2022 IL App (4th) 200612-U

NO. 4-20-0612

FILED
May 12, 2022
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	McLean County
REGINALD EARL BROWN,	)	No. 15CF565
Defendant-Appellant.	)	
	)	Honorable
	)	Scott D. Drazewski,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Turner and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding postconviction counsel provided reasonable assistance and the trial court properly denied defendant's petition for postconviction relief.

¶ 2 Defendant, Reginald Earl Brown, appeals from the McLean County circuit court's judgment denying his petition for relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2018)) after a third-stage evidentiary hearing. On appeal, defendant argues he was denied the reasonable assistance of postconviction counsel and asks this court to reverse the circuit court's judgment and remand for a new evidentiary hearing. The State disagrees, arguing the trial court's dismissal was proper and defendant was not denied the reasonable assistance of postconviction counsel. We affirm.

¶ 3 I. BACKGROUND

¶ 4 A. Trial and Direct Appeal

¶ 5 The facts of this case are more fully set forth in this court's Rule 23 order entered on direct appeal. See *People v. Brown*, 2019 IL App (4th) 170284-U; Ill. S. Ct. R. 23(b) (eff. Apr. 1, 2018). Accordingly, we will discuss only those facts necessary to resolve the issue presented in this appeal.

¶ 6 Following a 2017 bench trial, the McLean County circuit court found defendant guilty of one count of unlawful delivery of a controlled substance within 1000 feet of a public housing property (720 ILCS 570/407(B)(2) (West 2014)) and one count of unlawful delivery of a controlled substance (*id.* § 401(d)(i)). The charges stemmed from allegations that on April 27, 2015, defendant knowingly and unlawfully delivered to a confidential police source less than one gram of a substance containing cocaine while within 1000 feet of the Wood Hill Towers public housing property in Bloomington, Illinois.

¶ 7 At trial, the State presented testimony from, *inter alia*, the confidential source, John Walsh, and the lead investigating officer, Detective Raisbeck. As relevant to this appeal, Walsh testified on April 27, 2015, he met with Detective Raisbeck to set up a controlled drug transaction with defendant. Detective Raisbeck provided Walsh with a recording device and $100 to purchase crack cocaine. Walsh then proceeded to defendant's residence and spoke with him about purchasing the crack cocaine. Defendant stated Walsh would have to wait, as defendant needed to make some phone calls. According to Walsh, a woman named Lori Gipson and a man named Dan Butler were also present. Defendant left with Gipson and came back, after which Walsh provided defendant with $100. Defendant left again, and upon return, he provided Walsh with a bag of crack cocaine. Walsh then left and provided the bag to Detective Raisbeck. The video recording capturing the transaction was admitted into evidence and published to the court as People's Exhibit No. 3. On cross-examination, Walsh testified Lori Gipson was his

coworker and in a dating relationship with a man named Nathan Flint. According to Walsh, Flint was not present during the transaction.

¶ 8 Following defendant's arrest, police conducted a video recorded interview with defendant. The video recording was admitted as People's Exhibit No. 5 and published to the court. In the video, defendant recalls Walsh giving him $100 to obtain crack cocaine. Defendant further admits in the video to acting as a "middle man," meaning that he received money or drugs in exchange for finding drugs for customers like Walsh. Defendant did not testify or present any evidence.

¶ 9 The court found defendant guilty of both unlawful delivery of a controlled substance and unlawful delivery of a controlled substance within 1000 feet of a public housing property. At defendant's sentencing hearing, the court found the two convictions merged and sentenced defendant to eight years in prison on the latter charge. Defendant filed a motion to reconsider his sentence, which the trial court denied.

¶ 10 On direct appeal, this court found the State failed to prove beyond a reasonable doubt defendant delivered a controlled substance within 1000 feet of a residential public housing property, vacated that conviction, and remanded the case for resentencing on his conviction for unlawful delivery of a controlled substance. *Brown*, 2019 IL App (4th) 170284-U, ¶ 1. Following a hearing where no additional evidence was presented, the trial court resentenced defendant to eight years in prison. Defendant filed another motion to reconsider his sentence, arguing it was excessive, which the trial court again denied.

¶ 11 Defendant appealed, arguing the trial court abused its discretion at sentencing, and this court affirmed. *People v. Brown*, No. 4-19-0841 (2020) (unpublished summary order under Illinois Supreme Court Rule 23(c)).

