

**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).

2018 IL App (4th) 160662-U

NO. 4-16-0662

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

August 9, 2018

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
KENNETH L. THOMAS,	)	No. 03CF220
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Presiding Justice Harris and Justice Turner concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The appellate court affirmed, concluding the trial court's denial of defendant's second-amended petition for postconviction relief after third stage proceedings was not manifestly erroneous.
- ¶ 2 Following an October 2015 third-stage evidentiary hearing, the trial court denied defendant Kenneth L. Thomas's second-amended postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant contends the trial court erred by denying his postconviction petition where the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by not disclosing the bond sheet of a key witness containing the notation, “per Larry Mills” as evidence that Mills, the prosecutor in this case, made a deal with the witness in exchange for testimony against defendant. Defendant also argues trial counsel was ineffective for failing to impeach the same witness with the fact that the State neglected to file criminal charges against the witness. We disagree and affirm.

¶ 3

## I. BACKGROUND

¶ 4

### A. Trial Proceedings

¶ 5 In January 2005, a jury found defendant guilty of first-degree murder (720 ILCS 5/12-1(a)(1) (West 2002)), home invasion (720 ILCS 5/12-1(a)(5) (West 2002)), aggravated discharge of a firearm (720 ILCS 5/24-11.2(a)(1) (West 2002)), aggravated assault (720 ILCS 5/12-2(a)(1) (West 2002)), and three aggravating factors for enhanced sentencing, *i.e.*, murder in that while committing murder defendant was armed with a firearm (730 ILCS 5/5-8-1(d)(i) (West 2002)), personally discharged a firearm (730 ILCS 5/5-8-1(d)(ii) (West 2002)), and personally discharged a firearm that proximately caused great bodily harm or death to another person (730 ILCS 5/5-8-1(d)(iii) (West 2002)). The trial court sentenced defendant to the Illinois Department of Corrections for concurrent prison terms of 65 years for murder by personally discharging a firearm, 40 years for home invasion, 15 years for aggravated discharge of a weapon, and 364 days for aggravated assault. In August 2007, this court affirmed his convictions and sentence on direct appeal. *People v. Thomas*, No. 4-05-0245 (August 15, 2007) (unpublished order under Supreme Court Rule 23).

¶ 6

### B. Postconviction Proceedings

¶ 7 Subsequent to the filing of multiple *pro se* petitions seeking postconviction relief, the court appointed counsel who, in June 2014, filed an amended petition for postconviction relief. In August 2014, the State filed a motion to dismiss the amended petition. In September 2014, the court denied the State's motion to dismiss and advanced the petition to a third-stage evidentiary hearing.

¶ 8 In May 2015, defendant's counsel filed a second-amended postconviction petition adding a claimed *Brady* violation. In response, the State filed a motion to dismiss which the trial court denied in September 2015.

¶ 9 On October 16, 2015, the trial judge conducted a third-stage evidentiary hearing. At the evidentiary hearing, defendant raised four claims: (1) ineffective assistance of trial counsel, (2) violations of due process, (3) ineffective assistance of appellate counsel, and (4) a *Brady* violation. Here, we discuss only the claims defendant raises on appeal— an alleged *Brady* violation and an ineffective assistance of trial counsel claim.

¶ 10 Both claims involve witness, Kenneth “Kenny” Scott, who gave testimony at a January 15, 2005, evidence deposition played for the jury during defendant's trial. During the evidence deposition, Scott testified that on May 2, 2003—the night of Demond Penn's murder—he saw defendant and Penn arguing in the back of Penn's house. After Scott heard gunshots coming from Penn's house, he saw defendant walking away carrying a gun. Scott testified that he had several felony drug convictions, and on May 6, 2003, police arrested him on an outstanding warrant out of Ford County, Illinois. After his arrest, Scott talked to police about what he witnessed on May 2, 2003, and picked defendant out of a lineup.

¶ 11 During his arrest on May 6, 2003, the police found Scott in possession of a felony amount of cannabis. At the time of his arrest, Scott was on probation in Ford County for possession of cannabis with intent to deliver. A May 6, 2003, police report indicated, "Ford County advised they would extradite with Warrant WO3J4325 for Contempt of Court on Scott." On May 7, 2003, Scott received a recognizance bond. The recognizance bond reflected "per Larry Mills" in the upper right hand corner directly under the words "Contempt of Court/Ford County." Larry Mills served as the lead prosecutor in defendant's case.

¶ 12 During his trial, the Vermillion County Public Defender, Robert McIntire, represented the defendant. At the time of defendant's trial, McIntire's office also represented Scott in two criminal trespass cases. See Vermilion County case No. 04-CM-87; Vermilion County case No. 04-CM-563. Defendant's trial ended with a guilty verdict on January 20, 2005. On March 9, 2005, the State dismissed Scott's two criminal trespass cases. The State never filed charges against Scott in connection with his May 6, 2003, arrest.

