

No. 1-12-0120

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. 93 CR 24566
)	
SAADEEQ SHAHEED,)	Honorable
)	Brian K. Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Howse and Justice Epstein concurred in the judgment.

O R D E R

¶ 1 *Held:* Court did not abuse its discretion in denying discovery on post-conviction petition claiming ineffective assistance of trial counsel for not obtaining victim's undisclosed counseling records.

¶ 2 Following a bench trial, defendant Saadeeq Shaheed was convicted of criminal sexual assault and sentenced to 30 years' imprisonment. We affirmed on direct appeal. *People v. Shaheed*, No. 1-97-0667 (1998)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the dismissal on State motion of his post-conviction petition contending in

relevant part that trial counsel rendered ineffective assistance by not obtaining undisclosed records of the victim's counseling. He contends that the court erred in denying his motion for discovery of the records of the Department of Children and Family Services (DCFS) including the victim's counseling because those records are necessary to evaluate the ineffectiveness claim.

¶ 3 Defendant was charged with aggravated criminal sexual assault and aggravated criminal sexual abuse against F.S., alleged to be under 13 years old at the time of the offenses between May 1, 1992, and September 21, 1993, and between September 22 and 23, 1993.

¶ 4 In discovery, defendant requested all information regarding F.S.'s counseling, therapy, or treatment. In September 1996, trial counsel stated that he had been "told that there is some kind of ongoing counseling or some kind of service being provided to her" while in DCFS custody and demanded the records thereof. A DCFS representative provided the court what he represented to be "all of the records that we have" regarding F.S. and the court examined the records *in camera* and tendered to trial counsel any potentially exculpatory portions. After doing so, the court found in October 1996 that the State had complied with discovery.

¶ 5 At the November 1996 trial, F.S. testified that, in September 1993, she was nine years old and lived with defendant (her stepfather), her mother, and siblings. One day in the middle of said month, when her mother was at work and her siblings were either asleep or outdoors, F.S. fell asleep watching television while lying on defendant's bed, next to defendant who was asleep. When she awoke, her underwear had been pulled aside, defendant was on top of her with his underwear also pulled aside, and he was rubbing his penis on her vagina. F.S. pretended to be asleep until defendant stopped. F.S. reported this to her mother a "couple [of] days" later, and she reported it to police and brought F.S. to a physician. F.S. acknowledged telling her aunt and

nurse Ann Grote on one occasion each that nothing had happened to her. However, she explained that she said so to her aunt because she did not want to testify and to Grote because "my momma told me to tell," and she reiterated that defendant indeed molested her.

¶ 6 An Assistant State's Attorney testified that, in September 1993, F.S. described the aforementioned incident, and defendant gave a statement acknowledging that F.S. would sleep in his bed and that his penis may have touched her leg while he was sleeping on three such occasions. Dr. Joel Feinstein, a physician, testified to examining F.S. three times, in October 1993, January 1994, and July 1994, finding injury that may or may not have been due to sexual trauma in the first two examinations and injury consistent with sexual trauma on the third.

¶ 7 Ann Grote, a nurse specializing in child abuse cases, testified that when she interviewed F.S. alone in September 1993, F.S. described the aforementioned incident and indicated with anatomically-correct dolls what defendant had done to her. F.S. was nervous but able to maintain eye contact with her during the interview. In subsequent interviews in October 1993 and January 1994, F.S. did not recant, though she told Grote that her mother did not believe her. However, at an August 1994 interview after F.S. had been removed from her mother's home, F.S. was visibly anxious and told Grote that she falsely accused defendant because he was "beating on my mom." F.S.'s "whole demeanor was totally changed from when I first met her" – for instance, she could no longer look Grote in the eye – and Grote explained that some child abuse victims change their account because they feel responsible for their family and are attempting to protect it.

¶ 8 Defendant testified, denying any abuse of F.S. Diana Harmon, defendant's niece, testified that F.S. lived with her for a few days in October 1993, during which F.S. told her that

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"my daddy didn't do that." Social worker Jason Thomas testified that, in September 1996, F.S.'s probation officer Dale Estes expressed concern that she was reluctant to testify and may recant, though Estes did not report any actual recantation and Thomas later confirmed with F.S. herself that she was willing to testify.

¶ 9 On this evidence, the court found defendant guilty of two counts each of criminal sexual assault and aggravated criminal sexual abuse.

¶ 10 During the December 1996 sentencing hearing, the State entered a victim impact statement by F.S., stating in relevant part that she had received "counseling *** at the YWCA and the Metropolitan *** about how I am feeling about my abuse." Following evidence and argument in aggravation and mitigation, defendant was sentenced on a single count of criminal sexual assault to an extended prison term of 30 years.

¶ 11 In defendant's motion for a new trial and to reduce sentence, he argued in relevant part that the State failed to disclose the YWCA or Metropolitan counseling despite (1) defendant's discovery request for counseling records and (2) F.S. being in DCFS custody when she received counseling. Defendant asked the court for a new trial preceded by "production of all documents evidencing the counseling, treatment or therapy of" F.S. Following arguments, the court denied the motion.

¶ 12 On direct appeal, defendant contended that the evidence was insufficient to convict. He also contended that the State failed to produce the YWCA and Metropolitan counseling records and so denied his rights to prepare for trial and effectively cross-examine witnesses. We held that defendant forfeited the claim of a discovery error by not seeking a continuance. We also held that the record contains no evidence that said records existed or were in State possession or

that DCFS or the State had been aware of F.S.'s counseling by YWCA or Metropolitan prior to her victim impact statement. Lastly, we held that there was no reasonable probability that disclosure of the records would have changed the outcome of trial: the trial court found F.S. credible after she was cross-examined on – and credibly explained, we found – her inconsistent statements and recantations and after Grote and Harmon also testified regarding the recantations.

