

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).

2019 IL App (3d) 170060-U

Order filed April 2, 2019

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2019

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. 3-17-0060
)	Circuit No. 84-CF-161
MILTON JOHNSON,)	
Defendant-Appellant.)	Honorable Amy M. Bertani-Tomczak, Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* The circuit court did not err when it denied defendant's petition for postconviction relief following a third-stage evidentiary hearing.
- ¶ 2 Defendant, Milton Johnson, appeals from the denial of his postconviction petition following a third-stage evidentiary hearing. We affirm.
- ¶ 3 I. BACKGROUND
- ¶ 4 A jury found defendant guilty of the murder of Anthony Hackett (Ill. Rev. Stat. 1983, ch. 38, ¶ 9-1(a)(1), (a)(3)), and the aggravated kidnapping (*id.* ¶ 10-2(a)(3), (a)(5)), deviate sexual

assault (*id.* ¶ 11-3), rape (*id.* ¶ 11-1(a)), and attempted murder (*id.* ¶¶ 8-4(a), 9-1(a)) of Patricia Gail Payne. In defendant’s direct appeal, our supreme court exhaustively recited the facts adduced at his trial. *People v. Johnson*, 114 Ill. 2d 170 (1986). For purposes of consistency between cases, we adopt that recitation in large part here, supplementing where relevant to the particular issue of this appeal.

¶ 5 At trial, testimony from Payne established that on July 16, 1983, she and her boyfriend, Hackett, left their homes in Emden, Illinois, and spent the afternoon and evening at Great America Amusement Park (Great America) in Gurnee, Illinois. *Id.* at 181. While there, Hackett purchased a stuffed doll depicting a cartoon character popularly known as the Tasmanian Devil. Hackett placed the sales receipt for the doll into his wallet. At approximately 10 p.m., the two left Great America in Hackett’s vehicle. On their way home, the pair took a wrong turn and found themselves in Chicago. After reestablishing the proper direction, Hackett and Payne drove for another 45 minutes south on Interstate 55 before they pulled off onto the shoulder to sleep. Hackett slept in the front seat, while Payne slept in the back. *Id.*

¶ 6 Shortly after 1:30 a.m., Payne awoke to a tapping sound on the passenger-side window, followed by gunshots which struck Hackett and the sound of glass breaking. *Id.* An individual opened the passenger door and ordered Payne to hand over Hackett’s wallet, watch, and her purse. *Id.* at 181-82. As she complied, Payne noted that the assailant was a black man wearing a light- and dark-blue flannel shirt. *Id.* at 182. The man then ordered Payne to exit the vehicle and “crawl on her belly” to a pickup truck parked approximately 10 feet away. *Id.* When Payne reached the truck the man told her to get inside, stay on the floor, and keep her eyes closed. However, Payne made quick glances of the assailant’s face after he climbed into the driver’s side of the truck. *Id.*

¶ 7 Once the truck started moving, the man directed Payne to sit on the seat. *Id.* The assailant inserted his fingers into her vagina and commanded her to move back and forth. After 10 minutes, Payne's assailant ordered, and then forced, her to perform oral sex. He then pulled off the interstate and stopped the truck near a white building where Payne could see many highway lights and hear voices. The assailant spoke briefly to someone and then raped Payne.

¶ 8 During the rape, Payne's assailant taunted her, asking why she was crying and had she not engaged in sexual intercourse before with her boyfriend. *Id.* Her assailant then resumed driving and told Payne that it was 4:30 a.m. A short time later, he again pulled off the highway and stopped the truck. The assailant gagged and blindfolded Payne. Her assailant once again started to drive, only to pull off onto the shoulder of the highway after about 10 minutes. The assailant then stabbed Payne in the chest and she lost consciousness.

