2019 IL App (4th) 180762-U

NO. 4-18-0762

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
August 2, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
TYHEIM J. JOHNSON,	)	No. 14CF767
Defendant-Appellant.	)	
	)	Honorable
	)	Jeffrey S. Geisler,
	)	Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Steigmann and Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court's determination that trial counsel was not ineffective was not manifestly erroneous.

¶ 2 In March 2015, the trial court found defendant, Tyheim J. Johnson, guilty of aggravated discharge of a firearm and unlawful use or possession of a weapon by a felon. Thereafter, the court sentenced him to a total of 13 years in prison. Defendant appealed, and this court affirmed in part, reversed in part, and remanded with directions. On remand, defendant filed a motion for a new trial, claiming trial counsel was ineffective. The trial court denied the motion.

¶ 3 On appeal, defendant argues the trial court's decision on the merits of his ineffective-assistance-of-counsel claim was manifestly erroneous. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In July 2014, the State charged defendant by information with single counts of aggravated discharge of a firearm (count I) (720 ILCS 5/24-1.2(a)(2) (West 2014)) and unlawful possession of a weapon by a felon (count II) (720 ILCS 5/24-1.1(a) (West 2014)). Defendant pleaded not guilty.

¶ 6 Defendant waived his right to a jury trial, and his bench trial commenced in March 2015. At the trial, defendant appeared with attorney Charles Lukis. Steven Baylor testified he was living on North Oakland Avenue in Decatur on June 21, 2014, when he heard what he thought were fireworks. He then saw "two cars come flying by," and "they were weaving in and out of the traffic on Oakland Avenue shooting at each other." Baylor stated one vehicle was a silver Pontiac and the other was a small silver truck.

¶ 7 Decatur police officer Josh Davis testified he responded to a report of shots being fired at approximately 5 p.m. on June 21, 2014. He located a shell casing in the roadway at 1600 North Oakland Avenue. Decatur police officer Adam Siefman testified he observed bullet damage to several residences in the area.

¶ 8 Appearing in custody, Kameron Farrington testified he had felony convictions for manufacture/delivery of a controlled substance, delivery of a controlled substance, and obstructing justice. He acknowledged receiving immunity for his testimony, and he stated he was driving a gray Pontiac on the day in question. His friend and his cousin were with him in the car. While they were stopped in the middle lane at a red light, a pickup truck pulled up on the driver's side. Shots were fired from the truck, which pulled away. Farrington followed the truck, rolled down his passenger window, and "opened fire back." He stated he "let ten shots go" and only stopped because he "ran out of bullets."

¶ 9 Decatur police detective Ben Massey testified he listened to audio recordings of

jail calls as part of his investigation. During one call made at 6:37 p.m. on June 21, 2014, defendant told the incarcerated caller that "we're just ridin [*sic*] around." Four minutes later, defendant engaged in another phone call and stated "we caught Kam and them *** at the light on Oakland and Grand but that mother fucker pulled off too fast."

¶ 10 Defendant testified he went to the pool on June 21, 2014, with his cousin, his brother, and a friend. They stayed until 5:15 or 5:30 p.m. and then went to the house of defendant's cousin's girlfriend. Later that day, defendant received a phone call from his friend Terry Wells, and Wells stated he "had an altercation with the Kameron Farrington guy." Wells stated he had been shot at and a passenger in Wells's car fired back. Defendant said the statements he made in the jail calls were him "just being stupid, trying to seem tough to [his] cousin." Defendant denied involvement in the shooting.

¶ 11 Following closing arguments, the trial court found defendant guilty on both counts. In May 2015, the court conducted a sentencing hearing. In his statement of allocution, defendant apologized to the court and his family and pleaded for a "fair sentence." He assured the court any sentence would be "used constructively" so he could become a "more productive person to the community and [his] family."

¶ 12 The State recommended a prison sentence of 15 years on count I and 14 years on count II. The trial court asked the prosecutor if she was "in agreement that Count I is 85 percent sentence," and she responded in the affirmative. Defense counsel asked for a sentence of impact incarceration.

¶ 13 The trial court admonished defendant as to his right to appeal. Defendant interrupted, asking how he could "do this with ineffective counsel" and how he "can go about this by [himself]?" The court indicated it would take up defendant's questions "in just a

minute." After the court finished the admonitions, the following exchange occurred:

> "THE COURT: As far as any complaints you may have about your attorney, we're going to proceed today with your case. You have 30 days to put in writing what your complaints might be. Make sure you file that with the circuit clerk's office within 30 days.
>
> ***
>
> Do you understand?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: I can't rule on that today, because I don't know what your complaints are. You still have 30 days to file your complaints about your attorney. They have to be in writing so the Court understands specifically what you—what you're complaining about."

Defendant indicated he understood. Thereafter, the court sentenced defendant to 13 years in prison on count I and a concurrent term of 10 years in prison on count II.

¶ 14 On June 3, 2015, defendant filed a *pro se* motion to reconsider his sentence. Defendant stated he received a 13-year sentence but he was never made aware he would have to serve 85% of that sentence. Defendant claimed his trial attorney "reassured" him his sentence would be served at 50% and if he had known that fact earlier, he "may have plead [*sic*] to a lesser charge or sentence." He also stated he first heard about his 85% eligibility at the sentencing hearing. Defendant filed an identical *pro se* motion to reconsider his sentence on June 18, 2015.

