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2018 IL App (3d) 150761-U

Order filed April 30, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0761
SCOTT A. SMADO,)	Circuit No. 97-CF-4852
Defendant-Appellant.)	Honorable Daniel J. Rozak, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err by denying defendant's request for postconviction relief following a third-stage evidentiary hearing.
- ¶ 2 In 1997, defendant was convicted of attempt first degree murder and sentenced to 44 years of imprisonment. After extensive postconviction and appellate proceedings, defendant's amended petition advanced to a third-stage evidentiary hearing. The trial court denied the requested postconviction relief following the third-stage evidentiary hearing. Defendant appeals.

¶ 3

FACTS

¶ 4

In defendant's direct appeal, this court exhaustively recited the facts adduced at his trial. *People v. Smado*, 322 Ill. App. 3d 329 (2001). In subsequent appeals concerning the review of the claims set forth in defendant's first postconviction petition and amended postconviction petition, this court recited the facts relevant to defendant's postconviction contentions. *People v. Smado*, No. 3-01-0771 (2002) (unpublished order under Illinois Supreme Court Rule 23); *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23). For the purposes of consistency, we adopt the previous factual recitations here, supplementing and amending the prior recitation of facts when additional facts of record become relevant to the particular issues of this appeal.

¶ 5

I. Procedural History

¶ 6

In 1997, Scott A. Smado (defendant) was convicted of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 1996)) following a jury trial. The trial court sentenced defendant to 44 years of imprisonment, and this court affirmed defendant's conviction and sentence on direct appeal in *People v. Smado*, 322 Ill. App. 3d 329 (2001). Defendant then filed a postconviction petition in 2001, which the trial court dismissed as frivolous and patently without merit at the first stage of postconviction proceedings. On appeal, this court reversed and remanded defendant's case for second-stage postconviction proceedings in *People v. Smado*, No. 3-01-0771 (2002) (unpublished order under Illinois Supreme Court Rule 23).

¶ 7

On remand, in 2006, defendant filed an amended postconviction petition incorporating his original postconviction petition. In response to a motion to compel filed by the State, the court struck portions of defendant's amended postconviction petition and ordered defendant to

file a supplemental petition. On August 23, 2006, defendant filed a supplemental amended postconviction petition (supplemental amended petition) as ordered by the court.

¶ 8 On November 20, 2006, the State filed a motion to dismiss defendant's supplemental amended petition. The trial court granted the State's motion to dismiss defendant's supplemental amended petition at the second stage of postconviction proceedings.

¶ 9 Defendant appealed and this court held that defendant's supplemental amended petition, liberally construed, made a substantial showing of a constitutional violation of defendant's right to effective assistance of counsel and defendant's right to conflict-free representation in *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23). This court reversed and remanded the matter to the trial court for a third-stage evidentiary hearing on two issues: (1) whether defendant's trial attorney operated under a *per se* conflict of interest and (2) whether defendant's trial attorney was ineffective for failing to call certain witnesses. This court gave very specific guidance pertaining to the third-stage evidentiary hearing on remand by stating: "Brenner and Fehil should testify concerning the nature of their attorney-client relationship, if any, during any time when Brenner appeared at proceedings concerning the defendant's trial," and "Brenner should testify concerning why he did not call Marion, Rainey, and Jurgenson, as witnesses at the defendant's trial, to impeach the credibility of Novak's testimony."

¶ 10 II. Evidentiary Hearing

¶ 11 Following remand, the trial court conducted a third-stage evidentiary hearing to determine the merits of the claims raised in defendant's supplemental amended petition. During the evidentiary hearing, defense counsel did not present the testimony of any witnesses or any other evidence. Instead, defense counsel informed the trial court that after a diligent search, the

defense was unable to locate Brenner or Fehil. Consequently, defense counsel requested the trial judge take judicial notice of the entire record of all prior proceedings in this matter.