¶ 9 At approximately 5:30 a.m., a passing motorist found Payne in a grassy area in the median along Illinois Route 53 near Wilmington, Illinois. *Id.* She was subsequently taken to St. Joseph's Hospital in Joliet, Illinois. Dr. Clyde Dawson testified that upon Payne's arrival at the hospital in the early morning hours of July 17, 1983, she had no pulse or blood pressure. *Id.*

¶ 10 John Meduga, a special agent with the Illinois Department of Law Enforcement, testified that he met with Payne in the emergency room at 7:22 a.m., on July 17. *Id.* at 183. Because of Payne's condition, she could only respond to Meduga's questions with a simple yes or no, or a shake of her head. *Id.* Payne's responses indicated that her assailant was a black male who she believed was in his mid-twenties, 6 feet to 6 feet 2 inches in height, medium to heavy build with a pot belly, no observable facial hair, and a strong body odor; he was wearing a blue-plaid flannel shirt, blue jeans, low-cut gym shoes, and was armed with a shiny revolver that had a white handle. Meduga also interviewed Payne two other times later that day. At each of their

three meetings, Payne stated that she would be able to recognize her assailant's low growly voice and strong body odor. *Id.*

¶ 11 Police found the vehicle in which Payne and Hackett had traveled in parked on the shoulder of Interstate 55. *Id.* Hackett's body was in the front seat. An autopsy revealed that he had been shot five times. Two of the bullets recovered were forwarded to State evidence technicians for processing. Reddish-brown fibers were found on the floor of Hackett's vehicle, on the shoulder of the interstate near the front passenger door, and in the grassy area where Payne was found by the motorist. *Id.*

¶ 12 During the summer of 1983, defendant lived at the home of his stepfather, Sam Myers, with his mother, Dolly Myers, and his brother, James Johnson. *Id.* at 184.

¶ 13 The investigation into Hackett's murder and the assault, rape, and attempted murder of Payne stood at a standstill until February 28, 1984, when Ann Shoemaker telephoned the Will County sheriff's office. *Id.* Shoemaker spoke with Charles Malinkowski, a Will County deputy sheriff, and informed him of an incident which occurred on July 9, 1983, that prompted her to record on a slip of paper license plate number 889930B, which belonged to the Myers pickup truck. *Id.*

¶ 14 Shoemaker testified that during the late evening hours on July 9, 1983, she and a girlfriend were walking on Bruce Road in Will County when a dark pickup truck with a cabin enclosure over the flatbed portion passed them, turned around at the corner, and passed them again. *Id.* at 185. After several more such passes, the girls became frightened and returned to a party they had been at earlier that night. *Id.* After telling everyone at the party about the truck, Shoemaker and her friend got into Shoemaker's vehicle and followed the truck. *Id.*

¶ 15 The two followed the truck for over an hour, during which time Shoemaker wrote down the aforementioned license plate number along with the words “blue or black Chevy.” *Id.* Several times they pulled into a driveway, shut off the vehicle lights, and waited. Each time, the truck would turn around and come back. Finally, Shoemaker testified that, at one point, they saw the truck pulled over to the side of the road under a street light with its hood up. The driver, who was standing near the passenger side of the truck, was a black man, approximately 5 feet 9 inches in height, weighed approximately 200 pounds, and was wearing what Shoemaker believed was a red-flannel shirt. *Id.*

¶ 16 Thereafter, on March 6, 1984, Shoemaker met with Malinkowski and Investigator James Fetzner of the Will County sheriff’s office, and tendered to them the slip of paper bearing the license plate number of the Myers truck. *Id.* That same day, Meduga visited Payne at her home, where he showed her an array of photographs of five individuals, including defendant. After examining defendant’s photograph for several minutes, Payne tentatively identified defendant as her assailant, stating that he looked “pretty right” and adding “my gut feeling is it’s him but I can’t be sure—his side view looks right and his hairline seems right.” *Id.* at 186. Payne testified that she told Meduga that she could be more certain in her identification if she heard the individual’s voice. *Id.*

¶ 17 On March 9, 1984, Payne viewed a six-person lineup at the Will County courthouse. *Id.* The six participants were black males, ranging from 5 feet 8 inches to 6 feet 2 inches in height, and weighed from 180 to 250 pounds. Defendant was 5 feet 9 inches in height, and weighed 240 pounds at the time of the lineup. Because defendant had a moustache and goatee-type beard at the time and police were uncertain as to whether Payne had observed facial hair on her assailant, three other participants were included who had either a beard, moustache, or both. *Id.*

