2018 IL App (2d) 151198-U
No. 2-15-1198
Order filed June 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. HENRY MACK, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 07-CF-222 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's postconviction petition, which alleged that trial counsel was ineffective for introducing evidence of defendant's prior conviction: although the conviction was improper impeachment evidence under *Montgomery*, the record did not rebut the presumption that the court at a bench trial does not consider improper evidence, and thus defendant was not prejudiced by the introduction of the evidence.

¶ 2 Defendant appeals after the third-stage denial of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). He asserts that the trial court erred in denying his ineffective-assistance-of-counsel claim; he claimed that his counsel for his bench trial on three counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1)

(West 2006)) was ineffective for having him testify about a prior conviction, which was inadmissible under the rule in *People v. Montgomery*, 47 Ill. 2d 510 (1971). The State contends that, because we must presume that a court in a bench trial does not consider improper evidence, we must apply that presumption to conclude that defendant's testimony about the prior conviction could not have prejudiced him. We agree with the State that that presumption is applicable, and we find that defendant has not rebutted it. We thus conclude that defendant's ineffective-assistance-of-counsel claim necessarily failed for want of a showing of prejudice, and we affirm the trial court's denial of the petition.

¶ 3 I. BACKGROUND

¶ 4 In 2007, defendant was charged by indictment with three counts of predatory criminal sexual assault of a child. The assaults were alleged to have taken place between August 1, 2003, and April 30, 2006, and were against a single victim, D.H. The counts were distinguished by the time each covered: count I alleged an assault occurring between August 1, 2003, and August 31, 2004; count II alleged an assault occurring between August 1, 2004, and August 31, 2005; and count III alleged an assault occurring between August 1, 2005, and April 30, 2006. Defendant had a bench trial. In this appeal, he endorses the characterization of the evidence at that trial that we set out in his direct appeal: "the petitioner respectfully refers this Court to the Rule 23 Order [(*People v. Mack*, No. 2-09-0170 (2010) (unpublished order under Illinois Supreme Court Rule 23))] issued by this Court on December 28, 2010, for a recitation of the evidence adduced at trial."

¶ 5 At trial, a recorded forensic interview of D.H. and D.H.'s trial testimony formed the core of the State's evidence: although the State had witnesses whose testimony bolstered D.H.'s in- and out-of-court statements, the statements themselves were the only evidence of the assaults as

such. D.H. testified that she was born on January 31, 1996, and was 12 years old at the time of the trial, which started on December 16, 2008. She started living with her mother as a five-year-old. She had also lived with her grandmother, possibly before she started living with her mother, but clearly also until her grandmother died, which was a year before the trial. The earliest assaults to which D.H. testified took place about five years before the trial, when she was seven years old.

¶ 6 D.H. testified that defendant had been her mother's boyfriend. He had lived with her, her mother and her younger brother, P.M., as they moved from address to address. Defendant's assaults on her took place at three addresses:

> "When the State asked [D.H.] whether, 'beginning in the winter of 2003 going into 2004,' defendant had ever asked her to go into her mother's bedroom [at the first address] on Page Street, the victim responded 'yes.' [D.H.] testified that defendant asked her in the bedroom to do him a favor. He pulled his pants down, told the victim to get down, and pushed her head onto his penis. The victim testified that this activity occurred more than five times in the Page Street house. Something would come out of defendant's penis that tasted 'nasty.' The victim testified she would spit it out on a towel and then go into the bathroom and rinse her mouth out. While this was taking place, P.M. would be either in the living room or in the bedroom that he shared with the victim. [D.H.'s] mother was never at home when this took place. Sometimes defendant had the victim put her hand around his penis and move her hand up and down.
>
> [She] further testified that, at the Page Street residence, defendant had her watch a blue[-colored] videotape that showed a male and female engaging in oral sex. Defendant had her watch the tape in her bedroom.' ***

