2019 IL App (4th) 180483-U

NO. 4-18-0483

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
July 1, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Livingston County
DELARGO L. GULLENS,	)	No. 12CF237
Defendant-Appellant.	)	
	)	The Honorable
	)	Jennifer H. Bauknecht,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgment of the court.
Presiding Justice Holder White and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's third-stage denial of defendant's postconviction petition.

¶ 2 In August 2012, the State charged defendant, Delargo L. Gullens, with (1) possession with intent to deliver a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin) and (2) possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin). 720 ILCS 570/401(a)(1)(A), 402(a)(1)(A) (West 2010). In November 2012, a jury found defendant guilty of both counts. In March 2013, the trial court merged defendant's convictions and sentenced him to 30 years in prison for possession with intent to deliver a controlled substance.

¶ 3 In March 2016, defendant *pro se* filed a postconviction petition. In September 2016, the trial court advanced the petition to the second stage. Counsel amended defendant's pe-

tition on multiple occasions and argued (1) ineffective assistance of counsel and (2) actual innocence. The trial court advanced defendant's claims to the third stage for evidentiary hearings. In June 2018, after conducting several evidentiary hearings, the trial court entered a written order denying defendant's amended postconviction petition.

¶ 4 Defendant appeals, arguing the trial court erred in denying his postconviction petition because he demonstrated (1) ineffective assistance of counsel and (2) actual innocence. We disagree and affirm.

¶ 5 I. BACKGROUND

¶ 6 A. Defendant's Trial and First Appeal

¶ 7 In August 2012, the State charged defendant with (1) possession with intent to deliver a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin) and (2) possession of a controlled substance (15 grams or more but less than 100 grams of a substance containing heroin). *Id.*

¶ 8 In November 2012, defendant's case proceeded to a jury trial. Several law-enforcement officers testified that on the night of August 30, 2012, various city and county law-enforcement agencies executed a search warrant on a residential trailer. When the police entered the residence, an officer observed defendant run from the front kitchen into a rear bedroom. The police arrested Jeffrey Harris and defendant. The police also seized 212 plastic bags from the kitchen countertop, each of which contained a fine, white powder. Defendant later stipulated that the fine, white powder was 15.7 grams of heroin.

¶ 9 Olivia Hester, the owner of the trailer, testified that she lived with Harris. She stated that Harris began selling defendant's heroin in August 2012. She also stated that they stored and packaged heroin at her trailer. She explained that she had heard defendant and Harris

talk about heroin and observed them handling small plastic bags of heroin while in her home. Hester acknowledged that she did not see defendant bring drugs into her home. Hester testified that she had also sold defendant's heroin and that she had been charged with possession with intent to deliver a controlled substance and possession of a controlled substance.

¶ 10 Harris—who was also facing criminal charges—testified that he sold heroin that defendant supplied to him. Harris stated that on the night of August 30, 2012, he saw defendant in Hester's trailer at the kitchen countertop with multiple bags of heroin.

¶ 11 The jury found defendant guilty of both counts. In March 2013, the trial court merged defendant's convictions and sentenced him to 30 years in prison for possession with intent to deliver a controlled substance.

¶ 12 Defendant appealed, arguing that he was denied a fair trial because of comments the trial court made to his attorney. This court disagreed and affirmed. *People v. Gullens*, 2015 IL App (4th) 130357-U, ¶ 3.

¶ 13 B. The Postconviction Petitions

¶ 14 In March 2016, defendant *pro se* filed a postconviction petition. In September 2016, the trial court advanced the petition to the second stage. Counsel amended defendant's petition on multiple occasions and argued (1) ineffective assistance of counsel and (2) actual innocence. The trial court advanced defendant's claims to the third stage.

¶ 15 C. The Evidentiary Hearings

¶ 16 The trial court conducted an evidentiary hearing in September 2017 and May 2018. Hester testified that she was not truthful at defendant's jury trial. She stated that Harris was selling heroin out of her trailer. She also stated that defendant was not involved with any drug activity.

¶ 17 Hester also testified that Richard Felton was a "mutual friend" who "knew everybody" at her trailer. She stated that during August 2012, Felton was at her trailer with enough frequency that he had the opportunity to supply drugs to Harris.

¶ 18 Hester stated that Randy Yedinak, the prosecutor in defendant's original trial, pressured her into implicating defendant. She also stated that Jeff Hamilton, a Sergeant at the Livingston County Sherriff's Office, pressured her into implicating defendant. Hester also claimed that Harris threatened her before trial and coerced her into testifying against defendant.

