

NOTICE

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2017 IL App (5th) 140261-U

NO. 5-14-0261

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Madison County.
)	
v.)	No. 07-CF-541
)	
KEVIN M. SCOTT,)	Honorable
)	James Hackett,
Defendant-Appellant.)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying defendant's petition for postconviction relief following a third-stage evidentiary hearing because the ruling was not manifestly erroneous. We affirm.

¶ 2 Following a bench trial before the circuit court of Madison County, the defendant was convicted of first-degree murder and aggravated kidnapping. The trial court sentenced the defendant to a term of imprisonment of 34 years on the charge of first-degree murder, and a consecutive term of 7 years on the charge of aggravated kidnapping. The defendant appealed and we affirmed the judgment and sentence. *People v. Scott*, 2011 IL App (5th) 090002-U. At a hearing for postconviction relief, the

defendant argued that his defense counsel was ineffective for failing to challenge his fitness to stand trial, suppress statements to the police, effectively cross-examine witnesses, and call witnesses for the defense. He further contended that his appellate counsel was ineffective for failing to raise these issues on direct appeal. The trial court denied the defendant's petition for postconviction relief. We affirm.

¶ 3 On February 24, 2007, Ernest Walker was found dead in Wellston, Missouri. Witnesses told investigators from the Alton police department that Ernest's death was the result of a series of three beatings in Illinois and Missouri. The defendant was implicated as a participant in those beatings and in transporting Ernest, against his will, from Alton, Illinois, to Wellston, Missouri. The defendant was charged with first-degree murder and aggravated kidnapping, along with codefendant Eric Swisher and others. The defendant's girlfriend, Sigrid Hickman, was charged with concealment of a homicidal death. Hickman testified against the defendant at his trial. Neither the State nor the defense called Swisher as a witness. Although the defendant chose not to testify, the State presented a videotape of the defendant's interview with Alton police officers. The trial court found the defendant guilty on both counts. The defendant appealed, and we affirmed the sentence.

¶ 4 Upon denial of the direct appeal, the defendant filed a *pro se* petition for postconviction relief, alleging that both trial and appellate counsel were ineffective. See 725 ILCS 5/122-1 *et seq.* (West 2012). The trial court appointed postconviction counsel for the defendant. On September 27, 2013, postconviction counsel filed an amended postconviction petition, and requested a hearing. The State filed a motion to dismiss the

amended petition. The trial court did not rule on the State's motion to dismiss. Instead, on March 5, 2014, the trial court held a hearing on the defendant's amended petition. At the outset of the hearing, the court asked the defense if it would like to have any witnesses present. Defense counsel responded that he intended to call the defendant to the witness stand. The defendant was placed under oath and submitted to questioning by both parties.

¶ 5 The defendant testified about the allegations in his petition. He stated that defense counsel never raised what the defendant referred to as a "comprehension disability" to have him found unfit to stand trial, or to suppress his statements to the police. The defendant claimed that one of the State's witnesses lied under oath because she was threatened by the State, and that she was not effectively cross-examined. Regarding this claim, the defendant later acknowledged that he had not discussed this with the witness, and that he was speculating as to whether these threats occurred. The defendant discussed codefendant Swisher's affidavit. He noted that no subpoena was issued to procure Swisher's presence at trial. The defendant claimed that Swisher's testimony would have been substantially as follows: The defendant and the victim had a confrontation, the victim was alive the last time the defendant saw him, and the victim was taken away from the scene by other people. The defendant ultimately claimed he did not have any part in the victim's death.

¶ 6 Defense counsel was then called to testify. He stated the defendant never told him he was mentally disabled, nor did he observe signs of impairment. He testified that the defendant was able to review the discovery pretrial, and participate in the trial proceedings. He stated he did not file a motion to suppress the defendant's statement

because it did not appear to be coerced. He testified he cross-examined witnesses regarding their level of intoxication at the time of the offense. Defense counsel stated that Swisher was present in the courthouse, and available to testify at trial. Based on defense counsel's review of the discovery, he anticipated Swisher's testimony would be harmful to the defense. He testified that Swisher's attorney confirmed this at the time of trial. He claimed he advised the defendant not to testify in his own defense, so as to keep Swisher from being able to testify in rebuttal, and the defendant agreed.