> [She] testified that the family next moved to Exchange Street in Sycamore. The victim testified that defendant continued to place his penis in her mouth after they moved. It happened more than once at the Exchange Street residence but the victim could not say whether it happened more than 10 times. The victim testified that it generally happened in the afternoon when P.M.was outside playing.
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> [D.H.] testified that the family moved to a residence on North Cross Street in Sycamore. [She] could not remember whether her mother was still working when they lived there. There were times when defendant would pick up [her] and P.M. from school. Defendant would have [her] go into his and her mother's bedroom, where he would sometimes turn on the videotape and have her get on her knees and lick his penis. This happened more than once at this residence. The victim recalled a time when defendant had her lick chocolate sauce from his penis. The chocolate was in a little jar that her mother received for Christmas.
>
> [D.H.] could not remember the last time when defendant had her perform oral sex on him. When the State asked the victim to think back to when the school year ended in 2006, [she] guessed that the last time was 'during the summer.' There came a time when defendant stopped living with the victim, her mother, and her brother. The victim did not see defendant after he moved out." *Mack*, No. 2-09-0170 (2010) at 2-4.

¶ 7 D.H. testified that she had disclosed the assaults to her aunt, Ikina K., after she and a school friend, D., talked together about D.'s having disclosed a rape by her stepfather. Ikina and a cousin, whom she also told, persuaded D.H. to tell her mother about the assaults. D.H. denied that anyone—Ikina, her mother, or the forensic interviewer—had ever told her what to say. Ikina told D.H. to tell her mother the same thing that D.H. had told Ikina.

¶ 8 D.H.'s mother, Alyssa W., testified as a witness for the State that she, defendant, D.H., and P.M., who was born on November 26, 1998, lived on Page Street in Sycamore in 2003 and 2004. They then moved to Exchange Street. Alyssa said that one of her sisters, Kim, probably stayed there with them "a little while" after Alyssa's grandmother died. They lived in the Exchange Street house for less than a year and then moved to North Cross Street.

¶ 9 Tracy Mueller, a forensic interviewer, testified primarily to provide a foundation for introducing a recording of her interview of D.H. However, Mueller also testified that D.H.'s notably calm demeanor during the interview was an indication of sustained abuse.

¶ 10 The State and defendant stipulated to the admission of DNA test results:

> "One, that a purple bean bag chair was referred to in the plaintiff's case in chief at the trial of the cause, although not placed in evidence; [two,] that the piece of evidence purple bean bag chair was examined previously by members of the Illinois State Police crime lab and human DNA was found thereon; three, that a buccal swab or buccal sample was taken from the mouth of defendant *** and compared to the sample taken from the bean bag chair but no match was made."

¶ 11 Defendant's brother, Caprice Mack, was defendant's first witness. His testimony contradicted many details of D.H.'s statements, particularly as to how often defendant could have been alone with her. He implied that Alyssa W. met defendant in about 1992. He described P.M. as defendant's son. Defendant and Alyssa had started living together over three years before the trial. He agreed that he had convictions of offenses involving deception as well as of a drug offense.

¶ 12 P.M. also testified for defendant. He recognized defendant as his father and gave evidence that contradicted D.H. as to the location of the blue-colored videotape at a particular

time.

¶ 13 Defendant was one of six defense witnesses. Defense counsel, while having defendant introduce himself, raised the matter of defendant's prior conviction:

"[Defense counsel] Q. It's true, is it not, *** that you have a prior felony conviction?

[Defendant] A. Yes, I do.

Q. Can you tell us the first—if you have more than one, could you tell us the first prior felony conviction that you have earliest in time?