¶ 12 B. Postconviction Proceedings

¶ 13 In March 2019, defendant *pro se* filed a postconviction petition alleging, *inter alia*, ineffective assistance of trial counsel. Specifically, defendant alleged his attorney failed to call Nathan Flint as a witness at trial. According to defendant, Flint would have testified it was his girlfriend, Lori Gipson—not defendant—who delivered the drugs to the confidential source on the date of the alleged transaction. The trial court appointed counsel, Kelly Harms, to represent defendant in the postconviction proceedings.

¶ 14 In June 2020, Harms filed an amended postconviction petition arguing (1) trial counsel was ineffective for failing to call Nathan Flint or Lori Gipson as witnesses and (2) appellate counsel was ineffective for failing to raise the issue of ineffective assistance of trial counsel on direct appeal. Harms attached to the amended petition an affidavit from defendant and explained she did not attach an affidavit from Flint because defendant lacked Flint's contact information. Harms also attached a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. July 1, 2017).

¶ 15 In December 2020, the trial court conducted an evidentiary hearing on the amended postconviction petition. At the hearing, defendant testified his trial counsel, Ron Lewis, failed to prepare adequately for trial and did not discuss the discovery materials or trial strategy with him. Additionally, on one occasion, Flint came to the courthouse to meet with Lewis, but Lewis refused to listen to Flint and did not subpoena him as a witness. Defendant's friend, Dennis Terry, was also present during this interaction. According to defendant, Flint attempted to inform Lewis that it was Gipson—not defendant—who provided drugs to Walsh. Defendant testified Flint came to know this through "bedroom talk" with Gipson, as the two were in a

dating relationship at the time. Defendant further testified Flint was at his house during the drug transaction and he remembered seeing Flint in the video recording presented at trial.

¶ 16 Lewis testified he met with defendant at least three times before trial and discussed the discovery materials and trial strategy with him. Lewis also met with defendant whenever defendant had a court appearance, which included 14 dates. Lewis further testified he remembered an individual attempting to speak with him about the case but Lewis believed he would not have been helpful because he was not an "occurrence" witness. Lewis determined, based on his 25 years of experience, he would not have been able to use any information from someone who was not present during the transaction. Lewis decided not to call Lori Gipson as a witness based on her criminal background and chose instead to implicate her in the alleged offense during closing arguments based on Walsh's testimony.

¶ 17 During argument, Harms argued had Lewis investigated Flint and called him to testify, it "definitely" would have shown Lori Gipson "was the party that was the participant in this instance, not [defendant], and that he would have been found not guilty." The State argued defendant failed to demonstrate Lewis was ineffective and Lewis's decision not to call Flint was a matter of trial strategy.

¶ 18 At the conclusion of the hearing, the trial court denied defendant's postconviction petition, finding defendant was not credible and had not shown Lewis's performance was deficient or he was prejudiced by Lewis's performance. The court specifically found even if Flint had been called to testify, and his testimony—which was most likely inadmissible hearsay—was allowed, the State had nonetheless presented more than sufficient evidence to prove defendant guilty of unlawful delivery of a controlled substance beyond a reasonable doubt, as supported by this court's decision on direct appeal. See *Brown*, 2019 IL App (4th) 170284-U, ¶ 1.

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues this court should reverse the trial court's judgment and remand for a new evidentiary hearing because his postconviction counsel, Harms, failed to provide him with reasonable assistance. Specifically, defendant argues Harms (1) neglected to corroborate defendant's allegations with testimony or affidavits from Flint or Terry and (2) in the absence of this corroborating evidence, failed to prove trial counsel's deficient performance prejudiced him. The State responds even presuming Harms's unreasonableness, no reasonable probability exists that, but for her alleged errors, the trial court would have found defendant proved a claim of ineffective assistance of trial counsel. We agree with the State and affirm the trial court's judgment.