¶ 15 On June 22, 2015, the trial court conducted a hearing on defendant's motion. Attorney Lukis noted the motion "makes some kind of allegations along the lines of ineffective assistance of counsel," and thus, Lukis expressed a need to withdraw as counsel. The court continued the hearing. On June 26, 2015, defendant filed another *pro se* motion for a reduction of his sentence, claiming his attorney was ineffective for failing to inform him of the possibility of an 85% sentence. Lukis filed a motion to withdraw on August 5, 2015.

¶ 16 On August 6, 2015, the trial judge conducted a hearing on defendant's June 26 motion. After defendant stated he wanted a different lawyer, the judge stated "I don't think we have much choice considering the allegations he's made. I don't think Mr. Lukis can proceed." The judge allowed the motion to withdraw and directed the State to notify Rodney Forbes of his appointment as counsel.

¶ 17 Forbes filed a first amended motion to reconsider the sentence on October 6, 2015. Along with attaching defendant's June 18, 2015, motion to reconsider to the amended motion, counsel argued defendant's sentences were excessive. On October 27, 2015, the trial court conducted a hearing on the motion. Defendant testified he had tried to address the court at the sentencing hearing when it was noted he would have to serve 85% of his sentence. When asked why he thought the court should reconsider his sentence, defendant stated as follows:

> "I feel like the—I should be—my sentence should be reconsidered and the sentence is excessive because in criminal procedure due process of law provides that the Court's duty is to admonish and inform the accused of the offenses charged and the maximum penalties faced. In this matter, the—I was never made aware of the fact that my charge carried 85-percent eligibility.

> Therefore the rules of fundamental fairness should be applied in this case seeing that neither the Court nor my counsel informed me as to my maximum sentence and eligibilities hindering me from making an intelligent decision as to not take this offense to trial or to take a plea agreement. Furthermore, I'm contending that due process of law is a safeguards [*sic*] to protect the rights of an accused at every stage of his criminal proceeding, and in this case I wasn't awarded the protection of law, which is to be fair.
>
> So because of these issues of the error, I'm requesting that relief in the form of my sentence being reconsidered and reduced to the fashion where it is to be served at 50 percent. My impression throughout the entirety of my legal proceedings due to the Court and my counsel's error of informing me of the possible penalties."

¶ 18 When asked if his statement in allocution would have been different if his sentence would have been served at 50%, defendant stated as follows:

> "I would have—if I thought it was at 50 percent, I would have said something, like, I don't know, maybe whenever I come home after this—really just saying basically the same thing, but just more along the lines of for sure, for sure, when I come home that I'll be a better person, and I'll be able—because I know at 50 percent, I would have been able to get my drug treatment, my

schooling, and everything. I would have—probably been more along the line—and really it was kind of like along the lines of what I had already said, but it would have been more in detail because I didn't know that it was at 85 percent in the first place, but it would have been more."

¶ 19 When asked if he had anything else to say in support of his motion to reconsider his sentence, defendant stated as follows:

"What—what does—I would just like to ask what does the letter of allocution have to do with it? Because my—when—the letter of allocution was only written once my lawyer came to see me for sentence and told me that Mr. Forbes usually—I mean, not Forbes—Mr. Steadman usually takes it light on people who say sorry or admit what—admit their case or just write these type of letters or say something before the Court. And that's the best thing that I came up with. I probably would have came up with a little more if it would've got me 50 percent or if it would have been 50 percent."

¶ 20 On cross-examination, defendant indicated he decided to take his case to trial after talking with his attorney. He stated he received one offer from the State, but he was "under the impression that [his] entire case was 50 percent."

¶ 21 In his argument, Forbes was under the impression, based on the *pro se* motion and statements at the hearing, that "the defendant would argue that he would have made a better statement of allocution had he been informed that this sentence was to be served at 50 percent

rather than 85 percent." Forbes argued the misinformation "may have affected the way that the Court received the defendant's statement." Forbes also argued the sentence was excessive. At the conclusion of his argument, the following exchange occurred:

> "[FORBES]: As far as the evidence or statements concerning the plea agreement that may have been made or may not have been made, we did not prepare for that. Your Honor, this was just simply a Motion to Reconsider Sentence.
>
> I was just looking at those issues concerning the reconsideration of sentence not motions to vacate a trial or anything like that. This is something new that's come up during this Motion to Reconsider Sentence. I think that probably would be better suited for a motion to vacate trial or something like that. But we're not arguing that his sentence should be reduced in any way as a result of—
>
> THE DEFENDANT: But I do want my sentence—I do want to argue that my sentence should be reduced because of these issues. And I would also, like, ask what does my letter of allocution have to do with the Court not informing me of my eligibilities and giving me the chance to make a decision whether to take a trial or to ask for a plea agreement on the Count II or some type of agreement like 97 percent of all cases go to plea agreements instead of me going to trial."

