2019 IL App (4th) 170076-U

NO. 4-17-0076

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
April 8, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
ANTWAN C. BROWN	)	No. 13CF1927
Defendant-Appellant.	)	
	)	Honorable
	)	Roger Webber,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Presiding Justice Holder White and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the trial court's denial of defendant's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 2 Defendant, Antwan C. Brown, appeals from the third-stage denial of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2014)). He asserts the trial court's denial of his postconviction petition was manifestly erroneous because it was inconsistent with the findings the court made when it denied the State's motion for a directed finding. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In November 2013, the State charged defendant with two counts of aggravated battery of a peace officer (720 ICLS 5/12-3.05(d)(4)(i) (West 2012)). In February 2014, a jury trial was held on the charges. Urbana police officer Elizabeth Ranck (now Elizabeth Alfonso)

and Sergeant Cory Koker testified regarding the November 19, 2013, events. The officers testified Officer Ranck was called to assist a motorist (defendant) who was a passenger in a car blocking a lane on Florida Avenue, in Urbana, Illinois. After running a search for warrants and discovering one outstanding for defendant, Officer Ranck called Sergeant Koker for backup. Together, the officers approached defendant and asked him to confirm the information on the warrant. Defendant tried to "move past" the officers or "pushed his body forward" to get past the officers and "made contact" with the officers, "knock[ing] both of them to the ground." Defendant fled on foot but was soon apprehended. After a canine search, crack cocaine and heroin were discovered, although those charges were later dismissed. The defense did not call any witnesses at trial, and defendant did not testify. After deliberation, the jury found defendant guilty of aggravated battery to Sergeant Koker but could not reach a verdict as to Officer Ranck. The trial court declared a mistrial as to the charge of aggravated battery to Officer Ranck, and the State dismissed the charge.

¶ 5 In March 2014, the trial court sentenced defendant to 12 years in prison. Defendant appealed his conviction, arguing (1) the court erred by denying defendant's *Batson* claim and (2) the circuit clerk improperly imposed fines. This court affirmed defendant's conviction but vacated the improperly imposed fines. See *People v. Brown*, 2016 IL App (4th) 140260-U.

¶ 6 In June 2016, defendant filed a *pro se* postconviction petition under the Act. Defendant alleged the jury was not impartial and he failed to receive a fair trial. In July 2016, the trial court appointed counsel to represent defendant on his postconviction petition. Counsel filed an amended petition asserting trial counsel, Jim Kuehl, provided ineffective assistance of counsel when he failed to contact and interview Ashlee Larson, who was present at the time of the

alleged offense. Defendant maintained Larson had recently stated defendant "had plenty of room when he ran, didn't push or touch an officer and neither officer fell to the ground."

¶ 7 Appointed counsel attached an August 2016 affidavit signed by defendant to the amended postconviction petition. In the affidavit, defendant maintained trial counsel did not contact Larson and "did not fight for" defendant. Also attached to the amended petition was a portion of Sergeant Koker's written report of the incident. In the report, Sergeant Koker described his conversation with Larson after the incident. Sergeant Koker stated Larson explained she had only known defendant for approximately one week and "she had no idea [defendant] was going to push past [the officers] and run away."

¶ 8 Appointed counsel further supplemented the amended postconviction petition with an investigative report of a telephone interview with Larson (identified in the report as Larson-Morrow). An investigator with the Champaign County Public Defender's Office conducted the interview on September 22, 2016. Larson was incarcerated and unable to provide her own affidavit. In the interview, Larson stated she drove the vehicle and defendant sat in the front passenger seat. When the vehicle ran out of gas, Larson and defendant pushed the vehicle out of the road to wait for assistance. A female officer arrived and spoke with them about the vehicle after getting both Larson's and defendant's identification. Another officer arrived and requested defendant step out of the vehicle. Larson stated defendant stood in the opening of the car door with an officer on the other side of the door. Defendant ran but did not push or touch an officer. According to Larson, no officer fell to the ground. Larson maintained she had only known defendant for approximately one month and had no reason to lie.

¶ 9 On November 21, 2016, the State filed an answer to defendant's amended postconviction petition requesting the trial court deny the petition. On November 23, 2016, the

court denied the State's "Motion to Dismiss the Amended Post-Conviction Petition" and set an evidentiary hearing on January 12, 2017.

¶ 10 At the hearing, Larson, defendant, Sergeant Koker, and Kuehl testified. Larson testified on November 19, 2013, she was driving on Florida Avenue when her vehicle ran out of gas. Defendant sat in the front passenger seat of the vehicle. Larson testified she had known defendant for "about a year." While waiting for assistance, a police officer arrived and asked for their names, which they provided. Larson testified defendant was seated in the front passenger seat with the door wide-open. One of the police officers stood behind the open door. Larson stated she did not remember seeing a second officer standing at the door and did not think the second police officer arrived until after defendant "took off." Larson stated she did not observe defendant strike, push, or knock down any police officer. On cross-examination, Larson admitted she was seated in the driver's seat with the door closed. She did not remember the appearance of the police officers present, but she remembered speaking with them after the incident. Larson denied, however, using the words "pushed past" to describe defendant fleeing. She also denied being contacted by defendant's counsel before the original trial. The court took judicial notice of Larson's burglary conviction entered on June 10, 2013, approximately five months prior to the incident involving defendant.

