2016 IL App (4th) 140608-U

NO. 4-14-0608

FILED
April 14, 2016
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.	)	Macon County
BRIAN L. JACKSON,	)	No. 11CF369
Defendant-Appellant.	)	
	)	Honorable
	)	James R. Coryell,
	)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of defendant's amended petition for postconviction relief at the third stage of the postconviction proceeding was not manifestly erroneous.

¶ 2 In June 2014, the trial court denied defendant Brian L. Jackson's postconviction petition following a third-stage evidentiary hearing pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). At issue in this appeal is the effectiveness of defendant's trial counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2011, defendant was charged with residential burglary (720 ILCS 5/19-3 (West 2010)), a Class 1 felony. A March 21, 2011, docket entry shows defendant was given a copy of the information and was admonished as to the charges, penalties, and his constitutional rights. However, the report of proceedings reflects Judge Timothy J. Steadman did

not advise defendant of the nature of the charges, nor did he apprise defendant of the potential penalties. At the March 30, 2011, preliminary hearing, the trial court (Judge James R. Coryell) found probable cause to support the charge but did not inform defendant about the penalties he faced if convicted.

¶ 5 The evidence at the October 2011 jury trial showed defendant had broken into a residence but apparently did not take anything. The jury found defendant guilty of residential burglary. Thereafter, defense counsel filed a motion for a new trial or, in the alternative, a judgment notwithstanding the verdict, which the trial court denied.

¶ 6 At the November 2011 sentencing hearing, no additional evidence in mitigation or aggravation was offered by the State or defense counsel. During sentencing recommendations, the State asked for a sentence of at least 25 years, pointing out defendant was subject to mandatory Class X sentencing of 6 to 30 years in prison because of his criminal record. Defense counsel acknowledged defendant was facing a mandatory Class X sentence but recommended a sentence in the range of 10 to 15 years in prison. The trial court sentenced defendant to 20 years in the Illinois Department of Corrections (DOC). After his appeal-rights admonishments, defendant advised the court he wanted to forego a motion to reconsider the sentence and asked that a notice of appeal be filed *instanter*. The court admonished defendant he would be waiving his right to challenge the sentence by foregoing filing of a motion to reconsider the sentence.

¶ 7 On direct appeal, defendant argued (1) the evidence was insufficient to convict him of residential burglary, (2) he was entitled to presentence incarceration credit, and (3) the fines imposed by the circuit clerk had to be vacated and the cause remanded for clarification of the authority for the assessments imposed. This court affirmed defendant's conviction, vacated improperly imposed fines, and remanded for determination of the authority for various

assessments. *People v. Jackson*, 2013 IL App (4th) 111087-U (unpublished order under Supreme Court Rule 23).

¶ 8 On August 27, 2013, defendant filed a *pro se* postconviction petition, alleging he was denied effective assistance of counsel as a result of his trial counsel's failure to advise him he faced Class X sentencing of 6 to 30 years in DOC due to his criminal background. He alleged, had he known he was subject to 6 to 30 years in DOC, he would have accepted the State's plea offer of a 10-year sentence. In defendant's attached affidavit, he averred the following:

> "Because I did not have accurate information about the possible penalties, I was unable to knowingly and intelligently weigh the State's plea offers[,] which included an initial offer of 12 years and a subsequent offer of 10 years. I was never told that as a multiple[-]felony offender, if convicted, enhanced class X sentencing was mandatory and, had I been so informed, I likely would have accepted the State's offer of 10 years."

¶ 9 On September 25, 2013, the trial court appointed counsel to represent defendant on his postconviction petition.

¶ 10 On April 17, 2014, counsel filed an amended postconviction petition, which argued (1) trial counsel was ineffective for failing to advise defendant he faced a mandatory Class X sentence and (2) the trial court violated defendant's due-process rights because it did not admonish him about the mandatory Class X sentencing at the arraignment or the preliminary hearing.

¶ 11 In its May 15, 2014, response to the petition, the State conceded, "The trial court

record does not, on its face, contradict [p]etitioner's affidavit" and requested an evidentiary hearing.

