

No. 1-13-0172

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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. 08 CR 4249
)	
JAMES SMITH,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in the judgment.

ORDER

- ¶ 1 *Held:* Denial of defendant's post-conviction petition affirmed following an evidentiary hearing.
- ¶ 2 Defendant James Smith appeals from an order of the circuit court of Cook County denying his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) following an evidentiary hearing. He contends that he was denied his Sixth Amendment right to the effective assistance of trial counsel which resulted in his making an unknowing and unintelligent waiver of his right to a jury trial.

¶ 3 The record shows that defendant was charged with four counts of attempted first degree murder, two counts of aggravated battery with a firearm, four counts of aggravated discharge of a firearm, and five counts of aggravated battery, in connection with a shooting incident that took place on December 25, 2007. At trial, defendant was represented by private counsel, and waived his right to a jury trial. He was found guilty of two counts of attempted murder on evidence showing that he fired a gun into the apartment of Mary Solomon, striking Bryant Solomon in the foot, and hitting Mary in the shoulder, which caused her to become paralyzed from the chest down. The trial court subsequently sentenced him to an aggregate term of 61 years' imprisonment on his convictions, and defendant appealed. However, that appeal was voluntarily dismissed with prejudice on defendant's own motion. *People v. Smith*, No. 1-09-2261 (2010) (dispositional order).

¶ 4 On April 18, 2011, defendant filed a post-conviction petition through privately retained counsel. He alleged, in relevant part, that due to the ineffective assistance of trial counsel, his decision to waive his right to a jury trial was not made knowingly and with understanding, but rather on erroneous legal advice. He alleged that counsel failed to consult with him in any meaningful way prior to the day of trial, and only met with him once while he was in jail. He maintained that counsel "shirked" his professional responsibilities to consult with, and inform, him of developments in the case, and instead, gave him false hopes that counsel had the case "beat." Defendant was thus "forced" to make his decision on whether to waive a jury trial on the day of trial, when he expected to have a jury trial.

¶ 5 Defendant further alleged that counsel misunderstood the concept himself and failed to explain to him the concept of transferred intent. Defendant maintained that it was "ludicrous" for counsel to argue that the State failed to prove he was the shooter, and that he was not attempting to kill Bryant, and then concede defendant was the shooter when arguing there was no intent to kill Bryant. Defendant claimed he would have insisted on a jury trial if counsel had not told him that he had a good legal argument preventing the State from proving him guilty of attempted murder. Defendant further alleged that counsel told him that he would receive less prison time if he had a bench trial, and did not advise him of the minimum sentence before trial as evidenced by his motion to reconsider in which he indicated that defendant was sentenced to 35 years.

¶ 6 In support of his petition, defendant filed his own affidavit averring that trial counsel only visited him once while he was in jail, and, on the day of trial, convinced him to waive his right to a jury trial. He also averred that counsel never explained the concept of transferred intent, and misadvised him that the State could not prove him guilty of the attempted murder of Mary if the State's witnesses testified and were believed that defendant did not aim at Mary, but rather at Bryant and had only hit him in the foot. Counsel also advised defendant that the judge would likely give him less time if he took a bench trial, rather than a jury trial. Defendant averred that counsel never advised him that he was facing a minimum sentence of 61 years' imprisonment, and that had he known that and had not been told that he had a good legal argument, he would have requested a jury trial.

¶ 7 On April 10, 2012, the State filed a motion to dismiss, alleging that counsel attempted to mitigate defendant's criminal acts, where he would only be responsible for aggravated battery of

a firearm, which carried a considerably less sentence. The State maintained that it was better trial strategy to have a bench trial because the jury would not have understood the subtle nuance that he did not have the specific intent to kill, and could have been easily swayed by the mere sight of the paralyzed victim. The State further alleged that the fact that counsel was not successful does not render his assistance ineffective.

¶ 8 Defendant filed a response, asserting that an evidentiary hearing should be held at which counsel could explain his actions and thought process. He further asserted that proof of prejudice is the denial of the right to a jury trial, which does not require proof that the jury would decide the case differently.

¶ 9 The court denied the State's motion to dismiss, and the matter proceeded to an evidentiary hearing. At that proceeding, defendant's counsel informed the court that all grounds, except the ineffective assistance of counsel claim, were being withdrawn, and defendant indicated his agreement with this decision.

¶ 10 At the hearing, defendant testified that during the pendency of his case, trial counsel visited him once, and at that time, they both agreed to have a jury trial, which was set for April 15, 2009. On that date, counsel met with him in the room behind the courtroom in front of other prisoners, and they discussed whether he should waive his right to a jury trial. Counsel told him that it was in his best interests to do so, explaining that if he had a bench trial, as opposed to a jury trial, the judge would give him a lesser sentence. Defendant testified that counsel never told him the minimum sentence was 61 years' imprisonment, or explained the concept of transferred

intent, and always said that "he had the case beat." Had he known otherwise, defendant claimed he would not have waived his right to a jury trial.

