

2017 IL App (2d) 150257-U  
No. 2-15-0257  
Order filed December 7, 2017

**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  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Du Page County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05-CF-2230
	)	
MARK L. MARINO,	)	Honorable
	)	Robert G. Kleeman,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Hutchinson and Spence concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly denied the defendant's postconviction claim that his trial counsel was ineffective for failing to present certain mitigation witnesses at sentencing.

¶ 2 The defendant, Mark Marino, was convicted of two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)) and was sentenced to a total of 27 years' imprisonment. The defendant filed a postconviction petition, arguing that his trial counsel was ineffective for failing to investigate and call mitigation witnesses at his sentencing hearing.

Following an evidentiary hearing, the trial court denied the defendant any relief. The defendant appeals from that order. We affirm.

¶ 3

### BACKGROUND

¶ 4 On May 16, 2007, the defendant pled guilty to two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)). The factual basis provided that the defendant, who was 31 years old, had been having a sexual relationship with the victim, S.M., who was 12 years old at the time. The evidence would show that the defendant admitted to engaging in vaginal and oral sex with the victim between June 20 and August 30, 2005, at the Elmhurst Extended Stay Hotel.

¶ 5 On July 9, 2007, the trial court conducted a sentencing hearing. Detective Michael Camise of the Elmhurst police department testified that he went to the hotel where the defendant and the victim were living. The room had one bed and the room appeared to have been lived in for awhile. The defendant told him that the victim's stepfather was his cousin and was married to the victim's mother. They were truck drivers and had left the victim in the defendant's custody. After the defendant and the victim were both taken to the police station, the victim stated that she had sex with the defendant 25 times and that they planned to get married in Texas when she turned 14. Her sexual relationship with the defendant included vaginal intercourse, oral sex, and digital vaginal penetration. The defendant had also attempted anal penetration. Upon being confronted with this accusation, the defendant admitted that he had sex with the victim on a daily basis.

¶ 6 The victim's father testified that the victim felt "ashamed," "confused and hurt" as a result of the defendant's actions.

¶ 7 The trial court acknowledged that it received two letters on the defendant's behalf. The letters were from the defendant's father and his uncle. The defendant's pre-sentencing investigation (PSI) report was also submitted to the trial court. That report indicated that the defendant spent his free time studying the Bible and that he was studying to become an ordained minister.

¶ 8 Defense counsel argued that the defendant's criminal history included no sex offenses. Defense counsel additionally stated that the defendant had been a "model inmate" in jail. He attended Bible studies and had just been ordained a minister. Defense counsel stated that the defendant intended to serve as *de facto* chaplain in jail and that he wanted to continue as a minister upon his release.

¶ 9 The defendant provided a statement in allocution. He stated that he had "no excuses for what [he had] done." He also indicated that whatever sentence he received was "far less than [he] deserve[d]."

¶ 10 At the close of the hearing, the trial court described the defendant's actions as "a theft of her security, a theft of her innocence, a theft of her freedom to choose with whom she wanted to be intimate and when." The trial court found that the defendant's actions were "daily violations" of the victim. The trial court imposed consecutive sentences of 15 years' and 12 years' imprisonment. The defendant did not appeal from that order.

¶ 11 On July 14, 2010, the defendant filed a *pro se* petition for postconviction relief. On October 6, 2010, the trial court dismissed the petition as frivolous and patently without merit. On January 19, 2012, this court reversed the dismissal and remanded for second stage proceedings pursuant to the Post Conviction Hearing Act (725 ILCS 5/122-1 (West 2012)). See *People v. Marino*, 2012 IL App (2d) 101123-U.

¶ 12 On September 23, 2014, the defendant filed a second amended petition. The defendant alleged that his counsel was ineffective because he failed to (1) file a motion to reconsider sentence; and (2) properly investigate and present mitigation evidence at sentencing. In support of his petition, the defendant included the affidavits of his mother, father, uncle, Reverend Phillip Palmer, Richard McNeese, and Tony Singh.

¶ 13 The defendant's mother, Clela Stanfield, stated that she would have informed the trial court that she and the defendant's father divorced when he was only two years old. The defendant saw her second husband physically and verbally abuse her. She believed that the defendant suffered from Attention Deficit Hyperactivity Disorder and other psychological issues as a child. She would have testified that the defendant has taken full responsibility for his actions.