¶ 19 On cross-examination, Hester conceded that defendant is the father of her child. She also stated that at the time of defendant's trial, she did not know whether defendant or Harris was the father of her unborn child. Hester further conceded that she had sold heroin during August 2012. She also stated that she had previously given a recorded statement to the police that was consistent with the testimony she gave at defendant's original trial.

¶ 20 Richard Felton testified that although his case was still on appeal, he was serving a 75-year consecutive prison sentence for attempted murder and home invasion. Felton testified that he packaged and sold the heroin that the police found in Hester's trailer. Felton stated that defendant did not assist him with his heroin sales. Felton claimed that he was at the trailer "an hour or so before they had raided the house." On cross-examination, Felton displayed difficulty describing the logistics of his alleged heroin operation.

¶ 21 Defendant testified that he did not know about Felton's involvement until after he was convicted. Defendant also stated that his trial attorney (1) was rude to the court, (2) failed to visit him while he was in custody, (3) failed to show him the discovery prior to trial, (4) mispronounced his name during trial, and (5) mispronounced the name of a city during trial.

¶ 22 Yedinak testified that he did not pressure Hester into implicating defendant.

Yedinak noted that Hester gave a recorded statement prior to trial that was consistent with her trial testimony. He stated that he would have impeached Hester had she changed her story at trial. Yedinak noted that at the time of defendant's trial, Hester was also facing criminal charges.

¶ 23 Hamilton testified that he conducted surveillance on Hester's trailer "numerous times on different dates" prior to the execution of the search warrant. He further stated that prior to the execution of the search warrant, he conducted surveillance of Hester's trailer for "probably over an hour." Hamilton testified that he never saw Felton at Hester's trailer. He also stated that he did not pressure Hester to testify against defendant. On cross-examination, he conceded that it was theoretically possible that Felton was at the trailer when he was not conducting surveillance.

¶ 24 D. The Trial Court's Order

¶ 25 In June 2018, the trial court entered a written order denying defendant's amended postconviction petition. The court found that Hester "was not a credible witness." The court reasoned that her new testimony "is not consistent with the other evidence presented at this hearing and is not consistent with the trial evidence. Moreover, she is a biased witness as defendant is the father of her child ***." The court also found it was "simply not credible" that Harris, Yedinak, or Hamilton coerced her into testifying against defendant.

¶ 26 The trial court found that "Felton is simply not a credible witness and his testimony is inconsistent with all the other evidence in the case." The court reasoned that "Felton chose to wait [to testify] until he received basically a life sentence to come forward, thus he stands to lose nothing by claiming it was his heroin." The court further found that "[h]is testimony was vague and he was unable to provide even basic information concerning the [heroin] 'operation' he claimed to be running from this house or any details about the heroin seized that night." The court also found that his testimony was not credible because "Sergeant Hamilton testified that he

had surveilled the house on several different occasions and for more than an hour on the day of the raid and that he never saw Felton coming or going."

¶ 27 The trial court also concluded that Felton "is not a 'new' witness. If he was in the home that day, if it was his heroin ***, then defendant would have known all of that on August 30, 2012, and certainly well before the trial in his case. Defendant has failed to explain how this is 'new' evidence and why it was not presented earlier."

¶ 28 The trial court found that defendant's "testimony carries little weight as he is a biased witness and has a lot at stake." The court found that "he offered little on his claim of actual innocence other than denying he was selling heroin" and "did not provide an explanation for why Felton was not identified as the dealer before or during the trial ***."

¶ 29 The trial court found that "Yedinak's testimony was very credible, convincing[,] and unimpeached as well as consistent with the trial record." The court further found that Hamilton's testimony "was also credible and consistent with the trial evidence."

¶ 30 The trial court concluded that "defendant has failed to meet his burden of proof on his claim of actual innocence." In reaching this conclusion, the trial court reasoned as follows:

> "[Defendant] has not presented any new, material, noncumulative evidence that is so conclusive that it probably change[s] the result of the trial. Defendant's argument that Hester recanting her testimony coupled with Felton's *** testimony falls far short of affecting the trial result and completely ignores the other substantial and compelling evidence of defendant's guilt. *** Harris testified that he was selling heroin supplied to him from the defendant, *** that he observed defendant sitting at the kitchen countertop with bags of heroin shortly before the police arrived, and that when the police arrived he saw defendant run to the back of the

> trailer. [Citation.] Additionally, law enforcement also saw the defendant run from the kitchen to the back of the house when they approached. [Citation.] *** Further, there is no credible evidence that Felton was involved in this operation. Felton claims he was at the house about an hour before the raid, although no one at the house, including Hester, nor any of the surveillance officers watching the house during this time period place him at the house around this time. There is simply no credible evidence that Felton was involved in this drug operation or that his testimony is newly discovered evidence."