¶ 12 At the June 24, 2014, evidentiary hearing, defendant testified he was not advised of the possible sentences or the fact he faced mandatory Class X sentencing at the arraignment or preliminary hearing. Defendant testified at no time did his appointed counsel, Scott Rueter, tell him he was subject to mandatory Class X sentencing of 6 to 30 years. Defendant maintained, when Rueter told him about the State's plea offer of 10 years, Rueter never informed him he was subject to mandatory Class X sentencing. Defendant maintained had he known about his eligibility for Class X sentencing, he would have accepted the State's plea offer of 10 years. He further maintained he went to trial because he did not know about the mandatory Class X sentence and, had he known, he would not have gone to trial.

¶ 13 On cross-examination, defendant testified, prior to trial, he met with Rueter at the county jail. At that time, Rueter reviewed with defendant his pretrial bond report containing his past criminal history. Defendant did not recall Rueter underlining in red ink his prior convictions. He denied Rueter explained the sentencing range would be 6 to 30 years in prison. He further denied he told Rueter he did not want the offer of 10 years because, at best, this was attempt residential burglary. Defendant admitted he told Rueter he did not believe he had committed residential burglary because he did not steal anything from inside the house. Defendant admitted he did not think he had committed a crime. Defendant said he did not recall having a conversation with Rueter after he was sentenced indicating he did not want to challenge the sentence, but simply wanted to challenge the conviction.

¶ 14 On redirect examination, defendant again stated the first time he became aware of the mandatory Class X sentence was at the sentencing hearing.

¶ 15 The State called Rueter, who testified he met with defendant at the county jail prior to the trial date. Rueter relayed the State's plea offer of 10 years, which he explained to defendant was only good until the end of the first pretrial, at which time the State would withdraw the offer if it was not accepted. Rueter further testified:

> "Q. [ASSISTANT STATE'S ATTORNEY:] And did he indicate to you at that time that he wanted to, Number 1, reject the offer and Number 2, continue the case past the first pretrial date?
>
> A. [ATTORNEY RUETER:] He indicated that he wasn't interested in accepting the offer at that time. That his main focus, and I'm still to this day not exactly sure he thought it was in his advantage, but maybe because of delay he thought the witnesses would not show up or maybe he thought he was going to bond out. He was never really clear about that, but he specifically wanted to [*sic*] me to continue the case out several months, if I could, before we got to any actual action on it.
>
> Q. And according to the [d]efendant, did he make a statement to you to the affect [*sic*] that he was not, in fact, guilty of residential burglary because he had not stolen anything inside of the home?
>
> A. Our discussions about the facts of the case at that time were that he did not make entry as he told, if I recall correctly, as he told me and as he told the police, he just looked inside, he didn't try to make entry because he said the house was a mess inside.

That was an interesting feature of the case.

Q. Did he make any statement regarding that this was an attempt residential burglary at best?

A. He said, as he told the police that in his interview and when I talked to him about that, that was his same sort of attitude in our discussions. He always maintained that he shouldn't be convicted of anything, but at best the State would convict him of attempt residential burglary."

¶ 16 Rueter testified he had with him defendant's pretrial bond report when he met with defendant at the jail (People's exhibit No. 1). Rueter had underlined in red ink all the instances where defendant had Class 2, Class 1, or Class X felonies on his record, including both past convictions and pending charges. Rueter had circled a more recent charge out of Champaign County and had marked the notation defendant was currently on parole. Rueter testified such markings indicated to him he had taken specific note defendant would be Class X eligible because of the number of prior Class 2, Class 1, and Class X felonies. Rueter further testified:

"Q. [ASSISTANT STATE'S ATTORNEY:] Is it your standard practice when you meet with a criminal [d]efendant to review his or her criminal history with them when you discuss whether or not he's going to accept an offer from the State?

A. [ATTORNEY RUETER:] As I indicated to both yourself and [postconviction counsel] in discussing my testimony prior to testifying today, I cannot sit here and say that I honestly

remember specifically saying you are Class X eligible, but my standard practice is to take the packet of information I receive from the [c]hief [p]ublic [d]efender. First thing I do is I turn to the charges, I go over those charges with my client upon the initial meeting. The immediate next thing I do is go to their pretrial bond report as long as we have one and I discuss any issues in that with them to make sure these convictions are the ones that they belief [*sic*] they have also because that affects, on the pretrial, on the discovery packet that we get the offer from the State prior to the preliminary hearing that the [c]hief [p]ublic [d]efender usually negotiates, is written by the secretary for our office on the front of that. I always like to make sure that offer is a fairly fair offer with respect to the nature of the charge and the nature of the [d]efendant's prior convictions. So I always go through their prior convictions with them to make sure those are, in fact, what they have or if there is any discussion about that.