¶ 14 The defendant's father, Mark Marino, Jr., would have testified that the defendant was traumatized by things he witnessed at home with his mother. He stated that the defendant had always taken responsibility for his actions in the instant case.

¶ 15 The defendant's uncle, Stephen Marineau, stated that he would have testified that the defendant's mother's struggles with mental health issues affected the defendant during his childhood.

¶ 16 Reverend Palmer stated in his affidavit that the defendant was a former student of his at the Du Page County Jail. He taught Bible classes which the defendant attended and eventually mentored the defendant to become a minister.

¶ 17 Richard McNeese stated in his affidavit that he was involved in jail ministry and visited with the defendant three times a month for the two years prior to sentencing. He believed that

the defendant developed a strong faith and a genuine understanding of the Bible. He stated that the defendant would meet with other inmates in the jail to talk about the Bible.

¶ 18 Tony Singh, a volunteer chaplain at the Du Page County jail, stated that he would have testified that the defendant participated in religious services and was committed to rehabilitation. The defendant seemed remorseful and embraced the opportunity to apply Christianity to his life.

¶ 19 After denying the State's motion to dismiss, on March 16, 2015, the trial court conducted a hearing on the defendant's petition. Reverend Palmer testified consistently with his affidavit. The defendant testified that he had told his defense counsel about the witnesses he wanted to testify for him at sentencing. He had four witnesses that would have testified and at least two who would have written letters. However, no witnesses were called at the sentencing hearing, including McNeese, who was present at the hearing. The defendant stated that the witnesses would have testified as to how he had changed while in prison. They would have testified that he now had a moral compass and realized that his behavior affected the people around him. One of the main things he wanted his witnesses to testify about was that he had become a minister while in jail. The defendant also testified that he told his defense counsel that he wanted to file a motion to reconsider sentence.

¶ 20 At the conclusion of the hearing, the trial court found that the defendant had not made a substantial showing of a constitutional violation. The trial court found the defendant's testimony was not credible as to whether he had directed his counsel to file a motion to reconsider his sentence. As to the issue of trial counsel's failure to present mitigation at sentencing, the trial court found that counsel's performance did not constitute unprofessional error. The trial court explained that the PSI report contained much, if not all, of the mitigation that the defendant wanted presented. Further, the mitigation that was not in the presentence report was presented in

defense counsel's argument at sentencing. The trial court therefore found that the defendant was not prejudiced by defense counsel's failure to present the mitigation witnesses at sentencing. The trial court further noted that the defendant committed "acts of penetration that were repeated," including "anal penetration." The trial court determined that in light of the "staggering scope, degree, and repetition of abuse," the mitigation evidence that the defendant presented on postconviction would not have made a difference at sentencing. The trial court therefore denied the defendant's request for any postconviction relief. The defendant thereafter filed a timely notice of appeal.

¶ 21

#### ANALYSIS

¶ 22 On appeal, the defendant argues that the trial erred in denying him postconviction relief following the evidentiary hearing. The defendant contends that his counsel was ineffective for failing to investigate and present mitigating witnesses who would have testified about his troubled childhood and his efforts at rehabilitation since his arrest. The defendant also asserts that the trial court denied him any relief because it misapprehended the relevant facts. The defendant therefore asks us to reverse the denial of his postconviction petition and remand the cause for a new sentencing hearing.

¶ 23 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2014)) provides a remedy to criminal defendants who have had substantial violations of their constitutional rights during their criminal trial. See *People v. Vernon*, 276 Ill. App. 3d 386, 391 (1995). A postconviction proceeding is not an appeal *per se*, but a collateral attack upon a final judgment. See *People v. Lester*, 261 Ill. App. 3d 1075, 1077 (1994). At the first stage of a postconviction process, the trial court must review a defendant's petition within 90 days and determine whether the claim states the gist of a constitutional claim. 725 ILCS 5/122-2.1(a) (West 2014). If the

court finds such a claim, counsel is then appointed and the petition proceeds to the second stage, where counsel is given an opportunity to file an amended petition and the State may file a motion to dismiss or answer. 725 ILCS 5/122-5 (West 2014). If the court does not dismiss the petition at the second stage, the cause advances to the third stage, at which an evidentiary hearing may be held. 725 ILCS 5/122-4, 122-5 (West 2014). A defendant is not entitled to an evidentiary hearing as a matter of right; rather, a hearing is required when the defendant makes a substantial showing of a violation of a constitutional right. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998).