¶ 12 The record reveals that prior to the jury trial, which began on November 18, 1998, the prosecutor told the court that Fehil previously advised the prosecutor that Brenner had been Fehil's attorney, at some unidentified point in time.¹ During a preliminary hearing in Fehil's case that took place on November 19, 1998, Fehil stated that "[he] had a lawyer, but he quit."² Further, according to Fehil's sworn testimony in this case, defendant and Fehil discussed the fact that they had the same attorney, Brenner, and that this discussion took place in the Will County jail after defendant's arrest.³

¶ 13 In addition, defense counsel directed the court's attention to the previously filed affidavits from Tammy and Rick Rainey that appeared in the record. Both parties agreed that these affidavits were not to be considered for their substance, but only as evidence that Rick and Tammy Rainey spoke with Brenner, defendant's trial counsel, prior to defendant's trial. Both parties also agreed that defendant's witness list, tendered prior to trial, contained the names of Rick and Tammy Rainey. At the conclusion of the third-stage evidentiary hearing, the trial court took the case under advisement.

¶ 14 On October 21, 2015, the trial court denied defendant's request for postconviction relief following the third-stage evidentiary hearing. With regard to the conflict of interest issue, the trial court found that:

¹Fact as cited in *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23).

²Fact as cited in *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23).

³Fact as cited in *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23).

“there is as best I can tell absolutely no appearance that was ever filed on behalf of Mr. Fehil or Mr. Fahil or whoever he was by Mr. Brenner. I realize that is not determinative, but it would be something to consider. Apparently it isn't there. There is no evidence that I have heard of any payments to Mr. Brenner. Mr. Fehil apparently was in custody at the time so I would imagine that speaking from my own experience most payments are made through relatives or friends to attorneys and I didn't hear anything about that so we don't have any consideration. Again, I don't think that is necessarily determinative, but something to consider. There is no evidence that Mr. Fehil and Mr. Brenner ever actually met. I suppose there should be somewhere in existence if they ever met at the time when he was in custody, some Will County jail or ADF records that would show any visits that Mr. Brenner may have had with Mr. Fehil and I have not heard anything about that either. So there is absolutely nothing to indicate any connection between Mr. Fehil and Mr. Brenner other than Mr. Fehil indicating on a couple of occasions that it was his impression at least that Mr. Brenner was representing him, but he never appeared in Court and I have no other evidence of that. There is even some indication in the transcripts that Mr. Fehil was questioning [defendant] about Mr. Brenner because apparently Mr. Fehil didn't know much about him which adds to my thoughts that perhaps they never met. I really don't know. There is no evidence. So I can't say that there is any per se conflict here.”

With regard to the ineffective assistance of counsel issue the trial court stated:

“So without [Brenner's] testimony there is no clear reason why he would not have called those witnesses. You know, drawing from my own experience there are many, many, many times where a client has told me I have a witness who will say this and I

have a witness who will say that and when you get face to face with that potential witness, their testimony starts to fall apart real quick upon close examination, and that great witness that you thought you had suddenly may do you more harm or your client more harm than originally thought. The affidavits that I looked at have really little, if any detail of any kind. There is no indication regarding conversations with the complaining witness, where they occurred, when they occurred, who was present, what were the circumstances surrounding the conversation, was everybody drunk up, was everybody doped up, what might have been raised regarding the declarant's reputation for truth and veracity, any declarant's prior record, all of those are issues that have or could have led Mr. Brenner to decide not to call them. I note by one of the affidavits that apparently Mr. Brenner had some concern about the impression that Mr. Ramey [sic] might give because Mr. Ramey's [sic] own affidavit indicates that there was some discussion about his tattoos and how he can cover them up. So there are all kinds of reasons in my opinion why those witnesses would not have been called and they deal with trial strategy."

The trial court's written order denying defendant relief as requested in defendant's supplemental amended petition stated:

"As to defendant's claim of a Per se conflict of interest, court finds there is no evidence that Mr. Fehill [sic] and counsel Mr. Brenner entered into an attorney-client relationship. As to defendant's claim of ineffective assistance of counsel for failing to call witnesses, the court notes Mr. Brenner cannot be found to testify as to his reasons for not calling the witnesses, and that is typically a matter of trial strategy. Since there could be many reasons Mr. Brenner decided not to call the witnesses, he cannot be said to be ineffective."

¶ 15 On November 3, 2015, defendant filed a timely notice of appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant argues the trial court erred by denying defendant's request for postconviction relief following a third-stage evidentiary hearing on two grounds. First, defendant argues he established that his trial attorney labored under a *per se* conflict of interest, Second, defendant argues he made a substantial showing that trial counsel provided ineffective assistance for failing to call witnesses to potentially impeach the victim's testimony. In opposition, the State contends the evidence, or lack thereof, presented by defendant at the third-stage evidentiary hearing was insufficient to establish that defendant's attorney operated under a *per se* conflict of interest or that defendant received ineffective assistance of counsel.