Q. And does People's Exhibit 1 indicate to you that[,] based on the [d]efendant's prior criminal history[,] that he was, in fact, Class X eligible?

A. I would have noted that and I believe I would have discussed that with him on my initial meeting with him."

¶ 17 Rueter testified he had reviewed the transcript of the sentencing hearing. At the hearing, he stated he understood the sentencing range was 6 to 30 years prior to the trial court

sentencing defendant to 20 years. Rueter further stated:

"Q. [ASSISTANT STATE'S ATTORNEY:] And after the court sentenced the [d]efendant to 20 years, did you have a verbal discussion with the [d]efendant while you were both present here in court?

A. [ATTORNEY RUETER:] I did. I recall that. That was specifically to discuss the issue of whether we were going to file a motion to reconsider sentence based upon any sentencing issues that needed to be preserved for appeal or if we could just straight away ask for an appeal. I think [defendant] wanted to get on the appeal or get the appeal going as soon as possible and at that time didn't see any potential sentencing issues. I specifically remember that he didn't act surprised that his range was 10 [*sic*] to 30. There was no indication from him that he was shocked to learn it was his first, first time he had ever heard he was Class X sentence mandatory.

Q. And based upon your conversation in court with the [d]efendant on the day of sentencing, did you then put it on the record that you were waiving any sentencing issues?

A. We did.

Q. And that was based upon the conversation with the [d]efendant and done at his direction?

A. Yes, ma'am."

¶ 18 When Rueter was asked on cross-examination whether he was certain he had discussed with defendant the mandatory Class X sentence, Rueter stated, "I can't sit here and say I specifically remember that conversation. It's been several, over a year since that occurrence and I just don't have that memory, but as I have indicated about my notes."

¶ 19 The trial court acknowledged the record was clear defendant had not been told either at the preliminary hearing or the arraignment of the possible penalties. (The court noted its procedures had changed since the time of defendant's trial. The court's procedure now is, prior to trial, to advise defendants of the potential penalties and to inquire about any negotiations that may have taken place.) However, the court stated, "it's pretty clear he appears to be somewhat opportunistic that he says I didn't know that I was Class X eligible and I didn't want to take the offer because I didn't commit a crime." The court noted the jury was instructed on the lesser offense of criminal trespass to a residence. The court felt defendant was hoping for a conviction on the lesser offense. The court found the fact Rueter had marked all the prior convictions on defendant's pretrial bond report, which made him Class X eligible, suggested Rueter had advised defendant of his Class X status. The court further noted the absence of surprise shown by defendant at the sentencing hearing when the State and Rueter referred to the mandatory Class X sentencing range. Of further note to the court was defendant's insistence there be no challenge to the sentence before the case proceeded to appeal. The court found this to be circumstantial evidence defendant knew he was Class X eligible. Therefore, the court denied the postconviction petition.

¶ 20 This appeal followed.

¶ 21 II. ANALYSIS

¶ 22 On appeal, defendant argues the trial court's denial of his postconviction petition

was manifestly erroneous because (1) trial counsel's failure to advise him of his Class X sentencing status was objectively unreasonable and constituted deficient representation, (2) the court's finding counsel did advise him of the mandatory Class X sentencing was manifestly erroneous, and (3) he was prejudiced by counsel's failure to advise him he faced mandatory Class X sentencing of 6 to 30 years. We disagree.

