2019 IL App (2d) 170609-U
No. 2-17-0609
Order filed June 19, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CESAR G. ROJAS-FIGUEROA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 13-CF-790 Honorable Sharon L. Prather, Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justice Spence concurred in the judgment.
Justice McLaren concurred in part and dissented in part.

ORDER

¶ 1 *Held*: The trial court properly denied defendant's postconviction petition: a bond report was admitted only for its proper purpose; as defendant's witness was trying to take responsibility for the charged drug offense, the State was entitled to cross-examine him about his other acts of drug dealing; the court properly denied defendant's actual-innocence claim, as the evidence was not newly discovered or conclusive; the court properly denied defendant's ineffectiveness claim, as it properly discredited the witness whom counsel allegedly should have called.

¶ 2 Defendant, Cesar G. Rojas-Figueroa, appeals from the judgment of the circuit court of McHenry County denying, after an evidentiary hearing, his postconviction petition (see 725

ILCS 5/122-1 *et seq.* (West 2014)). Because the trial court did not abuse its discretion in admitting certain evidence and did not manifestly err in denying the petition, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was convicted of possessing with the intent to deliver cocaine (720 ILCS 570/401(a)(2)(B) (West 2012)), possessing with the intent to deliver cannabis (720 ILCS 550/5(d) (West 2012)), being an armed habitual criminal (720 ILCS 5/24-1.7(a) (West 2012)), and domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2012)). On appeal, defendant contended only that he was not proved guilty of constructively possessing either the gun or the drug evidence, and we affirmed. See *People v. Rojas-Figueroa*, 2015 IL App (2d) 140453-U.

¶ 5 Because we detailed the evidence in our original disposition, we will set out only the facts necessary to decide the issues in this appeal. On September 8, 2013, officers from the Harvard Police Department were dispatched, pursuant to a report of a domestic disturbance, to 409 Prairie Street, the residence of Brenda Valles. Valles told the officers that defendant was her boyfriend and that he lived there.

¶ 6 The police found defendant's checkbook, which showed an address of 204 South Park Avenue in Harvard, a piece of mail from Charter Communications addressed to defendant at the 409 Prairie Street address, and a notice of a driver's license suspension addressed to defendant at the 204 South Park Avenue address.

¶ 7 According to Valles, defendant had lived exclusively at her house since July 2013. She also testified that no one else lived there other than herself and three children. According to Valles, defendant paid the rent.

¶ 8 Valles described a room in the basement to which defendant had access. Defendant prohibited Valles from entering the room. A search of that room revealed evidence of drug dealing. A firearm was found in an unlocked box in a master bedroom closet.

¶ 9 The trial court found that defendant constructively possessed the drug evidence and the firearm. We held that there was "ample evidence" to support that finding. *Rojas-Figueroa*, 2015 IL App (2d) 140453-U, ¶ 29.

¶ 10 Defendant subsequently filed a petition pursuant to the Post-Conviction Hearing Act (Act) (see 725 ILCS 5/122-1 *et seq.* (West 2014)). He alleged that his trial counsel was ineffective for failing to file a motion to suppress the evidence and for failing to investigate and call his father, Lazaro Rojas, to testify that, when the evidence was found, defendant was living with him at 204 South Park Avenue. He further alleged a claim of actual innocence, asserting that his brother, Jesus Figueroa, had committed the offenses. The trial court denied the State's motion to dismiss and conducted an evidentiary hearing.

¶ 11 The following facts are taken from the hearing. Lazaro testified that he lived at 204 South Park Avenue. According to Lazaro, defendant lived there from July 2013 to March 2014. Although defendant did not pay rent, he gave Lazaro money toward bills. Defendant had his own room with a bed and dresser. Lazaro admitted that he did not monitor defendant as to where he went or where else he might have stayed.

¶ 12 According to Lazaro, defendant's trial attorney never contacted him to discuss where defendant had been living. Lazaro admitted, however, that even though he was present when the police arrested defendant on September 8, 2013, he never told the police, the prosecutor, or defendant's attorney that defendant had been living with him.

¶ 13 Jesus Figueroa testified that he knew Valles in 2013. According to Jesus, he rented a room in Valles's house for $150 per month. He kept "personal belongings" there, including cocaine and scales. He also kept a Tek 9 firearm there in an unlocked box.