¶ 31 The trial court also rejected defendant's ineffective-assistance-of-counsel argument. In reaching this conclusion, the court reasoned as follows:

> "[D]efendant has failed to demonstrate how the outcome would have been any different had defense counsel used a different style during the trial or spent more time preparing the case with defendant. Most of defendant's complaints are speculative ***. There is no evidence that *** the result would have been any different. *** [T]he evidence against defendant was overwhelming and very compelling with multiple eyewitness accounts. *** Moreover, defendant has provided only his own self-serving statements concerning the level of preparation for the trial."

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 Defendant appeals, arguing the trial court erred in denying his postconviction petition because he demonstrated (1) ineffective assistance of counsel and (2) actual innocence. We address these issues in turn.

¶ 35 A. The Post-Conviction Hearing Act

¶ 36 The Post-Conviction Hearing Act (Act) provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2016). At the first stage, the trial court must independently determine whether the petition is "frivolous or patently without merit ***." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed at the first stage, it advances to the second stage. *Id.* § 122-2.1(b). At the second stage, the trial court may appoint counsel, who may amend the petition, and the State may file an answer or move to dismiss the petition. *Id.* § 122-4, 122-5. The trial court may dismiss a petition at the second stage "only when the allegations in the petition, liberally construed in the light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005). If a constitutional violation is established, the trial court advances the petition to the third stage for an evidentiary hearing. *Crenshaw*, 2015 IL App (4th) 131035, ¶ 25.

¶ 37 "At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation." *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 146, 39 N.E.3d 1042. At this hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence" and "may order the [defendant] brought before the court ***." 725 ILCS 5/122-6 (West 2016). An evidentiary hearing allows the parties to develop matters not contained in the trial record. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 30, 40 N.E.3d 1235. "If the court finds in favor of the [defendant], it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary or-

ders as to rearraignment, retrial, custody, bail or discharge as may be necessary and proper." 725 ILCS 5/122-6 (West 2016).

¶ 38 B. Ineffective Assistance of Counsel

¶ 39 Defendant argues the trial court erred by denying his claim of ineffective assistance of counsel. We disagree.

¶ 40 1. *The Applicable Law*

¶ 41 A defendant has the right to effective assistance of counsel at all critical stages of a criminal proceeding. U.S. Const., amend. VI; *People v. Sturgeon*, 2019 IL App (4th) 170035, ¶ 81, _ N.E.3d _. To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was (1) deficient and (2) prejudicial. *People v. Westfall*, 2018 IL App (4th) 150997, ¶ 61, 115 N.E.3d 1148. An attorney's performance is deficient when it falls below an objective standard of reasonableness. *Id.* ¶ 62. This court is highly deferential of counsel's performance. *People v. McGath*, 2017 IL App (4th) 150608, ¶ 38, 83 N.E.3d 671. A defendant is prejudiced when but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Westfall*, 2018 IL App (4th) 150997, ¶ 63. A reasonable probability is a probability which undermines confidence in the outcome of the trial. *Id.* A defendant's failure to satisfy either prong negates a claim of ineffective assistance of counsel. *People v. Fellers*, 2016 IL App (4th) 140486, ¶ 23, 77 N.E.3d 994.

¶ 42 When a claim of ineffective assistance of counsel is raised in the trial court, this court defers to the trial court's factual findings and will disturb them only if they are against the manifest weight of the evidence. *People v. Phillips*, 2017 IL App (4th) 160557, ¶ 55, 92 N.E.3d 544. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence.

People v. Relwani, 2019 IL 123385, ¶ 18, _ N.E.3d _. However, this court reviews *de novo* the trial court's ultimate determination of whether counsel rendered ineffective assistance. *Phillips*, 2017 IL App (4th) 160557, ¶ 55.

¶ 43 2. *This Case*

¶ 44 At defendant's trial, Hester and Harris testified that they sold heroin that defendant supplied to him. Harris also stated that on August 30, 2012, he saw defendant with multiple bags of heroin at the kitchen countertop in Hester's trailer. On the night of August 30, 2012, multiple law-enforcement agents executed a search warrant on a residential trailer. When the police entered the residence, an officer observed defendant run from the kitchen into a rear bedroom. The police seized 212 plastic bags from the kitchen countertop that defendant later stipulated contained 15.7 grams of heroin. Based upon this, the trial court found that "the evidence against defendant [at his original trial] was overwhelming and very compelling with multiple eyewitness accounts." We conclude that this finding was not against the manifest weight of the evidence.