¶ 11 Defendant testified only regarding his plea negotiations prior to his jury trial. He did not testify regarding the events on November 19, 2013.

¶ 12 At the close of defendant's case, the State moved for a directed finding, arguing defendant failed to satisfy the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Although the trial court agreed defense counsel's failure to call Larson to testify "could be a strategic decision," it found a jury "would be free to discredit her, but I think it's a question

that the jury—at least at this point without evidence from Mr. Kuehl that this was a strategic decision, I think a jury is probably entitled to heal [*sic*], so I'll deny the motion for a directed finding as to that count."

¶ 13 The State presented the testimony of Sergeant Koker and Kuehl. Sergeant Koker's testimony was consistent with his testimony at the original trial, placing himself and Officer Ranck at the open passenger-side vehicle door at the time of the alleged incident. Defendant stood between Sergeant Koker and Officer Ranck. As Sergeant Koker stepped in front of defendant, defendant shoved Sergeant Koker. Sergeant Koker testified he fell into Officer Ranck and the two fell to the ground.

¶ 14 Kuehl testified he recognized defendant but did not recall the central issues of the case from three years earlier. Kuehl testified he did recall considering potential witnesses while preparing for defendant's trial. Specifically, he spoke with the woman who drove the car and asked for her account of the incident. Kuehl testified the woman told him she "didn't want to get involved." According to Kuehl, when witnesses state they do not want to be involved in a case, "[t]hat doesn't mean you don't ask them to be a witness. You have to kind of balance off what somebody can contribute." He stated with witnesses who do not want to get involved, "they tend to get very creative on the witness stand, so I don't like to call them as witnesses." Kuehl recalled, "What she contributed was more—it had something to do with the door, and I think her—she hadn't actually seen who pushed the door, but her assumption was that it was the defendant pushing the door trying to get away, but she didn't actually see anything. And that's, that's the best of my recollection." Based on his conversation with Larson, Kuehl believed Larson "would not have been helpful toward the resolution of [the] issues."

¶ 15 After the close of evidence and following arguments, the trial court denied defendant's amended postconviction petition. The court determined, while Larson was adamant she did not see defendant "strike, shove, or knock down the officers," she did not remember "if the second officer was even there before the defendant ran." The court found Sergeant Koker's testimony consistent with police procedure, while Larson's testimony placing an officer behind the open door did not "make sense with the purpose of the officers at that point in time." The court concluded defendant had not met his burden of proof "that the testimony of Ms. [Larson-]Morrow would have probably changed the outcome of the case." Since defendant was not prejudiced by the alleged error, the court did not need to resolve whether counsel's conduct was objectively deficient.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 On appeal, defendant asserts because the trial court's findings made upon denial of the State's motion for a directed finding "do not match" the court's "ultimate ruling" denying defendant's postconviction petition, this court should reverse. We disagree.

¶ 19 A. Postconviction Proceedings

¶ 20 The Act provides defendants with a collateral means to challenge his or her conviction or sentence for violations of federal or state constitutional rights. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. When a case does not involve the death penalty, the adjudication of a postconviction petition follows a three-stage process. *People v. Tate*, 2012 IL 112214, ¶ 9, 980 N.E.2d 1100. First, the trial court examines the petition to ascertain whether it is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). The court shall dismiss any petition deemed frivolous and patently without

merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). If a petition survives stage one, it advances to stage two, and counsel is appointed. *Andrews*, 403 Ill. App. 3d at 658. Then, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2014). If the State answers the petition or the trial court denies the State's motion to dismiss, the proceeding advances to a third stage. *Andrews*, 403 Ill. App. 3d at 658-59; 725 ILCS 5/122-5 (West 2014). Where a petition advances to the third stage of postconviction proceedings, the trial court conducts an evidentiary hearing where fact-finding and credibility determinations may be involved. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). At the third stage, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Id*.

¶ 21 B. Standard of Review

¶ 22 Where a trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on disputed issues of fact that require credibility determinations, we will reverse that decision only if it is manifestly erroneous. *People v. Coleman*, 183 Ill. 2d 366, 384, 701 N.E.2d 1063, 1073 (1998). " 'Manifestly erroneous means arbitrary, unreasonable and not based on the evidence.' " *People v. Ballard*, 206 Ill. 2d 151, 162, 794 N.E.2d 788, 798 (2002) (quoting *People v. Wells*, 182 Ill. 2d 471, 481, 696 N.E.2d 303, 308 (1998)). However, where a trial court's decision to deny a postconviction petition after a third-stage evidentiary hearing is based on undisputed facts, we will generally review that decision *de novo*. *People v. English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Typically, review of a claim of ineffective assistance of counsel involves a mixed question of law and fact and, therefore, a hybrid standard of review would apply. *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66, 25 N.E.3d 82. When addressing such a claim, we defer to the trial court's factual findings and will disturb them

only if they are against the manifest weight of the evidence. We review *de novo* the court's ultimate determination of whether counsel rendered ineffective assistance. See *id*.