¶ 22 A. Postconviction Proceedings

¶ 23 The Postconviction Act sets forth a procedure for a criminal defendant to obtain relief from a substantial denial of his constitutional rights during the proceedings leading to his conviction. 725 ILCS 5/122-1(a)(1) (West 2020). The Postconviction Act provides a three-stage process for the adjudication of postconviction petitions. *People v. English*, 2013 IL 112890, ¶ 23. At the third stage of postconviction proceedings, the trial court conducts an evidentiary hearing where fact-finding and credibility determinations may be made. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). At this stage, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Id.*

¶ 24 In this case, defendant's petition alleged ineffective assistance of trial counsel. To obtain relief, defendant was required to show "that counsel's representation fell below an objective standard of reasonableness and, furthermore, that counsel's actions resulted in

prejudice to the defendant." *People v. Marshall*, 375 Ill. App. 3d 670, 675 (2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). "It is the defendant's burden to affirmatively prove prejudice," which requires a showing that " 'but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland*, 466 U.S. at 694). Trial counsel's failure to call a potential witness to testify at trial may constitute deficient performance under the *Strickland* standard "if the testimony of the witness may exonerate [the] defendant." See *id.* at 676. However, whether such a failure amounts to deficient performance "depends on the value of the evidence to the case." *Id.*

¶ 25 If, after a third-stage evidentiary hearing, the trial court's denial of the petition is based on disputed issues of fact that require credibility determinations, we will reverse that decision only if it is manifestly erroneous. *People v. Coleman*, 183 Ill. 2d 366, 384 (1998). " 'Manifestly erroneous means arbitrary, unreasonable and not based on the evidence.' " *People v. Ballard*, 206 Ill. 2d 151, 162 (2002) (quoting *People v. Wells*, 182 Ill. 2d 471, 481 (1998)). However, if the trial court's decision to deny the petition after a third-stage evidentiary hearing is based on undisputed facts, we review that decision *de novo*. *People v. English*, 2013 IL 112890, ¶ 23. Where, as here, review of a claim of ineffective assistance of counsel involves a mixed question of law and fact, we apply a hybrid standard of review. *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66. Under this hybrid standard, we defer to the trial court's factual findings and will disturb them only if they are against the manifest weight of the evidence; we review *de novo* the court's ultimate determination of whether counsel rendered ineffective assistance. See *id.*

¶ 26 B. Reasonable Assistance of Postconviction Counsel

¶ 27 Additionally, the right to counsel in a postconviction proceeding is not constitutional but rather statutory in nature. *People v. Lander*, 215 Ill. 2d 577, 583 (2005). A postconviction petitioner is therefore only entitled to the level of assistance provided by the Postconviction Act. *People v. Flores*, 153 Ill. 2d 264, 276 (1992). Under the Postconviction Act, counsel is required to provide a "reasonable" level of assistance. *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). "To ensure this level of assistance, Rule 651(c) imposes three duties on appointed postconviction counsel." *People v. Profit*, 2012 IL App (1st) 101307, ¶ 18. Those duties include (1) consultation with the petitioner "to ascertain his contentions of constitutional deprivations," (2) examination of the trial court record, and (3) amendment of the petition to adequately present the petitioner's contentions in proper legal form. *Id.* "Substantial compliance with Rule 651(c) is sufficient," and the filing of the certificate creates a rebuttable presumption that postconviction counsel provided the petitioner reasonable assistance. *Id.* ¶¶ 18-19. Because Harms filed a facially valid Rule 651(c) certificate in this case, "it is defendant's burden to overcome this presumption by demonstrating [Harms's] failure to substantially comply with the duties mandated by Rule 651(c)." *Id.* ¶ 19.

¶ 28 Although this court does not evaluate claims of unreasonable assistance of postconviction counsel under the *Strickland* standard, Illinois courts have considered it " 'an essential standard for comparison.' " *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 37 (quoting *People v. Perkins*, 367 Ill. App. 3d 895, 901 (2006)). Generally, "if postconviction counsel's performance cannot be deemed deficient under *Strickland*, it cannot be said that counsel failed to provide the reasonable level of assistance required under the Act." *Id.* Accordingly, defendant's claim on appeal he was denied reasonable assistance must be supported with evidence he was prejudiced by Harms's failure to call Flint or Gipson as

witnesses or obtain their affidavits. See *People v. Meyers*, 2016 IL App (1st) 142323, ¶¶ 25, 30 (concluding that because the defendant suffered no prejudice from postconviction counsel's failure to call a witness at the evidentiary hearing, his claim of unreasonable assistance failed).

¶ 29 C. This Case

¶ 30 Here, we agree with the State that defendant has failed to show Harms's performance was unreasonable or that he was prejudiced by her alleged errors.

¶ 31 1. *Duty to Amend the Petition*

¶ 32 We first address defendant's argument postconviction counsel's performance was unreasonable because she violated her Rule 651(c) duty to amend the petition for the adequate presentation of defendant's ineffective assistance claim when she failed to attach the affidavits of Flint or Terry or present their testimony at the evidentiary hearing. We disagree.