A. I have a drug-related offense non-violent that occurred about 16 years ago in 1993, I believe it was.

Q. That was not in this county, was it?

A. Yes, it was in this county.

Q. And what was your sentence in that case?

A. Eight years.

Q. That was in the Department of Corrections?

A. Correct.

Q. Do you have any other adult felony convictions, sir?

A. No.

Q. Any misdemeanors?

A. No[,] *** I don't have any more convictions. I have a pending."

Defendant then testified that he had "fathered a child," P.M., with Alyssa, and that P.M. was now 10 years old. He met Alyssa in what he thought was the summer of 1992—that is, before his drug conviction. He and Alyssa "lived in University Village [in Rockford] when [Alyssa]

became pregnant with [P.M.]" In about 1999, he, Alyssa, D.H., and P.M. got a house together in Rockford, where they lived together for two years. They then moved to De Kalb. They then had a series of residences; they first moved to Sycamore in what he thought was 2003. That was to East Page Street. Contradicting Alyssa, he said that Alyssa's sister Kim had lived with them most of the time they lived on Page Street. He also denied ever assaulting D.H.

¶ 14 In closing, the State, while discussing the evidence of defendant's age, referred once to defendant's conviction:

> "The defendant is over 17 years of age. *** Caprice Mack *** gave his own age *** as 36 years old, and he testified that the defendant is his older brother. [Thus], during the years 2003 to 2006 the defendant was clearly over the age of 17.
>
> Additionally, Judge, the defendant's own testimony puts him over the age of 17 because he testified that in 1993 he was convicted of a drug-related offense [and] was sentenced to eight years in the Illinois Department of Corrections. For that sentence to have occurred, Judge, he had to be 17 years at the time or he would have been treated as a juvenile."

¶ 15 Defense counsel's closing argument primarily asserted the credibility of defendant's testimony.

¶ 16 The State's rebuttal focused on D.H.'s consistent statements and what the State characterized as defendant's attempts to "minimize" his conduct.

¶ 17 The trial court found defendant guilty on all counts. It explicitly found D.H.'s testimony credible and noted that other evidence had corroborated relevant details in D.H.'s statements. It commented that, in the forensic interview, D.H. "very clearly, consistently spoke about the addresses that she lived at, spoke about the abuse over a period of time, never embellished on the

acts that were committed and she spoke with clarity and with a knowledge that a child of that young age should not have." It stated that the suggestion that D.H. fabricated her disclosures was implausible:

> "Now, it's been argued that there was a tape that she was able to watch and that that tape could have given her *** knowledge of the sexual acts. That is inconsistent with her ability to talk about texture, feel, that when he ejaculated in her mouth what it tasted like, the feel of it as he ejaculated. Someone may watch a film but would not be able to intimately be able to testify as to those acts that would be perpetrated on them unless they had been a victim of that crime."

Moreover, D.H. was "void of any evidence of reason to fabricate" the accusations. The court did not make any explicit findings concerning defendant's credibility. However, it stated:

> "The Court finds that the testimony of [Caprice Mack] was not credible, taking into consideration his felony offenses which go to veracity, being both theft as well as deceptive practice."

It characterized the evidence of defendant's guilt as "overwhelming." It then sentenced him to three consecutive 10-year terms of imprisonment. He filed a direct appeal.

¶ 18 In that appeal, defendant contended that (1) the trial court deprived him of his right to present a defense when it disallowed evidence that, according to defendant, showed that Ikina had a motive to encourage D.H. to fabricate a claim, and (2) Mueller's testimony concerning the significance of D.H.'s calm demeanor was improper opinion evidence, the admission of which amounted to first-prong plain error. We affirmed defendant's conviction. See *Mack*, No. 2-09-0170.

¶ 19 On July 25, 2011, defendant filed a *pro se* petition for relief under the Act. He asserted,

among other things, that trial counsel had been ineffective for introducing evidence of defendant's prior conviction that was barrable under the rule in *Montgomery*, which teaches that, "if a period of more than 10 years has elapsed since the date of conviction or of the release of the witness from confinement, whichever is the later date," that conviction is not proper impeachment evidence. *Montgomery*, 47 Ill. 2d at 516-19. He also asserted that appellate counsel was ineffective for failing to raise the issue. The trial court appointed counsel for defendant.

¶ 20 On September 17, 2014, postconviction counsel filed an "Amended Post Conviction Petition Addendum." In that filing, defendant asserted again that trial counsel was ineffective for eliciting testimony concerning the conviction that was excludable under *Montgomery*.