¶ 14 According to Jesus, although he knew that defendant had been tried and sentenced in 2014, he did not come forward then, because he was "really scared." He was coming forward at the hearing because he did not feel it was right that defendant was serving time for something that defendant had not done.

¶ 15 When asked why the trial court should believe him, Jesus answered, "Why not?" Jesus denied that he had been forced to testify by defendant, friends, or family.

¶ 16 When asked on cross-examination where he had kept the drugs, Jesus answered that he had hid them in the basement room "[w]herever [he] could hide them." When asked exactly where in the room, he responded in boxes near "[a]ll the walls." He could not recall how many boxes or how much cocaine.

¶ 17 Jesus was also questioned about the nature and extent of his drug dealing. His attorney objected to that questioning as beyond the scope of the direct examination.

¶ 18 Jesus could not recall whether defendant had stayed at the house. He added that, because Valles and defendant had a child together, defendant sometimes would be at the house.

¶ 19 According to Jesus, in December 2015, he contacted a mutual acquaintance of his and defendant's regarding his claim that defendant was innocent. When asked to provide her name, Jesus refused to do so, because she did not want to get involved. When pressed, Jesus stated that he could not remember her name.

¶ 20 When asked whether he ever put drug money in his bank account, Jesus answered no. He added that the only money he put in his bank account was from his job as a construction worker during 2013.

¶ 21 The State sought admission of a pretrial bond report for Jesus. The State contended that, because the bond report showed that Jesus had been unemployed during 2013, it impeached his testimony. Defendant stipulated to the foundation for the bond report but not to the truth of its contents. The court admitted the bond report.

¶ 22 Defendant testified that, in August 2013, he lived with his father at 204 South Park Avenue.

¶ 23 The trial court issued a written order denying the petition. The court found that the claim of ineffectiveness for failing to file a motion to suppress evidence had been forfeited, as it could have been raised on direct appeal.

¶ 24 The trial court found that Lazaro was not credible and that his testimony was contradicted by the trial record. The court was also skeptical as to why Lazaro had waited almost three years to come forth. Thus, the court found that, because there was not a reasonable probability that the outcome would have been different had he testified, there was no prejudice from failing to call Lazaro at trial.

¶ 25 As for the actual-innocence claim, the trial court found that Jesus's testimony did not constitute newly discovered evidence. The court further found that Jesus entirely lacked credibility. Thus, the court found that his testimony was not of such a conclusive character that it would likely have changed the result of the trial. The court added that, because Valles' testimony was credible and convincing, it was confident in its original finding of guilt.

¶ 26 Defendant, in turn, filed this timely appeal. We granted the appellate defender's motion to withdraw, and defendant has proceeded *pro se*.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant contends that (1) the trial court erred when it allowed the State to impeach Jesus with a prior arrest in the bond report; (2) the court erred when it permitted the State to ask Jesus about prior bad acts related to his purported drug dealing; (3) the court erred in finding that defendant failed to establish a claim of actual innocence; and (4) the court erred in denying his claim of ineffective assistance of trial counsel for failing to investigate and call Lazaro as a witness.

¶ 29 The Act provides a means by which a convicted person may challenge his conviction by showing that his conviction resulted from a substantial denial of his federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). A postconviction petition is adjudicated in three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The third stage is an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246. At that stage, the burden is on the defendant to substantially show a deprivation of his constitutional rights. *People v. Coleman*, 206 Ill. 2d at 261, 277 (2002). At the hearing, the court serves as the fact finder, and its function is to determine witness credibility, weigh the evidence, and resolve any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34. After the hearing, the court must determine whether the evidence demonstrates that the defendant is entitled to relief. *Domagala*, 2013 IL 113688, ¶ 34.

¶ 30 A reviewing court will not reverse the trial court's decision unless it is manifestly erroneous. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶ 31. Under that standard, we greatly defer to the trial court's findings of fact, because the trial court is in the best position to weigh the credibility of the witnesses. *Hotwagner*, 2015 IL App (5th) 130525, ¶ 31. A ruling is

manifestly erroneous if it contains error that is clearly evident, plain, and indisputable. *Hotwagner*, 2015 IL App (5th) 130525, ¶ 31.

¶ 31 In addressing the claim that the trial court erred in admitting the bond report, we note that whether evidence is admitted in a postconviction evidentiary hearing is a matter of sound judicial discretion, and the decision will not be disturbed on review absent an abuse of that discretion. *People v. Meyers*, 2016 IL App (1st) 142323, ¶ 23. A trial court abuses its discretion when its decision is arbitrary, fanciful or unreasonable or when no reasonable person would take the view adopted by the trial court. *Meyers*, 2016 IL App (1st) 142323, ¶ 23.