¶ 13 Based on the circumstances and the timeframe of events, defendant alleged the State made a deal with Scott in exchange for his testimony against defendant. At the evidentiary hearing, defendant argued a *Brady* violation occurred where the State failed to disclose Scott's bond sheet as evidence that the State made a deal with Scott in exchange for his testimony against defendant. Defendant also argued he received ineffective assistance of trial counsel where his counsel, Robert McIntire, failed to impeach Scott with the information that the State never filed charges against him in connection with his May 6, 2003, arrest.

¶ 14 During the evidentiary hearing, McIntire testified that while he knew Scott had been arrested and released from custody after giving a statement to police implicating defendant in Penn's murder, McIntire never received a copy of the recognizance bond which contained the notation "per Larry Mills" on the face of the bond.

¶ 15 McIntire testified that at Scott's deposition he asked Scott about his arrest on May 6, 2003, but did not question Scott about the specifics of the arrest or about his release on his own recognizance after he gave a statement to police implicating defendant in the murder. McIntire could not recall if he followed up with Scott about why the State never charged him with possession of cannabis with intent to deliver. McIntire testified that leading up to defendant's trial he did not receive discovery indicating the State made a deal with, or had an

agreement with, Scott for his testimony. When asked why he did not ask Scott if he had made a deal with the State in exchange for his testimony, McIntire responded:

“Okay. Okay. I was aware and I knew Mr. Mills, um, the way he operated in this situation, Mr. Mills essentially had a, what I would describe as a habit or practice of if it had been brought to his attention that Mr. Scott was a significant witness in a murder case or a murder investigation of essentially not making deals or promises or anything of that nature but rather -- \*\*\*

I mean, essentially it was Mr. Mill[s'] habit, if you will, to simply not charge something like this just so that his witness would not be -- if you will, would not be marked with the charge, the prosecution, and that sort of thing, but Mr. Mills, frankly scrupulously avoided, if you will, making deals. In other words, he would, you know, essentially just take that approach with his witnesses to, um, as a prophylactic against the type of cross-examination that, um, Mr. Beardsley suggests might have been fruitful.”

¶ 16 At the evidentiary hearing, defendant testified that McIntire told him that while there was no written deal, it was "obvious something transpired there." Defendant stated he never saw any documentation of a deal between the State and Scott.

¶ 17 At the conclusion of the evidentiary hearing, the trial court asked the parties to submit written closing arguments. On September 6, 2015, after considering the parties written arguments, the trial judge filed a written order denying defendant's second-amended petition for postconviction relief. In regard to the *Brady* violation, the court found that "[t]here is no

evidence in this record that Kenneth Scott was offered an agreement by the State to testify against Petitioner in return for: (1) his release from custody on May 7, 2003; (2) not being charged with Possession of Cannabis with Intent to Deliver arising from his May 6, 2003[,] arrest; or (3) dismissal of his pending Trespass case in Vermillion County." The trial court concluded there "would be no obligation on the State to disclose a bond sheet indicating a release of Kenneth Scott on May 7, 2003, 'per Larry Mills.'" Specifically, the court held "it would not have been required under Supreme Court Rule 412 [(eff. Mar. 1, 2001)]."

¶ 18 As to the ineffective assistance of trial counsel claim, the court found that defense counsel was not ineffective for failing to cross-examine Scott regarding the fact he had not been charged with felony possession of cannabis with intent to deliver in the 18 months leading up to defendant's trial. The court determined, "[t]he mere fact that Scott was no longer in custody 18 months after his arrest would not, in and of itself, be a reason to question whether he received some benefit from his statement, but is one factor to consider when assessing Petitioner's trial counsel's performance." The court ultimately held that "[w]hen viewed in its entirety, there was nothing fundamentally unfair or unreliable about the Petitioner's trial[ ] or trial counsel's performance. There is no question that in hindsight[ ] more could have been done, but the State's case did not hinge solely on the testimony of Kenneth Scott."

¶ 19 This appeal followed.

¶ 20 II. ANALYSIS

¶ 21 On appeal, defendant argues the trial court's denial of his second-amended postconviction petition after an evidentiary hearing was manifestly erroneous because (1) the State violated *Brady* by failing to disclose the recognizance bond of a key witness containing the notation, "per Larry Mills," and (2) defendant's trial counsel provided ineffective assistance of

counsel when he failed to impeach that same witness with the fact that the State neglected to file criminal charges against the witness. We disagree and affirm.