¶ 21 The State answered the petition, defendant replied, and the court set the matter for a third-stage hearing. Trial counsel was the only witness at the hearing, testifying for both defendant and the State. The State asked trial counsel why he had asked defendant about his prior felony conviction. Trial counsel answered:

> "It was in my mind at that time that [defendant] was going to be testifying and it's my practice if I think that *** a prior conviction can be used to impeach credibility of my defendant, I'll usually pre-empt [*sic*] it in order to stop the State's Attorney from underlining it more broadly, so I raised it in that way."

The State questioned trial counsel further on that point:

> "[The State] Q. Was *** the reason why you introduced testimony from [defendant] as to that prior [conviction] was that you thought that because the MSR period that would have brought it within the ten years of Montgomery; is that correct?
>
> [Trial counsel] A. It was my understanding at the time that if I had not raised it, counsel for the State would have, so I raised it through [defendant's] testimony.

Q. So it was a tactical decision on your part at the time of trial?

A. Yes."

¶ 22 Defendant also questioned trial counsel about his understanding of *Montgomery*'s applicability. Trial counsel stated:

"I thought that [the time of the offense] was within the applicable case law and I thought that it was something that if [defendant] took the stand could be used to attack his credibility as a witness. It's my usual practice in such cases, at least in jury trials, that I would raise it myself rather than allowing the prosecution to raise it ***, so that's what I did. If I *** made an error with respect to the applicability of the appropriate case law, but the transcript and the record will speak for itself."

¶ 23 The court, with the trial judge presiding, denied defendant's petition in a written order filed on May 1, 2015—that is, more than six years after the trial. It noted that the record contained no indication that defendant's conviction had played any role in its finding him guilty. Defendant moved for reconsideration. The court appointed conflict counsel to assist with defendant's motion to reconsider, but it denied the motion on November 19, 2015. Defendant timely appealed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant asserts that the trial court erred in denying his ineffective-assistance-of-counsel claim. He argues that the evidence was closely balanced and that the outcome of the trial turned on the relative credibility of the witnesses, so that counsel's improper "fronting" of his conviction prejudiced him. He further argues that, because trial counsel's mistake was obvious, appellate counsel patently erred in failing to raise the matter on direct appeal.

¶ 26 In its response, the State does not contest defendant's contention that counsel's performance was deficient. That is, it presents no argument against the propositions that (1) the evidence of defendant's conviction was barrable under the rule in *Montgomery*, (2) trial counsel had no proper strategic reason to elicit evidence of the conviction, or (3) as a consequence, counsel's representation of defendant was deficient. However, it argues that, because a presumption exists that a court in a bench trial does not consider improper evidence, the evidence of the conviction could not have been prejudicial. It points out that nothing in the record suggests that the trial court considered the conviction for any purpose. In particular, the trial court never addressed defendant's credibility, focusing instead on the implausibility of any scenario in which D.H. was lying.

¶ 27 In his reply, defendant does not directly address the State's contention that we must presume that the trial court declined to consider the conviction. Instead, he argues, "The improper admission of the prior conviction, even if not expressly cited by the trial court, could easily have influenced the court's credibility determinations and tipped the scale toward conviction." He further implies that we should treat as dispositive two cases—*People v. Sanchez*, 404 Ill. App. 3d 15 (2010), and *People v. Valentine*, 299 Ill. App. 3d 1 (1998)—in which reviewing courts deemed that counsel was ineffective for causing the trier of fact to hear evidence of convictions that *Montgomery* should have barred. In oral argument, he argued that, despite the trial and the postconviction proceeding having the same judge, because the trial court was unable to positively deny that it had considered his conviction, we should deem the presumption rebutted.

¶ 28 We affirm the denial of defendant's petition. To succeed on a claim of ineffective assistance of counsel, a defendant must present evidence to satisfy both prongs of the standard

set out in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A defendant must show (1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant. *Id.* at 687. A defendant can show that he or she was prejudiced only by showing that "there is a reasonable probability 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.* at 694.