¶ 18 The Post-Conviction Hearing Act creates a three-stage mechanism for criminal defendants to collaterally challenge their convictions when a substantial denial of their constitutional rights has occurred. 725 ILCS 5/122-1 *et seq.* (West 2014); *People v. Makiel*, 358 Ill. App. 3d 102, 104 (2005). During second-stage proceedings, all factual allegations in the petition that are not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). During second and third-stage evidentiary proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Postconviction relief is justified following a third-stage evidentiary hearing only where a defendant demonstrates by a preponderance of the evidence that his or her conviction resulted from a substantial deprivation of constitutional rights. *People v. Rovito*, 327 Ill. App. 3d 164, 167-68 (2001).

¶ 19 During a third-stage hearing, where fact-finding and credibility determinations are involved, reviewing courts will not reverse a trial court's decision unless it is manifestly

erroneous. *Pendleton*, 223 Ill. 2d at 473. Here, defendant argues no new evidence was presented at the third-stage hearing and the issues involve questions of law subject to a *de novo* standard of review.

¶ 20 We first address the standard of review. Although defendant did not introduce any new evidence during this third-stage hearing, the trial court was called on to make many factual determinations based on the contents of the record subject to judicial notice. The facts of this case are intertwined with questions of law. Here, the trial court was not merely reviewing questions of law during the third-stage hearing. For instance, before the trial court could make the legal determination that a *per se* conflict of interest existed, the court had to decide a question of fact. Specifically, the court had to make a factual determination regarding the reliability and the weight to be applied to Fehil's statements concerning Brenner's representation. In doing so, the trial court considered the entire record to determine these statements by Fehil could be corroborated with some form of independent evidence. Thus, we conclude the trial court's decision is subject to the more deferential standard of the manifest weight. *Pendleton*, 223 Ill. 2d at 473. However, under either standard of review, we conclude the trial court's decision following the third-stage evidentiary hearing should be affirmed.

¶ 21 For purposes of this appeal, defendant contends he was deprived of his right to effective assistance of counsel where his trial counsel, Steven A. Brenner, operated under a *per se* conflict of interest at the time of trial because Brenner simultaneously represented Charles Fehil, who testified as a State's witness against defendant at trial. It is well established that accused persons are guaranteed the assistance of competent counsel for their defense. U.S. Const, amend. VI; Ill. Const. 1970, art. I, § 8; *Strickland v. Washington*, 466 U.S. 668, 685-686 (1984). Defendants are also guaranteed counsel who is free from any conflicts of interest. *People v. Flores*, 128 Ill. 2d

66, 83 (1989). The three situations where a *per se* conflict of interest exists are: “(1) where defense counsel has a prior or contemporaneous association with the victim, the prosecution, or an entity assisting the prosecution; (2) where defense counsel contemporaneously represents a prosecution witness; and (3) where defense counsel was a former prosecutor who had been personally involved in the prosecution of the defendant.” *People v. Fields*, 2012 IL 112438, ¶ 10. A contemporaneous professional relationship exists when defense counsel also represents the State’s witness at the time of the defendant’s trial or concerning the defendant’s trial. *Flores*, 128 Ill. 2d at 83.

¶ 22 In our order in *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23), involving the second-stage proceedings, this court emphasized that all factual allegations contained in defendant’s amended supplemental petition not positively rebutted by the record were true. However, during a third-stage evidentiary hearing, the trial court does not presume that defendant’s factual allegations are accurate and defendant must substantiate the claims contained in the supplemental amended petition to warrant the requested relief. At a third-stage hearing, the trial court is empowered to make factual and legal determinations based on the contents of the record and the evidence presented to the trial court.

¶ 23 During Fehil’s preliminary hearing that took place on November 19, 1998, Fehil stated on the record that “[he] had a lawyer, but he quit.” According to the record, sometime before November 19, 1998, Fehil told the prosecutor that Brenner was Fehil’s attorney. The prosecutor relayed Fehil’s statement to the court. In addition, according to Fehil’s sworn testimony during defendant’s trial, defendant and Fehil discussed the fact that they had the same attorney, Brenner, while both men were incarcerated in the Will County jail after defendant’s arrest.