¶ 33 Defendant testified and asserted in his petition that he did not know Flint's whereabouts or how to contact him. Although we agree with defendant's contention Harms owed defendant a duty to attempt to find Flint and Terry and obtain their affidavits or testimony (see *People v. Sanders*, 2016 IL 118123, ¶ 40), defendant does not provide any evidence Harms failed to do so other than the general assertion she could have contacted the circuit clerk's office for assistance with issuing a subpoena. Typically, if a postconviction petition is not supported by an affidavit in support of the petitioner's claims, the trial court may assume postconviction counsel made a concerted effort to obtain one but was unable to do so. See *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 25. By advancing defendant's petition to the third stage of proceedings, the trial court presumably accepted defendant's explanation as to why Flint's affidavit had not been attached. See 725 ILCS 5/122-2 (West 2020) (stating a postconviction petitioner must attach affidavits or other evidence in support of their claims or explain their absence).

¶ 34 Furthermore, and as explained below, Harms presented defendant's testimony at trial that Flint could have testified it was Lori Gipson who committed the offense in this case. Harms further argued but for trial counsel's failure to present this testimony, it "definitely would have shown that *** [defendant] would have been found not guilty." We find in presenting the available testimony and arguing how it undermined confidence in defendant's conviction, Harms adequately presented defendant's claims to the court in proper legal form.

¶ 35 2. *Failure to Establish Prejudice*

¶ 36 Defendant further argues Harms's performance was deficient because she failed to establish what testimony Flint would have provided, which was necessary to prove the prejudice prong of his *Strickland* claim. We agree with the State's argument there is no reasonable probability that, but for Harms's alleged failure to call Flint or Terry at the evidentiary hearing, defendant would have successfully proved a claim of ineffective assistance of trial counsel.

¶ 37 As an initial matter, the trial court's finding that defendant's testimony and affidavit were not credible was not against the manifest weight of the evidence. In evaluating defendant's credibility versus that of Lewis, the court noted multiple instances where defendant's testimony was refuted by the trial record. Specifically, defendant claimed Lewis only spoke to him about the case "maybe three times"; however, the record showed defendant appeared in court with Lewis 14 different times prior to his trial dates. Defendant testified Flint was, in fact, present for the drug transaction and therefore could corroborate his claim Lori Gipson provided the crack cocaine to Walsh. However, Lewis testified the information Flint provided him indicated he was not present, leading to Lewis's belief Flint's testimony would not be useful or admissible. Lewis's conclusion was consistent with defendant's initial claim Flint knew Gipson

was the culprit based on their "bedroom talk," as the two were in a dating relationship. As the trial court noted, it is not likely such "bedroom talk" would have been admissible at trial. Moreover, Walsh specifically testified at trial that Flint was not present. Based on this record, we cannot say the trial court's finding Lewis's testimony was more credible than defendant's was arbitrary or unreasonable.

¶ 38 Further, we reject defendant's assertion Harms failed to establish what Flint's testimony would have been had he testified at trial. During the evidentiary hearing, Harms asked defendant, "So the information that Nathan Flint had was that it was actually L[ori] Gipson that committed this offense; is that right?" To which defendant responded, "Yes." Harms proceeded to ask how Flint knew that, to which defendant responded that Gipson and Flint were in a dating relationship and expressed his belief that Flint was present during the alleged offense. We conclude this was sufficient to apprise the court of the substance of Flint's potential testimony.

¶ 39 Finally, even assuming postconviction counsel did not attempt to contact Flint, we agree with the trial court that between Walsh's testimony, the audiovisual evidence, and defendant's incriminating statement to police, there is no reasonable probability defendant would have been acquitted had Flint testified at trial—and therefore he could not demonstrate the prejudice required to prove an ineffective assistance claim. Accordingly, there is similarly no reasonable probability had Flint testified at the evidentiary hearing, the trial court would have found defendant proved his claim of ineffective assistance of counsel.

¶ 40 Because defendant cannot demonstrate he was prejudiced by Harms's failure to present testimony or affidavits from Flint or Terry at the evidentiary hearing, we conclude defendant has not shown Harms's representation was unreasonable.

¶ 41 III. CONCLUSION

¶ 42 For the reasons stated, we affirm the trial court's judgment.

¶ 43 Affirmed.