¶ 18 Meduga told Payne not to say anything until after all the participants had individually repeated the following commands her assailant had made: “Get on the ground and crawl on your belly to the truck,” “Stay low,” “Get in the truck,” “Stay on the floor,” “Keep your eyes closed,” and “You got your eyes closed?” *Id.* After each participant had repeated the commands, Payne positively identified defendant’s face and voice as that of her assailant. Payne further told Meduga that she had heard the participants perfectly, and when asked if she wanted to smell their body odors, Payne stated that there was no need to do so because she had no doubt that defendant was the assailant. *Id.*

¶ 19 On March 9, 1984, Sam Myers signed a “Consent to Search” form for police. *Id.* at 187. A search of the truck was conducted. *Id.* Among the items found during the search were reddish-brown fibers, stains which appeared to be blood, Caucasian head hairs, and a sales receipt from Great America. Search warrants for the truck and the Myers residence were issued on the basis of these items. A second search of the truck uncovered more reddish-brown fibers and a steak knife. Among the items seized from the Myers residence were three .357-magnum cartridges from the dresser top in the bedroom of Sam and Dolly Myers, a pair of size 10 low-cut gym shoes and another pair of size 11 high-cut gym shoes, both of which were found in the basement where defendant and his brother, James Johnson, slept. *Id.*

¶ 20 David Metzger, a forensic scientist with the Bureau of Scientific Services of the Illinois Department of Law Enforcement, testified that the vast majority of fibers discovered within the Myers truck were the same as, with some being indistinguishable from, those found at the scene where Payne had been stabbed, on her clothing and hospital bedsheet, and outside Hackett’s vehicle. *Id.* at 187-88. The unusual nature and multiplicity of the fiber clumps found, which appeared to Metzger to be useful only as stuffing to provide bulk to another object, strongly

suggested that they had come from the same source. *Id.* at 188. Metzger further testified that the knife found in the Myers truck was consistent in size with the holes in Payne's shirt, though no blood was found on the blade or on or underneath the handle, and the knife was of common size. Lastly, Metzger testified that one Caucasian head hair removed from the truck was morphologically consistent with a head-hair standard taken from Payne. *Id.*

¶ 21 Roger Peele, a special agent with the Federal Bureau of Investigation, testified to the results of neutron-activation analysis (NAA) he conducted on the cartridges found in defendant's home and the bullets recovered from Hackett's body. NAA is a chemical analysis which detects trace elements in a sample of material to identify the source of the material. According to Peele, NAA analysis showed that the composition of the samples "would commonly be expected to be found among bullets within the same box of cartridges." In other words, Peele opined that the bullets recovered from Hackett's body likely came from the box of cartridges found at defendant's residence.

¶ 22 Defendant did not testify at trial. Defense counsel also did not call an expert witness to rebut Peele's testimony that the NAA comparisons performed by the State were unreliable.

¶ 23 Finally, Dolly Myers, defendant's mother, testified that the pickup truck was used by all family members and various relatives. *Id.* Dolly stated that she and Sam were in Mississippi in the middle of July 1983, having driven there for a two-week vacation in one of their three other vehicles. *Id.*

¶ 24 Ultimately, the jury found defendant guilty. The court sentenced defendant to death (later commuted to natural life imprisonment). Defendant appealed directly to the supreme court. The supreme court rejected defendant's challenge to the sufficiency of the evidence without mentioning Peele's testimony regarding NAA. *Id.* at 191. In reviewing defendant's other claims,

the supreme court went on to find “[t]he evidence establishing defendant’s guilt was overwhelming.” *Id.* at 201.

¶ 25 On November 23, 1987, defendant filed a postconviction petition, which is the subject of this appeal. Initially, defendant’s postconviction petition contained numerous constitutional claims. The circuit court dismissed defendant’s petition twice, and each time the supreme court reversed portions of the dismissal orders and remanded for further proceedings. See *People v. Johnson*, 154 Ill. 2d 227 (1993); *People v. Johnson*, 205 Ill. 2d 381 (2002). The sole claim that is now the subject of this appeal is defendant’s contention that defense counsel provided ineffective assistance for failing to either rebut or attempt to bar Peele’s testimony regarding NAA.