¶ 7 On May 22, 2014, the trial court issued an order denying the defendant's amended postconviction petition. This appeal followed.

¶ 8 The defendant argues the trial court erred in dismissing the defendant's postconviction petition at a second-stage proceeding without an evidentiary hearing, because the defendant made a substantial showing of a constitutional violation. The State argues that the defendant's postconviction petition was properly denied after a third-stage evidentiary hearing where he failed to make a substantial showing of a constitutional violation. Therefore, we must first resolve whether the trial court dismissed the petition at the second or third stage of the proceedings.

¶ 9 The Post-Conviction Hearing Act provides a three-stage proceeding in which a defendant may challenge his conviction by alleging a substantial denial of constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2008). To survive a summary dismissal during the first stage, a defendant's *pro se* petition need only set forth the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). If the defendant meets his burden of setting forth the gist of a constitutional claim, counsel is

appointed, and the matter is set for a second-stage proceeding. 725 ILCS 5/122-2.1(b), 122-4 (West 2008).

¶ 10 During the second stage, the trial court makes no findings of fact or credibility determinations, because all well-pleaded facts not rebutted by the record are presumed to be true. *People v. Coleman*, 183 Ill. 2d 366, 380-81, 701 N.E.2d 1063, 1071 (1998). Petitions may be summarily dismissed as frivolous, or patently without merit, only if they contain no arguable basis in law or fact. 725 ILCS 5/122-2.1(a)(2) (West 2008); *Coleman*, 183 Ill. 2d at 379, 701 N.E.2d at 1071. The defendant bears the burden to make a substantial showing of a constitutional violation for the trial court to order a third-stage evidentiary hearing. *People v. Pendleton*, 223 Ill. 2d 458, 472-73, 861 N.E.2d 999, 1008 (2006).

¶ 11 At a third-stage hearing, the trial court hears live testimony, considers affidavits, and may entertain other evidence to make findings of fact and credibility determinations. *People v. Beaman*, 229 Ill. 2d 56, 72, 890 N.E.2d 500, 509 (2008). The defendant bears the burden of proving that a substantial deprivation of constitutional rights occurred at trial to obtain postconviction relief. *Coleman*, 183 Ill. 2d at 381, 701 N.E.2d at 1072. A reviewing court may only reverse a third-stage ruling that is manifestly erroneous. *Coleman*, 183 Ill. 2d at 384-85, 701 N.E.2d at 1073. The standard of review for dismissal of a postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 389, 701 N.E.2d at 1075.

¶ 12 In this case, despite the trial court's failure to rule on the State's motion to dismiss, the parties participated in a hearing on March 5, 2014. Neither party objected to the proceeding at that time. At this hearing, the defendant and his trial counsel gave sworn

testimony, and Swisher's affidavit was considered. At the conclusion of this proceeding, the trial court made findings of fact and credibility determinations. Specifically, in its May 22, 2014, order denying the defendant's amended postconviction petition, the court found that the defendant's claims of ineffective assistance of counsel were insufficient to show deficient performance by his attorney. The court also made a finding that the evidence presented did not demonstrate a significant probability that counsel's performance was in any way prejudicial to the defendant. Additionally, the court found that even if appellate counsel failed to raise certain issues, such a failure was neither objectively unreasonable nor prejudicial. Finally, the court made a credibility determination. The court determined that defense counsel offered clear and satisfactory explanations for all his efforts and decisions. Because live testimony was heard, an affidavit was considered, and factual findings and credibility determinations were made, this proceeding qualified as a third-stage evidentiary hearing.

¶ 13 We turn next to whether the trial court's denial of the defendant's postconviction petition, based on allegations of ineffective assistance of counsel, was manifestly erroneous. A ruling is manifestly erroneous where error is clearly evident, plain, and indisputable. *People v. Slover*, 2011 IL App (4th) 100276, ¶ 17, 959 N.E.2d 72. A reviewing court must afford great deference to the trial court's findings because of its superior position in gauging the weight and credibility of the evidence presented at the hearing. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 31, 40 N.E.3d 1235.