¶ 11 Defendant further testified that on subsequent status dates, counsel would discuss the case with him, but they did not discuss waiving his right to a jury trial. He admitted that he signed a jury waiver, and acknowledged his 2005 convictions for possession of a controlled substance, and delivery of a controlled substance, and his 2002 conviction for possession of a controlled substance.

¶ 12 Trial counsel testified that he has been practicing criminal defense law for 41 years. He testified that at the time defendant was charged, attempted murder carried a sentence of 6 to 30 years' imprisonment with an enhancement of 25 years to life, and that aggravated battery with a firearm had no such enhancement. Counsel stated that he met with defendant once in jail and in the lockup on several occasions. He further testified that he discussed the evidence against him and the potential penalties he was facing, and told him that attempted murder with a firearm had a minimum sentence of 31 years' imprisonment and that aggravated battery with a firearm had a sentencing range of 6 to 30 years. He also told defendant he would try to win against all the counts charged because he did not believe that anyone inside the apartment could see out the windows, and also discussed with him the difference in sentences.

¶ 13 Counsel further testified that on April 15, 2009, he met with defendant in the lock-up behind the judge's courtroom, and was prepared to conduct a jury trial. However, he told defendant that the jury would be unsympathetic to his case if he was identified as the shooter which left one of the victims paralyzed. Counsel acknowledged that a conversation regarding

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defendant waiving his right to a jury trial should take place in private, and requires thought, care and time. However, counsel denied ever telling defendant that "he had the case beat," but rather that he did not believe the judge would find him guilty of attempted murder while discharging a firearm because he did not believe that defendant intended to kill anyone.

¶ 14 He also discussed with defendant the concept of transferred intent, and told him that if he did not have specific intent to kill, he would only be found guilty of aggravated battery with a firearm if he were identified as the shooter. Counsel also discussed consecutive sentencing with defendant, but expected that there would be a finding of not guilty with regard to the attempted murder of Mary because she was not his intended victim, and that the injury sustained by her was not attributed to any intent on defendant's part to harm her. Counsel explained that under the concept of transferred intent, if defendant did not have the specific intent to kill anyone, the result would be, at worst, an aggravated battery with a firearm conviction. Counsel further testified that the drapes were closed in the apartment in question, and that he still cannot imagine how anyone could see through them and identify defendant as the shooter. Counsel also stated that defendant's statement, "where is that nigger," did not rise to the level of specific intent to kill. Counsel explained that specific intent is held to a very high standard by the judges, and that juries do not understand the concept well enough to differentiate between intent and specific intent. Notwithstanding, the trial court found defendant guilty of the attempted murder of both victims under the concept of transferred intent.

¶ 15 Counsel also testified that he never guaranteed defendant that he would be found not guilty of all charges, and told him that he would get less prison time if he was found guilty of

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aggravated battery with a firearm as opposed to attempted murder with a firearm. He also told defendant that his chances were far better to be found guilty of the lesser included offense of aggravated battery with a firearm through a bench trial, but did not promise defendant anything, and defendant ultimately chose to proceed with a bench trial.

¶ 16 Counsel further testified that he filed a motion to reconsider the sentence of 61 years' imprisonment imposed by the trial court, and acknowledged that the motion reflects that defendant was sentenced to 35 years' imprisonment. Counsel attributed this to a clerical error, and that he knew the minimum sentence was 61 years.

¶ 17 At the close of evidence, the court found trial counsel credible, and that his advice was reasonable and sound. The court further observed that counsel believed that he could win the case, and still seemed upset over the loss, but that he did not guarantee defendant victory. Counsel believed that a jury would have a harder time overlooking Mary in the wheelchair as opposed to a judge, and that the State would not be able to prove specific intent. Based on these factors, counsel recommended a bench trial, and although the discussion regarding jury waiver would have been better had on a day other than the day of trial, the court concluded that defendant voluntarily and knowingly waived his right to a jury trial. The court noted that counsel was experienced and knowledgeable, as well as competent, and advised defendant as to best way to proceed. Accordingly, the court denied defendant's post-conviction petition.

¶ 18 Defendant now challenges that ruling on appeal. He contends that he the court erred in denying his petition based on ineffective assistance of trial counsel, and requests this court to reverse the circuit court's decision and grant him a new trial.

¶ 19 As an initial matter, defendant contends that the standard of review is *de novo* because some of his issues involve legal matters. Such a standard is appropriate where the trial court's decision is necessarily based upon its review of the pleadings and the trial transcripts and not on the assessment of the credibility of the witnesses. *People v. Slover*, 2011 IL App (4th) 100276, ¶13. Here, however, where an evidentiary hearing was held, and factual findings and credibility determinations were made, the circuit court's decision will not be reversed unless it is manifestly erroneous, *i.e.*, error that is "clearly evident, plain, and indisputable." *People v. Beaman*, 229 Ill. 2d 56, 72-73 (2008), and cases cited therein. This deferential standard reflects the understanding that the circuit court is in the best position to observe and weigh the credibility of the witnesses. *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998).