¶ 24 During the third-stage evidentiary hearing defendant could not present the testimony of Fehil or Brenner due to their unavailability. In addition, defendant did not offer any other documentation showing Brenner simultaneously represented both defendant and Fehil in 1998. Defendant did not offer documentation that Brenner billed Fehil or that Fehil paid Brenner for his legal services. In addition, the trial court did not receive any evidence documenting that Brenner filed an appearance on Fehil's behalf in 1998.

¶ 25 After carefully reviewing the paucity of information provided to the trial court to substantiate defendant's allegations that Brenner had a *per se* conflict of interest, we conclude the trial court's decision to deny defendant postconviction relief, following the third-stage evidentiary hearing, was supported by the record and was not manifestly erroneous.

¶ 26 Defendant also contends he was deprived of effective assistance of counsel during his trial in this case. Defendant argues Brenner, defendant's trial counsel, should have presented the testimony of Tammy Rainey, Rick Rainey, and Lisa Jurgenson in order to impeach the credibility of the victim's testimony.

¶ 27 To prove ineffective assistance of counsel, defendant must show that: (1) counsel's conduct fell below an objective standard of reasonableness; and (2) that counsel's deficient performance so prejudiced the defendant that it is reasonably probable the result would have been different but for counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984). Counsel may be deemed ineffective for failing to present exculpatory evidence, including that of witness testimony that may support an uncorroborated defense. See *People v. Cabrera*, 326 Ill App. 3d 555 (2001); *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). However, to establish that counsel's performance was deficient, a defendant must overcome the strong presumption that trial counsel's decision on whether to

present a witness was a matter of trial strategy. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 28 Again, due to Brenner's unavailability, the trial court did not have any reason to conclude that Brenner's decision to call certain witnesses and not offer the testimony of others, was anything other than sound trial strategy. Here, defendant's argument on appeal misconstrues our prior court order in *People v. Smado*, No. 3-07-0471 (2009) (unpublished order under Illinois Supreme Court Rule 23) to have held that the burden of proof shifted to the State at the third-stage evidentiary hearing. In that decision, after liberally construing the contents of defendant's amended supplemental petition, defendant's petition included sufficient allegations of a constitutional violation. However, this argument, much like defendant's argument concerning a *per se* conflict of interest, fails to differentiate between the nature of second and third-stage proceedings.

¶ 29 When considering a petition at the second stage, courts merely determine whether a defendant has shown enough to warrant a third-stage hearing while accepting all factual allegations in the petition that are not rebutted by the record as true. *Hall*, 217 Ill. 2d at 334. At a third-stage hearing, defendant is required to take the next step and prove by a preponderance of the evidence that the alleged constitutional violation actually occurred.

¶ 30 In this case, both parties agree that Brenner interviewed Rick and Tammy Rainey prior to defendant's trial and listed their names on the list of potential defense witnesses. It is undisputed that neither Rick nor Tammy Rainey testified for the defense. The State did not have to prove Brenner's decision not to present the testimony of Rick and Tammy Rainey was a sound decision based on trial strategy. Instead, absent the second stage's applicable presumption that the facts alleged in defendant's petition were true, the burden was on defendant, during the third-stage

evidentiary hearing, to prove Brenner's decision not to present the testimony of either Rick or Tammy Rainey was not a matter of sound trial strategy by defense counsel.

¶ 31 We agree with the trial judge that a myriad of potential valid reasons exist concerning the reason Brenner elected not to call the witnesses to the stand. It is possible that Rick and Tammy Rainey's testimony would have been inadmissible, that Brenner found their statements incredible, that their appearance might not have played well in front of the jury, or that they could have had prior criminal records, *inter alia*.

¶ 32 Accordingly, absent Brenner's testimony, we agree with the trial court that defendant did not introduce sufficient evidence to rebut the strong presumption that Brenner's decision not to call the witnesses was based on sound trial strategy, immune to an ineffective assistance claim. The trial court did not err by denying the relief requested in defendant's supplemental amended petition following a third-stage evidentiary hearing.

¶ 33 CONCLUSION

¶ 34 The judgment of the circuit court of Will County is affirmed.

¶ 35 Affirmed.