¶ 14 The defendant argues that defense counsel was ineffective for several reasons. First, he claims defense counsel should have sought to challenge the defendant's fitness

to stand trial, and to suppress the defendant's statements to law enforcement, based on a "comprehension disability." Next, the defendant claims defense counsel failed to properly cross-examine witnesses at trial. Finally, he alleges that defense counsel failed to subpoena Swisher and call him as a witness at trial. The defendant also alleges that appellate counsel was ineffective for failing to raise any of the above-mentioned issues on direct appeal. We address each of these allegations in turn.

¶ 15 To prove an ineffective assistance of counsel claim, a defendant must prove: (1) the defense attorney's representation fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by the deficient representation. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 125 Ill. 2d 100, 531 N.E.2d 17 (1988). If an ineffective-assistance claim can be disposed of on the ground that the defendant did not suffer prejudice, a court need not decide whether counsel's representation was constitutionally deficient. *People v. Flores*, 153 Ill. 2d 264, 283-84, 606 N.E.2d 1078, 1087 (1992). To prove prejudice occurred, a defendant must show a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

¶ 16 We first address the defendant's contention that trial counsel was ineffective for failing to properly address his "comprehension disability" appropriately. Defense counsel will only be found ineffective for failure to raise the issue of fitness to stand trial where a *bona fide* doubt existed as to the defendant's fitness. *People v. Easley*, 192 Ill. 2d 307, 318-19, 736 N.E.2d 975, 985 (2000). That the defendant suffers from mental disturbances does not necessarily raise a *bona fide* doubt of his ability to consult with counsel. *People*

v. Eddmonds, 143 Ill. 2d 501, 519, 578 N.E.2d 952, 960 (1991). Fitness only relates to a person's ability to function within the context of a trial; a defendant may be fit to stand trial even though his mind is otherwise unsound. *People v. Griffin*, 178 Ill. 2d 65, 79, 687 N.E.2d 820, 830 (1997). The defendant must show that facts existed at the time of the trial that indicated his diminished ability to understand the nature and purpose of the proceedings and to assist in his defense. *Easley*, 192 Ill. 2d at 319, 736 N.E.2d at 985. The defendant must further show that the trial court would have found a *bona fide* doubt and ordered a fitness hearing if given the opportunity. *Easley*, 192 Ill. 2d at 319, 736 N.E.2d at 986. Relevant factors for a trial court to consider in determining whether a *bona fide* doubt existed include a defendant's irrational behavior, the defendant's demeanor at trial, and any prior medical opinion on the defendant's fitness to stand trial. *Eddmonds*, 143 Ill. 2d at 518, 578 N.E.2d at 959.

¶ 17 Here, the defendant testified that defense counsel was aware he suffered from a "comprehension disability." Attached to the defendant's *pro se* petition were two social security administration documents indicating the defendant had been considered disabled since a 1998 hearing on the matter. These documents appear to have been acquired by the defendant as recently as the summer of 2012. He testified that he had been receiving supplemental social security income since he was originally declared disabled. These documents do not, however, indicate that a medical opinion on the defendant's fitness to stand trial was considered at the hearing, and the defendant presented no such medical opinion to the trial court. Likewise, the defendant presented no evidence that the trial court would have found a *bona fide* doubt and ordered a fitness hearing if given the

opportunity.

¶ 18 Defense counsel testified that the defendant never informed him of this disability, and he never had any issues with the defendant's demeanor or ability to understand the proceedings. He testified that the defendant reviewed a large amount of pretrial discovery, independently and under his supervision. He stated that during the trial, the defendant was able to take notes and assist with his defense. Defense counsel further testified that there was no basis for suppressing the defendant's statements because the defendant showed no signs of cognitive problems, and the interviews did not appear to be coercive.

¶ 19 Regarding the allegations that defense counsel failed to address the defendant's mental disability, or to seek to suppress his statements, we hold the defense attorney's representation did not fall below an objective standard of reasonableness. Further, the defendant presented no evidence to establish a reasonable probability that but for trial counsel's failure to raise the issue of fitness, the result of the proceeding would have been different. Nor did he show that the trial court would have found a *bona fide* doubt and ordered a fitness hearing, if given the opportunity. Therefore, the defendant failed to prove he was prejudiced by trial counsel's allegedly deficient representation.

