

No. 1-12-2744

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 05 CR 11164
)	
GILBERT SANABRIA,)	Honorable
)	Dennis J. Porter,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LIU delivered the judgment of the court.
Justices Simon and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held:* Post-conviction counsel did not render unreasonable assistance at evidentiary hearing held on this court's mandate. Denial of post-conviction relief following evidentiary hearing was not manifestly erroneous; defendant testified that trial counsel failed to advise him that lesser-included-offense instruction was his decision, but counsel effectively testified to the contrary.

¶ 2 Following a jury trial, defendant Gilbert Sanabria was convicted of burglary and sentenced to 24 years' imprisonment. We affirmed on direct appeal. *People v. Sanabria*, No. 1-

06-0494 (2007)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the circuit court's denial of post-conviction relief, following an evidentiary hearing, on his petition as amended. On appeal, he contends that post-conviction counsel provided unreasonable assistance and that the court erred in denying him post-conviction relief.

¶ 3 At the January 2006 trial, counsel argued in defendant's opening statement that a burglary occurred but defendant was not the burglar. Briefly stated, the evidence at trial was that defendant burglarized the detached garage of a home. The homeowner saw the burglar near his garage, carrying a car jack (in a box) and the speakers from a vehicle sound system, and he identified defendant as the burglar at trial. However, the homeowner called the police before trying to find the burglar in the neighborhood, so about 15 minutes passed between seeing the burglar with the jack and speakers and seeing defendant nearby with a jack that the homeowner identified as his after defendant's arrest. An acquaintance of defendant testified that defendant was with her at a laundromat, though he left for about 10 to 15 minutes to eat; when he returned, he was carrying a large box that he was not carrying when he left. A jury instruction conference was held off the record, after which it was spread of record that there were no objections and no request for additional instructions; the jury was instructed on burglary alone. In closing argument, counsel argued in part that defendant could not have burglarized the garage in the time he was absent from the laundromat, so that it was more likely he purchased the jack from the burglar. Following deliberation, the jury found defendant guilty of burglary.

¶ 4 Counsel's general post-trial motion was denied without argument. Defendant sought to file a *pro se* motion but the trial court would not allow it as he had counsel. When the court noted that the decisions made by a defendant include whether to seek a lesser-included-offense

instruction, defendant stated that he asked counsel for such an instruction but counsel "didn't think that was a good idea." The court replied that "I asked you about that" and that counsel "might have been right." Following arguments in aggravation and mitigation, the court sentenced defendant as a mandatory Class X offender to 24 years' imprisonment.

¶ 5 On direct appeal, defendant's sole contention was that his sentence was excessive.

¶ 6 In March 2008, defendant filed a *pro se* post-conviction petition, claiming in relevant part ineffective assistance by trial counsel for not seeking a lesser-included-offense instruction and by appellate counsel for not raising trial counsel's ineffectiveness on direct appeal. In particular, he alleged that when he asked counsel for instructions on theft, counsel replied that it was not a good idea because it would "give the jury something to grasp on to." He also alleged that trial counsel failed to inform him that it was his personal decision whether to seek such instructions.

¶ 7 Post-conviction counsel was appointed for defendant in mid-2008, and in 2009 certified pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that she consulted with defendant and reviewed the record. While post-conviction counsel's certificate of April 29 referred to examining the record "of his guilty plea and sentencing," her May 5 certificate referred to "his trial and sentencing." Both certificates lacked a finding by post conviction counsel that no amendments, or further amendments, were needed to properly raise defendant's claims. Also in 2009, an amended petition was filed,¹ expanding upon other claims in the *pro se* petition and including legal citations.

¶ 8 The State moved to dismiss the petition, arguing in relevant part that it is a defendant's decision whether to seek a lesser-included-offense instruction and that it was a reasonable

¹ The amended petition refers to defendant proceeding both *pro se* and through post-conviction counsel, and is signed by defendant but not signed by post-conviction counsel.

strategy for trial counsel to recommend against such instructions. A response to the motion was filed,² arguing in relevant part that trial counsel did not inform defendant that a lesser-included-offense instruction was his personal decision, and that he would have sought such an instruction from the court had he known it was his decision. The response also noted that trial counsel argued theft in closing argument but then did not seek jury instructions on theft.

¶ 9 In October 2009, following arguments by the State and post-conviction counsel, the circuit court granted the motion to dismiss. In relevant part, the court noted that defendant admitted that trial counsel discussed the possibility of theft instructions. The court stated that it would not presume from the silence of the record that counsel usurped defendant's decision on theft instructions. The court also found that a decision to not seek theft instructions was reasonable because, on the overwhelming evidence of guilt, the all-or-nothing strategy gave defendant a chance at acquittal.