¶ 29 We review a trial court's factual findings made after a third-stage evidentiary hearing for manifest error; however, the court's ultimate determination regarding questions of law is subject to *de novo* review. *People v. Coleman*, 183 Ill. 2d 366, 384-88 (1998). Here, the court assessed a straightforward legal question about prejudice. That is, the evidentiary hearing did not adduce conflicting evidence, and trial counsel admitted that he had defendant testify about his conviction because he believed that it was proper impeachment evidence under *Montgomery*. Accordingly, *de novo* review is appropriate.

¶ 30 After carefully considering the record and the court's findings, we hold that defendant failed to satisfy *Strickland*'s prejudice prong. As the State points out, Illinois law recognizes a presumption that a court in a bench trial has considered only proper—*i.e.*, admissible—evidence and a defendant must rebut that presumption. "[W]hen a trial court is the trier of fact a reviewing court presumes that the trial court considered only admissible evidence and disregarded inadmissible evidence in reaching its conclusion." *People v. Naylor*, 229 Ill. 2d 584, 603 (2008). "The presumption that a court in a bench trial considered only competent evidence in reaching its finding 'may be rebutted where the record affirmatively shows the contrary.' " *Id.* at 603-04 (quoting *People v. Gilbert*, 68 Ill. 2d 252, 258-59 (1977)). The presumption, as applied to criminal cases, arises from *People v. Popescue*, 345 Ill. 142, 156 (1931), in which our supreme

court, ruling on the use of evidence at sentencing, stated that the trial court "should be said to possess legal discernment enough to sift out the competent and disregard the incompetent evidence." As we discuss, defendant is unable to show that the record rebuts this presumption. Thus, applying the presumption, we deem that the court did not consider defendant's conviction for impeachment, so that his ineffective-assistance claim necessarily cannot satisfy the prejudice prong of the *Strickland* test. We further conclude that the authority on which defendant relies fails to support his claim: *Sanchez* is distinguishable, and *Valentine*, a case in which the defendant had a jury trial, is inapposite. Given the passage of years between the trial and the hearing on defendant's petition, we reject defendant's suggestion that the trial court should have been able to state directly whether it had considered the evidence of his conviction.

¶ 31 Defendant has failed to show how the record rebuts the presumption that the trial court did not consider his conviction for impeachment. Most obviously, the trial court judge said nothing that would directly rebut it. That is, nothing the court said suggested that it considered the conviction for *any* purpose. Thus, it appears that the trial court judge exercised "legal discernment enough to *** disregard the incompetent evidence" (*Popescue*, 345 Ill. at 156), and it is axiomatic that defendant could not have been prejudiced by evidence that the court did not consider.

¶ 32 *Valentine* is not relevant authority here. In *Valentine*, the court reversed the defendant's conviction, which was entered after a jury trial; it held that defense counsel had provided deficient representation by asking the defendant questions that opened the door to evidence of the defendant's *Montgomery*-barred convictions. The *Valentine* court further held that the defendant was thereby prejudiced, as the case turned on credibility. *Valentine*, 299 Ill. App. 3d at 4. Thus, *Valentine* can stand for two propositions: (1) that counsel performs deficiently if he or

she causes the admission of a *Montgomery*-barred conviction; and (2) that the consideration of such evidence is prejudicial if the case is close enough that credibility could be critical. However, the trier of fact here was not a jury as in *Valentine*, but the trial court. Thus, in contrast to *Valentine*, the presumption that improper evidence was not considered is applicable here. *Valentine* is thus inapposite.