¶ 26 At the third-stage evidentiary hearing, defendant presented the testimony of William Tobin, an expert in metallurgy and materials science analysis. Tobin described NAA as the “most sophisticated junk science ever perpetrated upon the courts generally.” In Tobin’s opinion, Peele’s testimony was “scientifically unfounded. It’s false and misleading.” Tobin also testified that at the time of defendant’s trial experts in several scientific fields were available to debunk the methodology employed by NAA.

¶ 27 After taking the matter under advisement, the circuit court denied defendant’s postconviction petition. In rejecting defendant’s claim, the court noted that defense counsel could have hired an expert witness to rebut Peele’s testimony. However, the court concluded that such testimony would not have changed the outcome of the trial because the remaining evidence against defendant was overwhelming.

¶ 28 **II. ANALYSIS**

¶ 29 Defendant contends that the circuit court erred in denying his postconviction petition following an evidentiary hearing. Specifically, defendant contends that he established that

defense counsel provided ineffective assistance for failing to move to bar or rebut the State's expert witness who opined as to the origin of the bullets recovered from Hackett's body and the cartridges recovered from defendant's residence. Upon review, we find the court did not err in denying defendant's postconviction petition, because defendant failed to establish prejudice resulting from counsel's purported deficient performance. *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (failure to satisfy either prong of this test precludes a reviewing court from concluding that counsel was ineffective).

¶ 30 Throughout the third stage of postconviction proceedings, it is defendant's burden to make a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). "When a petition is advanced to a third-stage, evidentiary hearing, where fact-finding and credibility determinations are involved, we will not reverse a circuit court's decision unless it is manifestly erroneous." *Id.* "A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented." *Best v. Best*, 223 Ill. 2d 342, 350 (2006). However, "[i]f no [fact-finding or credibility] determinations are necessary at the third stage, *i.e.*, no new evidence is presented and the issues presented are pure questions of law, we will apply a *de novo* standard of review ***." *Pendleton*, 223 Ill. 2d at 473.

¶ 31 To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish prejudice, defendant must show there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 11. Even assuming defense counsel performed deficiently, we

find that defendant cannot demonstrate that there is a reasonable probability that the result would have been different because the evidence of defendant's guilt is overwhelming.

¶ 32 Initially, we note that in defendant's direct appeal, our supreme court found the evidence of defendant's guilt to be "overwhelming" without even mentioning Peele's expert testimony. *Johnson*, 114 Ill. 2d at 190-91. We agree with our supreme court's view of the evidence. At trial, Payne positively identified defendant as the man who assaulted her and murdered Hackett. "Overwhelming circumstantial evidence found within the Myers pickup truck, to which defendant undisputedly had access," corroborated her testimony. *Id.* at 191. The specific circumstantial evidence found in the truck included:

"the Great America receipt which documented the purchase of a Tasmanian Devil doll on July 16, 1983; the unusual fibers, indistinguishable from those found at the scenes where Hackett was murdered and Payne was stabbed; the head hair that was morphologically similar to the head-hair standard of Payne; and the knife which could not be eliminated as the cause of the stab holes made in Payne's shirt." *Id.*

None of the above evidence would be called into question had defense counsel moved to bar or rebut Peele's expert testimony. As noted in *Strickland*, "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact-finder would have had a reasonable doubt respecting guilt." *Strickland*, 466 U.S. at 695. Given that the evidence of defendant's guilt is overwhelming without even considering Peele's expert testimony, any attempt by defense counsel to challenge the forensic evidence would have had no impact on the jury's determination. At best, the potential rebuttal testimony would have demonstrated that it was impossible to state with certainty that the bullets recovered from

Hackett's body and the cartridges found in defendant's residence came from the same box. The rebuttal evidence would not show that the bullets came from *different* boxes. In other words, the defense's expert testimony would merely negate Peele's testimony. Consequently, we hold that it is not reasonably probable that the outcome of the trial would have been different had defense counsel successfully moved to bar Peele or presented a witness to rebut his testimony.

¶ 33

III. CONCLUSION

¶ 34

For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 35

Affirmed.