¶ 22 A. Standard of Review

¶ 23 During the third stage of postconviction proceedings, a defendant has the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261, 277, 794 N.E.2d 275, 286 (2002). After an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court's decision will not be reversed unless manifestly erroneous. *People v. Coleman*, 183 Ill. 2d 366, 385, 701 N.E.2d 1063, 1073-74 (1998). The manifest weight standard is a deferential standard of review grounded in the reality that the trial court is in a superior position to determine and weigh the credibility of the witnesses, observe the witnesses' demeanor, and resolve conflicts in their testimony. *People v. English*, 406 Ill. App. 3d 943, 953-54, 943 N.E.2d 689, 697-98 (2010). A reviewing court will not substitute its judgment for that of the trial court and will not reverse the court's judgment unless the ruling contains an error that is clearly evident, plain, and indisputable. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 19, 958 N.E.2d 367. Having established the standard of review, we first consider whether the State committed a *Brady* violation.

¶ 24 B. A *Brady* Violation

¶ 25 Under *Brady*, 373 U.S. at 87, the State must disclose evidence that is both favorable to the accused and "material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Illinois codified *Brady* in Illinois Supreme Court Rule 412(c) (eff. Mar. 1, 2001). To establish a *Brady* violation, a defendant must demonstrate three elements: the evidence in question is favorable to him because it is exculpatory or impeaching; the State willfully or inadvertently suppressed the evidence; and he suffered prejudice. *Strickler*

*v. Greene*, 527 U.S. 263, 282 (1999). Prejudice results when the undisclosed exculpatory or impeaching evidence was material in the sense that it would create at least "a reasonable probability that the result of the trial would have been different if the suppressed document had been disclosed." *Id.* at 291. When we consider prejudice, the question is, "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id.*

¶ 26 Defendant contends that a *Brady* violation occurred when the State failed to disclose, prior to trial, a recognizance bond sheet for Scott. Defendant claims the evidence shows Mills' intervention where police arrested Scott on May 6, 2003, with 26.4 grams of cannabis and the police report indicated Ford County planned to extradite Scott on a contempt of court charge. Later that day, Scott gave a statement to Mills implicating defendant in the murder. The next day, the Vermillion County jail released Scott on a recognizance bond "per Larry Mills." The State never charged Scott with possession of cannabis with intent to deliver. Also, after the conclusion of defendant's trial on January 20, 2005, the State dismissed Scott's two criminal trespass cases. Defendant argues without the disclosure of the bond sheet, defense counsel had no way of impeaching Scott with the information that Mill's intervened on Scott's behalf, had him released from jail on his own recognizance, agreed to refrain from charging him, and agreed to dismiss his pending charges— all in exchange for his testimony implicating defendant.

¶ 27 The trial court disagreed and found no *Brady* violation, stating the bond sheet in no way indicated that the State agreed to release Scott, not charge him in connection with the May 6, 2003, arrest for possession of cannabis with the intent to deliver, and dismiss his two



trespass cases, in exchange for his testimony against defendant. We find the trial court's assessment proper.

¶ 28 Initially, we note our skepticism as to whether the bond sheet is impeaching evidence under *Brady*. In reviewing the bond sheet, we find defendant's argument that the sheet is evidence of the lead prosecutor's involvement in securing the release of Scott and their all-encompassing "deal" questionable to say the least. Absent from the bond sheet is any explanation as to the reason "per Larry Mills" appears on the document. Further, also lacking is any indication of the existence of an agreement, let alone the terms of any agreement.

¶ 29 During the hearing, Defendant never established the meaning of the language, "per Larry Mills," located under the description of the Ford County charge. Defendant also failed to present evidence at the evidentiary hearing establishing a deal between the State and Scott. Defendant's claim that Mills intervened and had Scott released is a matter of pure speculation. Given the facts, we are tempted to end our analysis here. However, even if we assume the bond sheet did constitute impeaching evidence, defendant's claim still fails.

¶ 30 Reversal based on a *Brady* violation requires that there be a reasonable probability that the disclosure of the bond sheet would have changed the result on retrial. See *Brady*, 373 U.S. at 280. We find lacking, a reasonable probability that disclosure of the bond sheet would have resulted in a different verdict because as the trial court noted, the State's case did not hinge solely on Scott's testimony. Even if the bond sheet demonstrated what defendant argues, the evidence is not of such character as to put the whole case in such a different light as to undermine confidence in the verdict.

¶ 31 The evidence at trial established that two weeks prior to Penn's murder, someone shot up the door to Penn's apartment. The gun used to shoot Penn's door was the same gun used to kill Penn.

¶ 32 The testimony of Teresa Galloway linked defendant to the previous shooting where Galloway testified she saw defendant outside Penn's apartment building yelling about how he was going "to get his money," saw defendant run toward Penn's apartment, heard shots, and saw defendant put a gun in the trunk of his car and leave. Fannie Grant also linked defendant to the door shooting through her testimony that defendant admitted to her that he shot up Penn's door. Grant saw defendant outside Penn's apartment the night before Penn's murder scoping out the area.