¶ 20 To prevail on a claim of ineffective assistance, defendant must show that his counsel's performance was both deficient and prejudicial. *Strickland v. Washington*, 466 U.S. 668 (1984). For the reasons that follow, we find that defendant failed to show that his counsel's performance was deficient, and, accordingly, the denial of his petition was not manifestly erroneous.

¶ 21 Defendant contends that counsel met with him only once, and made him decide on the day of trial to waive his right to a jury trial. He claims that counsel "shirked" his responsibilities to thoroughly consult with him, in a private setting, so that he could make an informed decision about waiving his right to a jury trial, and that this unprofessional conduct caused his waiver to be unknowing and unintelligent.

¶ 22 Contrary to defendant's contention, the evidentiary hearing revealed that counsel met with him, and discussed his case with defendant numerous times. On the day of trial, he

recommended a bench trial after seeing the young paralyzed victim in the wheel chair. Seeking the best strategy for defendant, counsel opined that a bench trial was better because a jury would be less sympathetic to defendant upon seeing the victim. The evidence thus shows that counsel's recommendation regarding the type of trial to be had related to trial strategy, which does not constitute ineffective assistance. *People v. Powell*, 281 Ill. App. 3d 68, 74 (1996).

¶ 23 Defendant further contends that counsel failed to explain the concept of transferred intent to him. He further contends that he misunderstood the concept, and was therefore convinced to proceed with a bench trial based on erroneous legal advice. He maintains that counsel conveyed to him that he had a good legal defense to attempted murder based on counsel's misunderstanding of the concept of transferred intent even though there was no chance counsel's theory would be accepted by a learned and experienced trial judge. He thus maintains that this court should find counsel's advice unreasonable.

¶ 24 Defendant does not explain how counsel's alleged misunderstanding of transferred intent caused him to waive his right to a jury trial. His statement of error in this regard, like others made here, is conclusory and lacking in specificity, and provides no basis for finding the denial of his petition manifestly erroneous. Moreover, the record shows that counsel testified that he advised defendant on the concept of transferred intent, and there is no indication that counsel did not understand that concept which, as is relevant to this case, provides that if defendant intended to murder Bryant, then his intent transferred to Mary who was also shot. *People v. Migliore*, 170 Ill. App. 3d 581, 589 (1988).

¶ 25 Defendant, nonetheless, maintains that he thought there were realistic options for getting a lesser included verdict and/or lesser sentence by taking a bench trial based on misadvice from counsel specifically, that the State would be unable to prove attempted murder based on its inability to prove specific intent, and that he would be sentenced to less time if he had a bench trial as opposed to a jury trial. He claims that he did not know he was facing an all or nothing defense, namely, that he would either be proved to be the shooter or not, and that had he known this, he would have elected a jury trial.

¶ 26 Defendant claims that counsel unreasonably advised him that even if identity was proven, the State would be unable to prove specific intent which is required for an attempted murder conviction. We find this advice to be one of trial strategy, which this court will not second-guess. *People v. Popoca*, 245 Ill. App. 3d 948, 959 (1993). Neither mistakes in strategy, nor the fact that another attorney with the benefit of hindsight would have handled the case differently will support a finding of incompetence. *People v. Young*, 341 Ill. App. 3d 379, 383 (2003).

¶ 27 Notwithstanding, defendant further contests the credibility of trial counsel. He claims that counsel advised him, contrary to counsel's assertion at the evidentiary hearing, that he would receive less time if he had a bench trial, and he was unaware as to the length of the sentence he could receive. We observe that counsel testified that he advised defendant of the correct minimum time he was facing, and that the error in his motion to reconsider was clerical. In any event, these matters relate to credibility, a determination made by the trial court in favor of trial counsel and provide no basis for reversal. *Coleman*, 183 Ill. 2d at 384-85. Furthermore, and contrary to defendant's contention, as there were no errors by counsel as claimed by defendant,

there is no cumulative effect demonstrating that his waiver of a jury trial was not made intelligently and based on sound legal advice.

¶ 28 In reaching this conclusion, we find *People v. Smith*, 326 Ill. App. 3d 831, 848 (2001), cited by defendant, to be factually distinguishable from the case at bar. In *Smith*, counsel allegedly advised defendant that it would be better to take a bench trial because the judge owed him a favor and would have information not available to the jury. Here, unlike *Smith*, counsel did not act in a professionally unreasonable manner by indicating some favorable return from the court, for something unrelated to the evidence and unlike *Smith*, counsel in this case did not provide defendant with erroneous advice.

¶ 29 In light of the foregoing, we find no manifest error by the court in denying defendant's post-conviction petition following an evidentiary hearing, and affirm the order of the circuit court of Cook County to that effect.

¶ 30 Affirmed.