¶ 23 C. Effectiveness of Counsel

¶ 24 We review ineffective assistance of counsel claims under the standard set forth in *Strickland*, 466 U.S. 688. To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness and (2) the deficient performance prejudiced the defendant. *People v. Houston*, 226 Ill. 2d 135, 144, 874 N.E.2d 23, 29 (2007). To establish prejudice, the 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. Makiel*, 358 Ill. App. 3d 102, 108, 830 N.E.2d 731, 740 (2005). The prejudice prong is satisfied if the defendant can show counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* at 108-09. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *Houston*, 226 Ill. 2d at 144-45.

¶ 25 1. *Prejudice*

¶ 26 Defendant argues the trial court's findings made upon denial of the State's motion for directed finding, that Larson's testimony was clear enough to create "a question for the jury," caused the court's "ultimate ruling" denying defendant's postconviction petition to be manifestly erroneous. We note at the outset the language quoted by defendant, "a question for the jury," does not appear in the record. The court stated, in relevant part:

> "So I think that had Mr. Kuehl called this witness and she had been believed, the result likely could have been different.

> The fact that he did achieve a hung jury on one count suggests that perhaps—and in a case where it's a police officer's word against the defendant's word, those are sometimes close calls and hard to take. I understand [Larson] was vague about some of the details, but she was clear and adamant that her view of vision would have allowed her to see the pushing past the officers if that occurred, and she's adamant that it did not occur.
>
> The jury, of course, would be free to discredit her, but I think it's a question that the jury—at least at this point without evidence from Mr. Kuehl that this was a strategic decision, I think a jury is probably entitled to heal [*sic*], so I'll deny the motion for a directed finding as to that count."

¶ 27 The evidentiary record before the trial court at the time of the motion for directed finding was not the same as the record before the court at the time of the court's denial of defendant's postconviction petition. At the close of the evidentiary hearing, the court considered all of the evidence, including the testimony of the State's witnesses, Sergeant Koker and Kuehl. The court's initial findings in support of its denial of the State's motion for directed finding did not go unchallenged. We do not find the court's ruling on the motion for directed finding to be a determination Larson's testimony was credible, and thus defendant's case was proved by a preponderance of the evidence. The court's findings in support of its denial of the State's for directed finding did not preclude a judgment denying defendant's postconviction petition at the conclusion of the third-stage evidentiary hearing. We find therefore the court's findings in support of its denial of the motion for directed finding did not cause its final judgment denying defendant's postconviction petition to be manifestly erroneous.

¶ 28 The State offered the testimony of Sergeant Koker and Kuehl. Sergeant Koker testified he and Officer Ranck approached defendant at the open passenger-side door and defendant shoved Sergeant Koker into Officer Ranck when attempting to flee. Kuehl testified he spoke with Larson who told Kuehl she did not see anything. Based on his conversation with Larson, Kuehl believed Larson "would not have been helpful toward the resolution of [the] issues."

¶ 29 Following arguments at the close of all of the evidence, the trial court correctly stated, "At this stage after an evidentiary hearing, the Court is to serve as factfinder and determine witness credibility, the weight to be given testimony and the evidence[,] and resolve evidentiary conflicts." The court considered the testimony of Larson and Sergeant Koker. The court found Larson was "very clear she did not see the defendant strike, shove or knock down the officers," but she did not recall which officer arrived first or whether the second officer arrived before defendant attempted to flee. Further, the court found Larson's testimony placing one officer on the opposite side of the door "just doesn't make sense with the purpose of the officers at that point in time," particularly after the court found Sergeant Koker's testimony "consistent with everything I know about police procedure."

¶ 30 Thus, the court found defendant failed to prove by a preponderance of the evidence Larson's testimony would have changed the outcome of the case. The court's conclusion is supported by the record. Because defendant failed to meet his burden as to the prejudice prong, the trial court's judgment was not manifestly erroneous.

¶ 31 2. *Deficiency*

¶ 32 Because we find the trial court's denial of defendant's postconviction petition was not manifestly erroneous, where it found there was no prejudice to defendant, we need not

address whether it is arguable counsel's performance was deficient. See *People v. Buss*, 187 Ill. 2d 144, 213, 718 N.E.2d 1, 39 (1999) ("If a reviewing court finds that the defendant did not suffer prejudice, it need not decide whether counsel's performance was constitutionally deficient.").

¶ 33 III. CONCLUSION

¶ 34 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. See 55 ILCS 5/4-2002(a) (West 2016).

¶ 35 Affirmed.