¶ 33 Michelle Mabry testified to a confrontation hours before Penn's murder in which defendant pointed a gun at Penn and threatened to kill Penn if he did not get defendant his money. During the confrontation, defendant admitted that he shot up Penn's door and stated he "was not playing anymore." Shannon Hann's and Dee Willie Keys' testimony corroborated Mabry's testimony that on the day of Penn's murder, defendant threatened to kill Penn if he did not pay defendant.

¶ 34 Walter "Tom" Shoaf testified to being at Penn's apartment on the night of his murder. Shoaf testified that when someone started kicking the door in, he ran and hid in the bathroom. As he ran to the bathroom, he saw Penn struggling with a black man. Shoaf then heard three shots fired. Officer Gene Woodard testified that Shoaf identified a photo of defendant as the man he saw struggling with Penn.

¶ 35 Defendant told police and admitted in his trial testimony that Penn owed him money and that Penn had not paid him.

¶ 36 If we accept defendant's position regarding what the bond sheet proves, it is information that serves to diminish Scott and raise questions about his reliability. However, the fact that the jury never heard the evidence fails to undermine confidence in the verdict. Lacking here is any plausible argument that the evidence would have somehow put the whole case in a different light and undermine confidence in the verdict. For example, the evidence in no way points to a different perpetrator. There is no indication of a credible alibi. Absent is any suggestion of some other credible explanation for what happened to the victim in this case. Assuming that unbeknownst to the jury, there did exist a deal between Scott and the State, our confidence in the verdict and the fairness of defendant's trial remains firm. While one might argue that defense counsel neglected to make one witness look as bad as he could have, the evidence falls short of impugning the verdict.

¶ 37 Ultimately, we are unconvinced the bond sheet constituted impeaching evidence, and if it did, the evidence could not reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. Thus, we agree with the trial court's decision that no *Brady* violation occurred. Next, we consider defendant's claim that trial counsel provided ineffective assistance of counsel when he failed to impeach Scott with evidence that, after Scott gave his statement to the prosecution, the State failed to charge Scott in connection with his May 6, 2003, arrest.

¶ 38 C. Ineffective Assistance of Counsel

¶ 39 We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail under *Strickland*, the defendant must show defense counsel's performance was deficient and prejudice resulted from counsel's deficient performance. *People v. Houston*, 226 Ill. 2d 135, 143, 874 N.E.2d 23, 29 (2007).

Specifically, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Domagala*, 2013 IL 113688, ¶ 36, 987 N.E.2d 767 (quoting *Strickland*, 466 U.S. at 694). Our review of counsel's performance is highly deferential. *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy."

(Internal quotation marks omitted.) *Id.* A defendant is entitled to reasonable representation, and a mistake in strategy or judgment does not, by itself, render the representation incompetent. *People v. Fuller*, 205 Ill. 2d 308, 331, 793 N.E.2d 526, 542 (2002).

¶ 40 Both prongs of the *Strickland* test must be satisfied; therefore, a finding of ineffective assistance of counsel is precluded if a defendant fails to satisfy one of the prongs. *People v. Simpson*, 2015 IL 116512, ¶ 35, 25 N.E.3d 601. "A court may resolve a claim of ineffective assistance of counsel by reaching only the prejudice prong, as a lack of prejudice renders irrelevant the issue of counsel's alleged deficient performance." *People v. Hall*, 194 Ill. 2d 305, 337-38, 743 N.E.2d 521, 540 (2000). We turn first to the prejudice prong, as we find it dispositive.

¶ 41 Assuming for the sake of argument that counsel provided objectively unreasonable performance, defendant is unable to demonstrate prejudice. The evidence in this case demonstrates that there is no reasonable probability that but for counsel's assumed error the result of defendant's trial would have been different. We refer the parties to our review of the evidence as part of our analysis of defendant's claimed *Brady* violation. As shown above,

defendant's case did not hinge solely upon Scott's testimony. Multiple witnesses provided compelling evidence to seal the fate of defendant. Even assuming the jury decided to disregard Scott's testimony entirely, because it thought the State declined to charge him in order to get his testimony, there is no reasonable probability that the result of the trial would have been different.

¶ 42 Thus, we conclude defendant cannot show prejudice. In light of his failure to demonstrate prejudice, defendant's ineffective assistance of trial counsel claim fails. We therefore find the court's decision to deny defendant's postconviction petition was not manifestly erroneous and we affirm the court's judgment.

¶ 43 III. CONCLUSION

¶ 44 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a)(West 2016).

¶ 45 Affirmed.