¶ 24 Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If a court denies a postconviction petition at the third stage, the decision is reviewed under the manifest-error standard. A decision is against the manifest weight of the evidence when an opposite conclusion is clearly evident, plain, and indisputable. *Coleman*, 183 Ill. 2d at 384-85.

¶ 25 As the defendant's claim alleges the ineffective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To succeed on such a claim, a defendant must show both that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694). To satisfy the first portion of the *Strickland* test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms. *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). There is a strong presumption, which a defendant must overcome, that counsel's performance "falls within the wide range of reasonable professional assistance." *People v.*

*Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001). To establish ineffective assistance of counsel at sentencing, the defendant must establish that counsel's performance was objectively unreasonable and that there is a reasonable probability that the deficient performance affected the defendant's sentence. *People v. Orange*, 168 Ill. 2d 138, 168 (1995). An insufficient showing as to either component of the test will defeat the claim. *People v. Enoch*, 12 Ill. 2d 176, 201 (1988).

¶ 26 Here, we cannot say that the trial court's finding—that the defendant was not prejudiced by his counsel's representation—was against the manifest weight of the evidence. The gist of the defendant's claim was that his counsel was ineffective for not presenting witnesses to testify on his behalf in mitigation at the sentencing hearing. However, the evidence the defendant wanted presented was already before the trial court at the sentencing hearing. Two of the witnesses—the defendant's father and uncle—submitted letters on the defendant's behalf that the trial court considered prior to sentencing. A third witness—the defendant's mother—would have testified that the defendant was a person who took responsibility for his actions. This fact was readily apparent to the trial court based on the defendant's guilty plea and his statement in allocution acknowledging responsibility for his actions. The other witnesses that the defendant wanted to testify—Reverend Philip Palmer, Richard McNeese, and Tony Singh—would have testified as to the defendant's participation in prison ministry and that he had become an ordained minister. This information was presented to the trial court in the defendant's statement of allocution and in the PSI report. As the testimony that the defendant wanted presented was cumulative of the evidence already submitted to the trial court, defense counsel was not ineffective for failing to introduce that testimony. *People v. Enis*, 194 Ill. 2d 361, 412 (2000).



¶ 27 The defendant argues that his defense would have been stronger had his defense counsel submitted live testimony rather than just relying on the letters that were submitted and on defense counsel’s own argument. That may be true. However, the mitigation evidence that the defendant presented through his affidavits—that he had a difficult childhood, that he took responsibility for his actions, and that he had become a minister in prison—paled in comparison to the daily abuse that the defendant inflicted upon the victim. Thus, we cannot say that the trial court’s sentencing decision would have been any different had the evidence in mitigation been submitted via a different form. *Strickland*, 466 U.S. at 699–700 (trial counsel not ineffective where the evidence that the defendant says his trial counsel should have offered at the sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge).

¶ 28 We next turn to the defendant’s argument that the trial court’s ruling was based on a misapprehension of fact. The defendant points out that, in describing the evidence, the trial court stated that the “acts of penetration that were repeated, and they don’t \*\*\* bear repeating in every detail, but they included anal penetration, and on a daily basis.” The defendant notes that he was charged and convicted of sex offenses involving vaginal and oral sexual penetration. He insists that “[t]here was absolutely no allegation or evidence that anal penetration occurred.” As the trial court’s decision was based “on the mistaken belief that [the defendant] had engaged in daily anal sex” with the victim, the defendant argues that the trial court’s decision must be reversed.

¶ 29 The defendant’s argument is without merit. First, Detective Camise testified that the victim told him that the defendant had attempted anal penetration of her. Second, reviewing the trial court’s comments in context, the trial court did not find that the defendant was engaging in daily anal sex with the victim. Rather, the trial court found that the defendant daily abused the

victim and that, on one occasion, the abuse included anal penetration. As that finding was supported by the record, there is no basis to disturb the trial court's decision.

¶ 30

CONCLUSION

¶ 31 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed. As part of our judgment, we grant the State's request that the defendant be assessed \$50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 32 Affirmed.