¶ 10 Defendant filed a *pro se* motion for reconsideration. One of the exhibits was an April 2009 letter from post-conviction counsel to defendant stating that she would file her Rule 651(c) certificate, would not file an additional amended petition to defendant's original and amended petitions, and "the petitions that you filed adequately state the reasons as well as the appropriate case law that should be utilized when the court makes its ruling [on] the petition." The reconsideration motion was denied, and defendant appealed.

¶ 11 On appeal, we found that defendant made a substantial showing on his lesser-included-offense instruction claim, and particularly that theft instructions were required if the defense had sought them. Contrary to the circuit court finding that the record was silent on lesser-included-

² The response states that it is brought "by and through" post-conviction counsel but is signed by defendant alone.

offense instructions, defendant raised the issue post-trial. We therefore remanded for an evidentiary hearing on the ineffective assistance claim. *People v. Sanabria*, No. 1-10-0514 (2011)(unpublished order under Supreme Court Rule 23).

¶ 12 At the evidentiary hearing on August 14, 2012, post-conviction counsel gave an opening statement noting that whether to seek a lesser-included-offense instruction is a defendant's personal decision and stating that she would show that defendant was not allowed to make his own decision on that point.

¶ 13 Defendant testified that trial counsel did not inform him of which strategic decisions are his own and which are made by counsel, so that the first time he learned that the lesser-included-offense instruction decision was his own was when the trial court told him so post-trial. He made his own decision on whether to plead guilty and whether to have a bench or jury trial. Though he did not know it was his choice to seek theft instructions, he asked trial counsel for such instructions. Trial counsel told him that it was not a good idea because it would "give the jury something to grasp on," and thus "wasn't going to do it," without mentioning that it was defendant's choice.

¶ 14 On cross-examination, defendant admitted to having known that, due to his extensive criminal history, he faced Class X sentencing if convicted of burglary but also if convicted of theft an extended prison term of up to six years for Class 4 burglary or up to 10 years for Class 3 burglary. He had rejected a State plea offer of 5 years' imprisonment. He also admitted that trial counsel explained to him that the best or only hope of receiving no prison sentence would be precluded by theft instructions. During the instruction conference, defendant was present but did

not tell the court that he wanted theft instructions because "I had an attorney that should have said that."

¶ 15 Trial counsel Richard Kruss testified that he had discussed defendant's case with him, including the evidence and his potential sentencing due to his extensive criminal history. While Kruss could not recall the exact conversation he had with defendant regarding lesser-included-offense instructions, they discussed the possibility of theft instructions and that his prison sentence for theft could be as long as 10 years so that theft instructions would still result in lengthy imprisonment. While Kruss could not recall specifically telling defendant that the theft instructions were his choice, "I have been doing this job for almost 14 years and *** I have always told clients it is their decision whether they wanted to have a lesser included instruction. I never told [defendant] that it was my decision and not his. I never told him he couldn't ask for a lesser included instruction." Had defendant insisted on theft instructions, Kruss would have asked for them "absolutely." "Again, I have a vague recollection of this, but I can tell you the upshot of it is [defendant] did not want a lesser included instruction" because "he didn't want to risk getting 10 years on the case as opposed to rolling the dice and trying for a straight not-guilty." Kruss opined that had the jury been instructed on theft, "I guarantee he would not have been found not guilty of both [theft and burglary]. He would have been found guilty at the minimum of the lesser included instruction *** and maybe still the burglary." Kruss testified that it was by "mutual agreement that he wanted to go for the all-or-nothing strategy."

¶ 16 On cross-examination, Kruss admitted that his closing argument at trial was to the effect that defendant might be guilty of possessing stolen property but not of burglary. However, Kruss explained that he so argued because "at that point there was no lesser included. A jury either

found him guilty of burglary or he was not guilty." In other words, a jury could conclude that defendant came into improper possession of the jack and/or speakers yet also believe that it was unproven he entered the garage, so that he would be found not guilty on the charge of burglary. The theft argument, Kruss explained, was intended to make it "more credible in front of the jury to admit that [defendant] wasn't an angel out there."

¶ 17 In closing argument, post-conviction counsel argued that it was defendant's decision whether to seek lesser-included-offense instructions but defendant testified that trial counsel refused to seek such instructions when defendant asked him for them. Following closing arguments, the court denied defendant relief, finding that Kruss was more credible than defendant, that all-or-nothing was a reasonable strategy here, and that defendant himself chose the all-or-nothing strategy of no theft instructions on Kruss's advice. This appeal followed.

¶ 18 On appeal, defendant first contends that post-conviction counsel provided unreasonable assistance.