¶ 13 In March 1999, defendant filed his *pro se* post-conviction petition, claiming in relevant part ineffective assistance of trial counsel for seeking a mistrial rather than a continuance upon learning of F.S.'s counseling in her victim impact statement.

¶ 14 Counsel was appointed on the petition and, in October 2006, filed a motion for discovery seeking, in relevant part, DCFS records regarding F.S. and her siblings, arguing that they are essential to evaluating trial counsel's effectiveness. The State responded to the discovery motion, arguing that the DCFS records would not be probative to the petition and that using the DCFS records to impeach F.S. would relitigate an issue decided on direct appeal. After argument in November 2006, the court denied the discovery motion in relevant part, noting that it had examined the DCFS records *in camera* and tendered all documents showing inconsistent statements by F.S. so that defendant is relitigating the trial proceedings.

¶ 15 Following continuances to interview witnesses and prepare a supplemental petition, counsel certified in 2011 pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that a supplemental petition was unnecessary.

¶ 16 Also in 2011, the State filed a motion to dismiss the petition, arguing in relevant part that defendant failed to show prejudice from trial counsel's alleged ineffectiveness. On January 6, 2012, the court granted the motion to dismiss following argument. This appeal timely followed.

¶ 17 On appeal, defendant contends that the circuit court erred in denying his motion for discovery of DCFS records including F.S.'s counseling because those records are necessary to evaluate his claim that trial counsel was ineffective for not obtaining the counseling records.

¶ 18 A post-conviction proceeding is a collateral attack on the trial court proceedings, allowing a defendant to challenge substantial deprivations of constitutional rights that were not, and could not have been, adjudicated previously. *People v. English*, 2013 IL 112890, ¶¶ 21-22. Generally, issues decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal but were not are forfeited. *Id.*

¶ 19 There are three stages in post-conviction proceedings. *Id.*, ¶ 23. A petition may be summarily dismissed within 90 days if frivolous or patently without merit; that is, if it has no arguable basis in law or fact. *People v. Domagala*, 2013 IL 113688, ¶ 32. A petition not summarily dismissed proceeds to the second stage, where the State may move to dismiss it. *Id.*,

¶ 33. On such a motion, the circuit court must determine whether the petition makes a substantial showing of a constitutional violation. *Id.* If the defendant succeeds in bearing the burden of making that showing, the petition proceeds to the third stage, an evidentiary hearing. *Id.*, ¶ 34. While the court in a third-stage evidentiary hearing serves as a fact-finder, determining witness credibility and weighing the evidence, evidentiary questions are not resolved at the first or second stages but only the legal sufficiency of the petition. *Id.*, ¶¶ 34-35. All well-pleaded facts not positively rebutted by the trial record are to be taken as true. *Id.*, ¶ 35. Unless an evidentiary hearing was held involving fact-finding and credibility determinations, our review of the disposition of a post-conviction petition is *de novo*. *English*, 2013 IL 112890, ¶ 23; *People v. Brown*, 2013 IL App (1st) 091009, ¶ 52.

¶ 20 A criminal defendant has a constitutional right to the effective assistance of counsel, and a claim of ineffective assistance is subject to a two-prong test whereby the defendant must demonstrate that counsel's performance was deficient -- that is, objectively unreasonable under prevailing professional norms -- and that the deficient performance prejudiced the defendant in that there is a reasonable probability that the result of the proceeding would be different absent counsel's unprofessional errors. *Domagala*, 2013 IL 113688, ¶ 36. A reasonable probability is one sufficient to undermine confidence in the result of the trial; that is, to indicate that trial counsel's deficient performance rendered the result unreliable or the proceedings fundamentally unfair. *People v. Johnson*, 205 Ill. 2d 381, 399 (2002).

¶ 21 While the circuit court has inherent discretionary authority to order discovery in post-conviction proceedings, that authority must be exercised with caution because of the limited scope of such proceedings and the potential for abuse of the discovery process. *People v. Williams*, 209 Ill. 2d 227, 236 (2004). Therefore, discovery should be allowed only when the movant demonstrates good cause, and we review the circuit court's discovery decision regarding discovery for abuse of discretion. *Williams*, 209 Ill. 2d at 234, 236. Good cause is evaluated in light of the claims raised in the petition, scope of the requested discovery, time between the conviction and the post-conviction proceeding, burden of discovery on the State and any witnesses, and availability of the evidence from other sources. *People v. Pinkston*, 2013 IL App (4th) 111147, ¶ 13, citing *Johnson*, 205 Ill. 2d at 408.

¶ 22 Here, this court on direct appeal found that there was not a reasonable probability that disclosure before trial of F.S.'s counseling records with YWCA and Metropolitan would have changed the outcome of trial. That conclusion of no-reasonable-probability is fatal to a finding

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of prejudice from ineffectiveness for not obtaining said records and is thus *res judicata* as to the post-conviction ineffectiveness claim. It is reasonable for the circuit court to conclude that discovery in support of a claim barred by *res judicata* is unnecessary. Moreover, it is reasonable on this record to conclude -- as we also found on direct appeal -- that records of such counseling were and are not in DCFS possession to be produced pursuant either to the post-conviction discovery motion at immediate issue or by trial counsel's discovery at ultimate issue. In September 1996, DCFS represented to the trial court that it provided all of its records regarding F.S., and the court agreed in October 1996 after examining the records. F.S.'s victim-statement disclosure of the counseling at issue followed less than two months later. Under such circumstances, we will not find that the circuit court abused its discretion in denying the discovery motion as to DCFS records.

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

¶ 24 Affirmed.