¶ 45 On appeal, defendant argues his counsel was defective because his attorney (1) was rude to the court, (2) failed to visit him while he was in custody, (3) failed to show him the discovery prior to trial, (4) mispronounced his name during trial, and (5) mispronounced the name of a city during trial.

¶ 46 However, defendant fails to demonstrate a nexus between counsel's allegedly deficient performance and how the result of the proceeding would be different. It would be speculative—at best—for this court to assume that defendant would have been found not guilty at trial if his attorney had been more polite, visited defendant while he was in jail, showed defendant the discovery, or used proper pronunciation. See *Sturgeon*, 2019 IL App (4th) 170035, ¶ 98 ("[T]o

establish prejudice, a defendant must show that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. [Citation.] The sort of speculation that defendant asks this court to engage in here falls far short of that requirement."). Thus, because defendant has failed to demonstrate prejudice, his ineffective assistance of counsel claim fails.

¶ 47 C. Actual Innocence

¶ 48 Defendant next argues that the trial court erred by denying his claim of actual innocence. We disagree.

¶ 49 1. *The Applicable Law*

¶ 50 "The due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *People v. Ortiz*, 235 Ill. 2d 319, 333, 919 N.E.2d 941, 949-50 (2009). "The elements of a claim of actual innocence are that [(1)] the evidence in support of the claim must be 'newly discovered'; [(2)] material and not merely cumulative; and [(3)] of such conclusive character that it would probably change the result on retrial." *People v. Edwards*, 2012 IL 111711, ¶ 32, 969 N.E.2d 829.

¶ 51 "Newly discovered evidence is defined as evidence that has been discovered since the trial and could not have been discovered sooner by the defendant through due diligence." *People v. Jones*, 2017 IL App (1st) 123371, ¶ 43, 87 N.E.3d 938. "Evidence is not newly discovered if it presents facts already known to the defendant, even if the source of those facts was unknown, unavailable or uncooperative." *People v. English*, 2014 IL App (1st) 102732-B, ¶ 49, 13 N.E.3d 157.

¶ 52 "The United States Supreme Court has emphasized that claims of actual inno-

cence must be supported 'with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' " *Jones*, 2017 IL App (1st) 123371, ¶ 44 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)). "Claims of actual innocence are rarely successful because such evidence is obviously unavailable in the vast majority of cases." *Id*. Furthermore, "[t]he recantation of testimony is regarded as inherently unreliable. As a result, the courts will not grant a new trial on that basis except in extraordinary circumstances." *People v. Morgan*, 212 Ill. 2d 148, 155, 817 N.E.2d 524, 528 (2004).

¶ 53 When the trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on disputed issues of fact and credibility determinations, we will reverse that decision only if it is manifestly erroneous. *Phillips*, 2017 IL App (4th) 160557, ¶ 55. A decision is manifestly erroneous when the opposite conclusion is clearly evident. *People v. Coleman*, 2013 IL 113307, ¶ 98, 996 N.E.2d 617.

¶ 54 2. *This Case*

¶ 55 Recantation testimony "is regarded as inherently unreliable" and "courts will not grant a new trial on that basis except in extraordinary circumstances." *Morgan*, 212 Ill. 2d at 155. Hester's recantation testimony was especially unreliable because she learned that defendant is the father of her child *after* he was convicted. Furthermore, Hester's testimony was contradicted by Yedinak and Hamilton—both of whom the trial court found to be credible witnesses. Likewise, Hester's testimony is inconsistent with the evidence presented at defendant's trial.

¶ 56 Similarly, Felton's testimony was suspect because he admitted to manufacturing the heroin *after* he was convicted of a different crime and sentenced to a *de facto* life sentence. Further, the trial court found that Felton's testimony was unreliable because (1) "he was unable

to provide even basic information concerning the [heroin] 'operation' he claimed to be running" and (2) Hamilton never saw him enter or exit the trailer where the drugs were found.

¶ 57 Stated simply, defendant failed to introduce evidence of such conclusive character that it would probably change the result on retrial. See *Jones*, 2017 IL App (1st) 123371, ¶ 43. Thus, we conclude that the trial court's denial of defendant's postconviction petition was not manifestly erroneous. See *id.* ¶ 46. Because we have rejected defendant's arguments on the merits, we need not address whether Hester and Felton's testimony was "newly discovered" evidence.

¶ 58 III. CONCLUSION

¶ 59 For the reasons stated, we affirm the trial court's order. As a part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2016).

¶ 60 Affirmed.