¶ 19 There is no constitutional right to the assistance of counsel in proceedings under the Post-Conviction Hearing Act (Act)(725 ILCS 5/122-1 *et seq.* (West 2010)), only the statutory right under the Act to reasonable assistance of counsel. *People v. Thomas*, 2013 IL App (2d) 120646, ¶ 6. Supreme Court Rule 651(c) (eff. Feb. 6, 2013), governing appeals in post-conviction cases, provides that:

"Upon the timely filing of a notice of appeal in a post-conviction proceeding, if the trial court determines that the petitioner is indigent, it shall order that a transcript of the record of the post-conviction proceedings, including a transcript of the evidence, if

any, be prepared and filed with the clerk of the court to which the appeal is taken and shall appoint counsel on appeal, both without cost to the petitioner. The record filed in that court shall contain a showing, which may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner by phone, mail, electronic means or in person to ascertain his or her contentions of deprivation of constitutional rights, has examined the record of the proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions."

" [T]he purpose of Rule 651(c) is to ensure that counsel shapes the petitioner's claims into proper legal form and presents those claims to the court.' " *Thomas*, ¶ 6, quoting *People v. Perkins*, 229 Ill. 2d 34, 44 (2007).

¶ 20 Here, we first reject defendant's argument that post-conviction counsel was required by the express provisions of Rule 651(c) to file another Rule 651(c) certificate following our remand. The Rule does not so require, but instead provides separately that (1) for every appeal in a post-conviction case, transcripts and counsel shall be provided for indigent defendants, and (2) the record on appeal in a post-conviction case must include counsel's showing of review, consultation, and proper presentation of the defendant's claims. Moreover, where -- as here -- this court remands for an evidentiary hearing on a particular claim, it would be redundant to require post-conviction counsel show again that all claims in the record and defendant's knowledge are adequately represented. For the same reason, any unreasonable assistance by

post-conviction counsel in the second stage of proceedings did not prejudice defendant; he has received the *desiderata* of the post-conviction petitioner, an evidentiary hearing, regardless of whether by or despite the efforts of post-conviction counsel.

¶ 21 Only unreasonable assistance by post-conviction counsel at the evidentiary hearing itself could give rise to a claim in this case, and our review of the hearing and preceding proceedings shows no unreasonable assistance. The circuit court shared post-conviction counsel's pre-hearing misapprehension that our remand was for a new Rule 651(c) certificate, and post-conviction counsel argued and questioned at the evidentiary hearing on the lesser-included-offense instruction claim alone so that the misapprehension was timely dispelled. Post-conviction counsel elicited from defendant the elements of his claim, cross-examined Kruss on whether he informed defendant that theft instructions were his choice, and properly focused her closing argument on defendant's testimony that Kruss usurped the lesser-included-offense instruction decision.

¶ 22 Defendant also contends that the circuit court erred in denying him post-conviction relief.

¶ 23 Under the Act, the circuit court may summarily dismiss a petition within 90 days of filing if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition not so dismissed advances to the second stage, where counsel is appointed for an indigent defendant and the State may file a motion to dismiss. 725 ILCS 5/122-2.1(b), -4, -5 (West 2010). If the petition is not dismissed for failing to make a substantial showing of a constitutional violation, it proceeds to a third-stage evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶¶ 33-34.

¶ 24 At an evidentiary hearing, the court serves as a fact finder -- evaluating witness credibility, deciding the weight of testimony and evidence, and resolving any evidentiary

conflicts -- and determines whether the evidence introduced demonstrates that the defendant is entitled to relief. *Id.* Where an evidentiary hearing was held involving fact-finding and credibility determinations, we reverse the resulting decision of the circuit court only where it is manifestly erroneous. *People v. English*, 2013 IL 112890, ¶ 23. Manifest error is an error that is clearly evident, plain, and indisputable. *People v. Brown*, 2013 IL App (1st) 091009, ¶ 53, citing *People v. Johnson*, 206 Ill. 2d 348, 360 (2002).

¶ 25 Here, while defendant testified firmly that Kruss did not tell him that lesser-included-offense instructions were his decision, Kruss testified that he always tells his clients that such instructions are their decision and that he would have requested such instructions here if defendant had insisted. While defendant puts great weight on Kruss's testimony that he could not recall the particulars of his conversation with defendant years later, we do not in light of Kruss's firm testimony that he always tells clients that it is their choice. Also, while defendant puts great weight on the circuit court's finding that not seeking theft instructions was a reasonable strategic decision, the court also expressly found that defendant made that decision. We conclude that the circuit court's denial of post-conviction relief following an evidentiary hearing was not manifestly erroneous.

¶ 26 Accordingly, the judgment of the circuit court is affirmed.

¶ 27 Affirmed.