¶ 23 During the third stage of postconviction proceedings, a defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). "When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous." *Id.* " 'A ruling is manifestly erroneous only if it contains error that is clearly evident, plain, and indisputable.' " *People v. Slover*, 2011 IL App (4th) 100276, ¶ 17, 959 N.E.2d 72 (quoting *People ex rel. Madigan v. Petco Petroleum Corp.*, 363 Ill. App. 3d 613, 623, 841 N.E.2d 1065, 1073 (2006)). "[R]eviewing courts apply the manifestly erroneous standard in recognition of 'the understanding that the post-conviction trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a position of advantage in a search for the truth which is infinitely superior to that of a tribunal where the sole guide is the printed record.' " *Id.* ¶ 14 (quoting *People v. Coleman*, 183 Ill. 2d 366, 384, 701 N.E.2d 1063, 1073 (1998)). In this case, the trial judge who ruled on the postconviction petition also presided over defendant's jury trial and sentencing hearings and had direct knowledge of defendant's behavior and demeanor at those hearings.

¶ 24 With ineffective-assistance-of-counsel claims, this court applies 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). 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. *Id.* at 93, 708 N.E.2d at 1163-64. "More specifically, the defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Petrenko*, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198, 1203 (2010) (quoting *Strickland*, 466 U.S. at 694).

¶ 25 In this case, the issue of whether defendant's constitutional rights were violated by the ineffectiveness of his trial counsel boiled down to the credibility of defendant versus his trial counsel. The trial court, being in a superior position to make a credibility determination, found Rueter more credible than defendant. After hearing the testimony of defendant and Rueter, the court felt it was "pretty clear [defendant] appear[ed] to be somewhat opportunistic" when he said he did not know he was Class X eligible while maintaining he did not commit the crime and rejecting the State's plea offer. The court found Rueter's testimony he had marked all of defendant's prior felony convictions on the pretrial bond report before he met with defendant, which indicated defendant was Class X eligible, "suggested" Rueter had advised defendant of his Class X status. As a reviewing court, we will generally defer to the trial court's credibility determination "because the trial court, 'by virtue of its ability to actually observe the conduct and demeanor of witnesses, is in the best position to assess their credibility.' " *In re Marriage of Manker*, 375 Ill. App. 3d 465, 477, 874 N.E.2d 880, 890 (2007) (quoting *In re Commitment of Sandry*, 367 Ill. App. 3d 949, 980, 857 N.E.2d 295, 319 (2006)).

¶ 26 We further note Rueter testified his standard practice was to review a defendant's pretrial bond report and mark all the prior convictions. During his first meeting with a

defendant, Rueter testified his practice was to go over the current charges, review the prior convictions with the defendant for accuracy, and discuss any plea offers. While Rueter could not state with full assurance he had discussed the Class X status with defendant, he had marked the pretrial bond report as per his standard practice, which indicated defendant was Class X eligible. Rueter stated, "I believe I would have discussed that with [defendant] on my initial meeting with him." Accordingly, the record reflects the court's decision was not manifestly erroneous. Moreover, defendant's presentence investigation report revealed this was defendant's fourth residential burglary conviction and he had a prior Class X delivery of cocaine conviction. One of the residential burglary convictions occurred in January 2006. Defendant was extended-term eligible, absent any Class X status. See 730 ILCS 5/5-5-3.2(b)(1) (West 2010). The maximum sentence he faced without Class X enhancement was 30 years, the same as with Class X enhancement. See 730 ILCS 5/5-4.5-30(a) (West 2010). His conviction was nonprobationable and subject to a mandatory four-year minimum. See 730 ILCS 5/5-5-3(c)(2)(G) (West 2010). With at least 12 felony convictions, defendant was not a candidate for a minimum sentence.

¶ 27 The record supports the following: (1) defendant knew he was Class X eligible; (2) defense counsel went over his prior convictions with him; (3) defense counsel presented the State's plea offer and the deadline for acceptance to defendant; (4) defendant persisted in his position he would not be found guilty of residential burglary and that, rather than his purported ignorance of his Class X eligibility, was the reason defendant rejected the State's plea offer; (5) defendant directed counsel to continue his trial beyond the time for acceptance of the State's plea offer; (6) defendant was eligible for an extended term of 30 years even if not Class X eligible; (7) defendant deliberately waived his right to challenge his sentence; and (8) defendant's sentence was within the extended-term range for a Class 1 felony without regard to defendant's eligibility

for Class X sentencing. Therefore, we see no reason to disturb the trial court's finding.

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 30 Affirmed.