¶ 32 There was no abuse of discretion in admitting the bond report. Initially, we note that the bond report is not in the record. Therefore, any doubts about whether it contained the arrest must be resolved against defendant. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Even if it did, the State sought its admission merely to show that Jesus, inconsistent with his testimony, had been unemployed during the relevant time. That was a legitimate purpose. More importantly, the record does not show that the court considered any arrest in the bond report as bearing on Jesus's credibility. Thus, the court did not abuse its discretion in admitting the bond report.

¶ 33 We next consider the cross-examination of Jesus. Initially, we note that defendant forfeited the issue by failing to raise it below. See *People v. Williams*, 165 Ill. 2d 51, 60-61 (1995).

¶ 34 Even had he preserved the issue, it lacks merit. Rulings concerning the scope of cross-examination are within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion resulting in manifest prejudice. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 56.

¶ 35 Here, Jesus claimed that he, instead of defendant, had committed the charged offense of drug dealing. Thus, it was entirely proper for the State to cross-examine Jesus about his purported drug dealing. In doing so, the State necessarily questioned him about the nature and extent of his drug dealing in an effort to show that he was being untruthful. Because that questioning was directly related to Jesus's credibility, it was not an abuse of discretion to allow it.

¶ 36 We next address defendant's contention that the trial court manifestly erred in rejecting his claim of actual innocence. It did not.

¶ 37 To succeed on an actual-innocence claim, a defendant must present new, material, noncumulative evidence that is so conclusive that it would probably change the result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. New evidence is that which was discovered after trial and that could not have been discovered earlier through due diligence. *Coleman*, 2013 IL 113307, ¶ 96. Material evidence is relevant and probative of the defendant's innocence. *Coleman*, 2013 IL 113307, ¶ 96. Noncumulative means evidence that adds to what the fact finder heard. *Coleman*, 2013 IL 113307, ¶ 96. The evidence is conclusive if, when considered along with the trial evidence, it would probably lead to a different result. *Coleman*, 2013 IL 113307, ¶ 96.

¶ 38 The trial court typically determines first whether the evidence was new, material, and noncumulative. *Coleman*, 2013 IL 113307, ¶ 97. If it was, the court must then determine whether that evidence places the trial evidence in a different light and undercuts the court's confidence in the factual correctness of the guilty verdict or finding. *Coleman*, 2013 IL 113307, ¶ 97. That is a comprehensive approach that involves credibility determinations that are

uniquely appropriate for the trial court. *Coleman*, 2013 IL 113307, ¶ 97. As noted, we will disturb the trial court's judgment only if it is manifestly erroneous.

¶ 39 Here, the trial court found that Jesus's testimony was not newly discovered. We agree. At the time of trial, defendant knew Jesus and would have been aware of his purported connection to Valles and her home. Additionally, the record does not indicate that Jesus's potential testimony could not have been discovered earlier through due diligence. Thus, the evidence that Jesus was the actual offender was not newly discovered.

¶ 40 Additionally, Jesus's testimony was not so conclusive that, when considered along with the trial evidence, it probably would have led to a different result. The trial court found Jesus to be incredible. The court was in the best position to make that assessment. Further, when we read the transcript of Jesus's testimony, it is littered with inconsistencies and vagaries. Not only was Jesus's testimony highly questionable, but the trial evidence was compelling. In particular, the court found Valles' testimony credible and convincing. When Jesus's testimony is considered along with the trial evidence, it is not so conclusive that it likely would change the result on a retrial. Thus, the court did not commit manifest error in denying the actual-innocence claim.

¶ 41 That leaves defendant's contention that his trial counsel was ineffective for failing to investigate and call Lazaro as a witness. That contention lacks merit.

¶ 42 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Domagala*, 2013 IL 113688, ¶ 36. Prejudice requires a showing that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v. Williams*, 2017 IL App (1st) 152021, ¶ 36. A reasonable probability is one sufficient

to undermine confidence in the outcome. *Williams*, 2017 IL App (1st) 152021, ¶ 36. If an ineffective-assistance claim can be disposed of on the ground of insufficient prejudice, then that course should be taken and the court need not consider the attorney's performance. *Williams*, 2017 IL App (1st) 152021, ¶ 36.