¶ 33 *Sanchez* is both clearly distinguishable and instructive. The defendant in *Sanchez* was charged with possession of a controlled substance with intent to deliver. *Sanchez*, 404 Ill. App. 3d at 15. He had a bench trial in 2008, and the trial court found him guilty of a lesser included offense, possession of a controlled substance. *Id.* at 17. The reviewing court ordered that he be retried, concluding that defense counsel had rendered ineffective assistance for stipulating that the defendant had been convicted in 1996 of possession of a controlled substance with intent to deliver. *Id.* at 17-18. That prior conviction was barrable under *Montgomery*. Although the State argued that the trial court should consider the defendant's term of mandatory supervised release as part of his "confinement" for purposes of calculating the conviction's availability for impeachment under *Montgomery*, the *Sanchez* court noted that, as parole was never treated as part of the period of "confinement" under *Montgomery*, mandatory supervised release could not be either. *Id.* at 18. Applying that rule and taking the defendant's release date from the records of the Illinois Department of Corrections, the *Sanchez* court determined that the defendant had been released from confinement more than 10 years before his trial, making the conviction inadmissible under *Montgomery*. *Id.* at 18. Moreover, the *Sanchez* court was "unable to discern any valid strategic reason" for trial counsel's failure to prevent the admission of the conviction. *Id.* at 18. Thus, the court held that defense counsel's performance was deficient under *Strickland*'s first prong.

¶ 34 The prejudice analysis in *Sanchez* does not favor defendant. To be sure, the *Sanchez* court described the defendant's trial as "amount[ing] to a credibility contest" (*Sanchez*, 404 Ill. App. 3d at 19), a description that defendant suggests should be applied to the trial in this case as well. However, in *Sanchez*, unlike in this case, no doubt existed that the trial court considered the conviction—the trial court in *Sanchez* explicitly stated that it was doing so. Faced with conflicting accounts from the defendant and a police officer, the trial court, expressly relying on the defendant's prior conviction, concluded that the defendant was less credible than the officer. The *Sanchez* court therefore stated: "Based on the importance of the issue of credibility in this case and the specific findings of the trial court regarding the 1996 prior conviction, we believe that there is a reasonable probability that the outcome of the defendant's trial would have been different had he not been improperly impeached with his prior conviction." *Sanchez*, 404 Ill. App. 3d at 19. That is, the reviewing court took into account the closeness of the evidence, but also the weight that the trial court *explicitly* gave the conviction, when it held that the defendant had satisfied *Strickland*'s prejudice prong.

¶ 35 The presumption that a court in a bench trial does not consider improper evidence was never a factor in the *Sanchez* court's analysis. The primary reason for this was that the trial court's statement about the weight it gave the improper evidence so obviously rebutted the presumption that the State could not have reasonably argued that the presumption still applied. Additionally, the trial court in *Sanchez* could not have known from the trial evidence that the conviction was improper impeachment evidence under *Montgomery*. The evidence it heard included neither the exact date of the 1996 conviction nor the date of the defendant's release from prison. *Id.* at 17. Thus, the trial court could not have inferred from the evidence that the conviction was proper impeachment evidence under *Montgomery*. Here, we do not face that

situation as the court did not explicitly accord the conviction any weight at all.

¶ 36 Despite the foregoing, defendant also argues that the "improper admission of the prior conviction, even if not expressly cited by the trial court, could easily have influenced the court's credibility determinations and tipped the scale toward conviction." We reject this argument as contrary to the presumption itself, which is a rule of law dictated by our supreme court. See *Naylor*, 229 Ill. 2d at 603-04; *Gilbert*, 68 Ill. 2d at 258-59; *Popescue*, 345 Ill. at 156. Moreover, we take the trial court judge at her word concerning the evidence she considered in finding defendant guilty. The law requires that we do no less. See *id*.

¶ 37 Because the record here does not rebut the presumption that the trial court properly considered the evidence, defendant has failed to show that counsel's performance resulted in any prejudice. Therefore, *Strickland*'s second prong was not satisfied, and the trial court did not err in denying defendant's postconviction ineffective-assistance claim.

¶ 38 III. CONCLUSION

¶ 39 For the reasons stated, we affirm the denial of defendant's postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 40 Affirmed.