¶ 20 We now address the defendant's remaining claims that defense counsel failed to effectively call and question witnesses. Generally speaking, whether to call particular witnesses and the manner and extent of cross-examination are matters of trial strategy that will not ordinarily support an ineffective-assistance-of-counsel claim. *People v. Watson*, 2012 IL App (2d) 091328, ¶ 32, 965 N.E.2d 474. Defense counsel is not required

to call a witness if he reasonably believes that individual's testimony would be harmful to the defendant. *People v. Flores*, 128 Ill. 2d 66, 106, 538 N.E.2d 481, 498 (1989). Defense counsel testified that he did not want to call Swisher as a witness because his statement was not favorable to the defendant. He stated that Swisher was physically present in the courthouse, and available to testify at the time of the trial, but defense counsel had learned through speaking with Swisher's attorney that he intended to implicate the defendant in the murder. The State did not call Swisher in its case-in-chief. After the State rested, the defendant and defense counsel collectively agreed that it would be in the defendant's best interest not to testify to prevent Swisher from being called as an impeachment witness for the State. This appears to be a matter of sound trial strategy. Accordingly, the defendant failed to prove that defense counsel's failure to call Swisher as a witness fell below an objective standard of reasonableness, or that this decision caused the defendant prejudice.

¶ 21 The defendant alleges that defense counsel's representation was ineffective because he failed to question State witnesses about their state of intoxication at the time. This allegation appears to be unfounded. Defense counsel asked Hickman whether she remembered drinking that day with the individuals involved. She responded that she did. He inquired as to whether she remembered buying alcohol with them, and the degree to which certain individuals became intoxicated. Defense counsel testified consistently with this at the third-stage hearing on the defendant's postconviction petition. We find that trial counsel eliciting testimony about the level of intoxication of the State's witnesses in no way prejudiced the defendant.

¶ 22 The defendant alleges in a separate claim that defense counsel failed to effectively cross-examine Hickman. As we stated before, the manner and extent of cross-examination are matters of trial strategy that will not ordinarily support an ineffective-assistance-of-counsel claim. *Watson*, 2012 IL App (2d) 091328, ¶ 32, 965 N.E.2d 474. Defense counsel first attempted to impeach Hickman's credibility with her pending felony, pointing out the possibility of losing her children and going to prison. He was able to elicit testimony from her that various individuals could have had access to her vehicle that night. She revealed she did not witness the victim being placed in the trunk of her car, or the vehicle's departure. She testified that Swisher came to her apartment later and asked her to launder his clothes, which she did. Finally, she confirmed that she had given two statements to police, and that she did not disclose all of the details of her story during the first interview. After the State briefly questioned Hickman on redirect, defense counsel had no further questions. We find that defense counsel's cross-examination of Hickman was objectively reasonable, and that it caused the defendant no prejudice.

¶ 23 Finally, the defendant alleges that appellate counsel was ineffective for failing to raise each of the claims we have so far discussed. The *Strickland* analysis also applies to appellate counsel. *People v. Mahaffey*, 165 Ill. 2d 445, 458, 651 N.E.2d 174, 182 (1995). It is not ineffective assistance of counsel to refrain from raising meritless issues, unless counsel's appraisal of the merits is patently wrong. *Easley*, 192 Ill. 2d at 329, 736 N.E.2d at 991. Since we determined that defense counsel's representation did not satisfy the *Strickland* test regarding each of the defendant's claims, it follows that appellate

counsel's failure to raise them on direct appeal also fails to satisfy the *Strickland* test.

¶ 24 In conclusion, we hold that the defendant failed to prove that a substantial deprivation of constitutional rights occurred, and the trial court's order denying the defendant's amended postconviction petition, following a third-stage evidentiary hearing, was not manifestly erroneous.

¶ 25 For the foregoing reasons, we affirm the trial court's judgment.

¶ 26 Affirmed.