¶ 43 In this case, we need not evaluate whether trial counsel's failure to investigate or call Lazaro as a witness was deficient, as any error was not prejudicial. The trial court found Lazaro incredible. In doing so, it questioned why Lazaro, defendant's father, would wait so long before offering his testimony. Because the trial court was in the best position to assess Lazaro's credibility, we can find no fault with that assessment. That Lazaro was found to be an incredible witness alone defeats any claim of prejudice.

¶ 44 Even crediting Lazaro, however, his testimony would not have probably changed the outcome of the trial. As the trial court noted, Valles' testimony that defendant had lived with her was credible and convincing. Further, although Lazaro testified that defendant had a bedroom at Lazaro's house and that he stayed there during the relevant time, he admitted that he did not know where else defendant might have stayed during that time. Therefore, Lazaro's testimony would not have precluded a finding that defendant also stayed at Valles' home. Considering the ample evidence that defendant had lived with Valles, Lazaro's questionable testimony would not have probably changed the result of the trial. Because there was no prejudice from failing to investigate or call Lazaro, the trial court did not commit manifest error in denying defendant's claim of ineffective assistance of counsel.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the circuit court of McHenry County. The State has requested that defendant be assessed $50 as costs for this appeal pursuant to

section 4-2002(a) of the Counties Code (55 ILCS 5/4-2002(a) (West 2016)) and *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978). The statute authorizing the fee has been repealed effective July 1, 2019. Given this and as noted in *Nicholls*, the fee is a "relic of another era." *Id*. at 179. However, we remain bound to follow the statute and *Nicholls*. See *People v. Knapp*, 2019 IL App (2d) 160162, ¶¶ 49-50. Thus, we determine that the State is entitled to the $50 fee.

¶ 47 Affirmed.

¶ 48 Justice McLAREN, concurring in part and dissenting in part.

¶ 49 I concur with the majority's affirmance of the trial court. However, I dissent from the assessment of the $50 appellate fee contained in section 4-2002 of the Counties Code (55 ILCS 5/4-2002 (West 2016)). In *Nicholls*, the supreme court affirmed the appellate court's assessment of the fee against defendant Nicholls, who had appealed from the dismissal of his postconviction petition; the supreme court recognized "a legislative scheme which authorizes the assessment of State's Attorney's fees as costs in the appellate court against an unsuccessful *criminal* appellant upon affirmance of his conviction." (Emphasis added.) *Nicholls*, 71 Ill. 2d at 174.

¶ 50 However, as I have demonstrated in *Knapp*, *Nicholls* was "based on the false premise that a postconviction petition is a criminal case." *Knapp*, 2019 IL App (2d) 160162, ¶ 97 (McLaren, J., dissenting). Postconviction proceedings are not criminal proceedings; they are civil, collateral proceedings. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). This well-established fact was recently reaffirmed in *People v. Johnson*, 2013 IL 114639, where all of the participants, including the State and the supreme court, recognized this fact. See, *i.e.*, *id*. at ¶ 12 ("The statutory provision that allows imposition of the $50 [*habeas corpus*] fee first appeared in the statute in a 1907 amendment, and has remained unchanged, despite the creation of *additional collateral*

proceedings such as a section 2–1401 petition and a postconviction petition" (emphasis added); *Knapp*, 2016 IL App (2d) 160162, ¶ 133.

¶ 51 My dissent in *Knapp* provides a full exposition of the faulty premise of *Nicholls*, the illogic of its application to appeals from civil collateral proceedings, and the absurd results that may obtain from such application. The majority in *Knapp* declined to address *Nicholls*' faulty premise. The majority here now cites *Knapp* as support for its claim that we are "bound" to follow *Nicholls*, again without addressing *Nicholl*s' lack of a solid foundation. The majority seems content to allow the repeal of the statute to end the misapplication of *Nicholls* rather than address, let alone attempt to refute, the *Nicholls* counterfactual. Suffice to say, the conclusion that appellate fees are collectible in collateral civil proceedings, such as postconviction proceedings, is not based in reality. *Nicholls* has no application to civil collateral proceedings since, by its own terms, it was adjudicating *criminal* proceedings, and it has been wrongly cited as support for the assessment of this fee for too long. As there is no basis for the assessment of the fee in this case, I dissent from its imposition.