case. The petitioner also contends that the court misinterpreted certain facts in arriving at its determination that Dickinson had provided reasonable assistance at trial. Specifically, the court wrongly found that the petitioner had "confessed" to the shooting to Dickinson, and expressed "severe concerns" about the statements of the petitioner's exonerating witnesses.

¶ 37 We find these arguments to be unpersuasive. Initially, we do not agree that the court was incorrect in its concerns over the credibility of the exonerating witnesses' statements. As the court noted, several of these witnesses did not furnish affidavits until almost ten years after postconviction proceedings had been initiated. Further, the court reasonably concluded that Dickinson's decision not to call the alibi witnesses did not amount to ineffective representation, where the petitioner had stated to Dickinson that he was actually present at the scene of the shooting. And in any event, the "errors" alleged above, even viewed collectively, fail to show that the court has prejudged the petitioner's guilt or is otherwise biased against him.

¶ 38 The petitioner also asks that we enter an order barring Dickinson from testifying against him in the event of a retrial. We reject this invitation as premature. It is speculation to presume that, even if a retrial did occur, Dickinson would be called to testify. The petitioner does not challenge the testimony Dickinson provided at the postconviction hearing as in any manner improper. Therefore, we find no basis to issue a blanket order at this stage of proceedings barring all future testimony on the part of Dickinson.

¶ 39 For the foregoing reasons, we grant the petitioner's request for relief under the Act, reverse his conviction and sentence, and remand this matter for a new trial.

¶ 40 Reversed and remanded.