The trial court told defendant it was not his time to argue, and Forbes continued as follows:

"So I'm just arguing those matters that were brought to the Court's attention at sentencing. The error that the defendant claims is that he was instructed that this was a 50-percent sentence instead of an 85-percent sentence that affected his ability to make an accurate statement of allocution at sentencing, and we're also asking arguing [*sic*] that his sentence is excessive.

But, you know, at this point I'm not in a position to argue that some plea agreement was not enforced or anything of that matter because I'm not aware of that, [Y]our Honor. This is something new that's come up during the sentencing hearing, Your Honor."

Thereafter, defendant made the following statement to the court:

"THE DEFENDANT: Your Honor, how—can—can I ask how can we argue that my sentence is excessive and then not ask for it to be reduced? That's all I want. How can you—how—how can my lawyer—I asked him to make these arguments, and he's telling me the same thing he wrote in his letter, like, he doesn't have any—like it's not relevant to him and this is the things that I want argued.

He's saying, like, he doesn't want it argue [*sic*]—I mean, he's saying it's excessive, but it's not to be reduced we don't want to reduce it or just to reconsider the sentence. That's—it did—not only did the errors happen in my sentencing, it happened in my

whole legal proceedings. I was never informed of the sentencing eligibilities. That's—that's why I filed this motion."

¶ 22 The trial court concluded by stating as follows:

"Well, let me—I want to think about this, but let me say this: First of all, this wasn't a plea of guilty. If a person pleads guilty, the judge has to tell him or her all the possible sentences. And actually although not required by law, the judge should also tell the individual whether if it is a prison sentence, it's an 85-percent sentence, or day-for-day, or 75-percent sentence. But Mr. Johnson didn't plead guilty. Mr. Johnson went to trial.

The Court knew full well that it was an 85-percent sentence. I'm sure the state's attorney knew that. I would be shocked if Mr. Lukis didn't know that and disappointed if he didn't tell Mr. Johnson that. But in any event, the Court certainly knew it was 85 percent. When the Court arrived at its sentence that was factored in. Now having said that, as far as anything new today, as I understand it, somehow there's been among other arguments that Mr. Johnson's allocution statement would have been different had he known it was 85 percent or words to that effect.

He's had another say today. He said what he wanted to say. He supplemented his right to allocution and that will be factored in by the Court. So, again, I do want to think about it. I will issue a decision."

¶ 23 On October 27, 2015, the trial court entered the following docket entry:

> "The Court finds there have been no changes in the law or newly discovered evidence that was not available at the sentence hearing held 5/27/15. Further, that the Court properly considered factors in aggravation and mitigation in arriving at the sentence imposed. The First Amended Motion to Reconsider Sentence is denied."

¶ 24 Defendant appealed, arguing (1) the trial court denied him a proper hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984), (2) his posttrial counsel was ineffective, and (3) this court should vacate fines improperly imposed by the circuit clerk. This court affirmed in part, reversed in part, and remanded with directions. *People v. Johnson*, 2018 IL App (4th) 150898-U. With regard to defendant's claim that posttrial counsel was ineffective, this court held as follows:

> "Here, the trial court found defendant guilty of the offense of aggravated discharge of a firearm, which required defendant to serve 85% of his sentence. 730 ILCS 5/3-6-3(2)(iv) (West 2014). Defendant alleged trial counsel 'reassured' him he would serve his sentence at 50%. Unfortunately, *Krankel* counsel failed to flesh out defendant's claim at the hearing, stating instead he 'did not prepare' for evidence concerning any plea agreement and he was not in a position to argue since the issue was 'something new that's come up during the sentencing hearing.' While defendant received a proper preliminary *Krankel* hearing—one where the trial court

> appointed him a new attorney—he did not receive a second-stage hearing on his underlying claim of trial counsel's ineffectiveness. As *Krankel* counsel's performance was deficient and defendant's claim went unaddressed, we find *Krankel* counsel was ineffective. See [*People v.*] *Downs*, 2017 IL App (2d) 121156-C, ¶ 92, 83 N.E.3d 584 (finding '*Krankel* counsel failed to subject trial counsel's conduct to any meaningful adversarial testing and thus effectively deprived him of counsel during a critical stage of the proceedings, such that we may presume the existence of prejudice without requiring defendant to demonstrate it')." *Johnson*, 2018 IL App (4th) 150898-U, ¶ 46.

Given our findings, we remanded for a hearing on defendant's claim of trial counsel's alleged ineffectiveness and directed the trial court to appoint new counsel and allow counsel the opportunity to file a new motion. *Johnson*, 2018 IL App (4th) 150898-U, ¶ 47.

¶ 25 Before further hearings on remand were conducted, defendant filed a *pro se* motion to vacate his sentence and for a new trial in May 2018. Defendant alleged trial counsel was ineffective for failing to call an alibi witness, Terry Wells, whose testimony would have allegedly changed the outcome of the trial. Defendant attached a January 24, 2017, affidavit from Wells to his motion. The trial court dismissed the motion, stating it had no jurisdiction because the case was still in the appellate process.

¶ 26 Once notified of the remand order, the trial court appointed new posttrial counsel, who filed an amended motion for a new trial and to vacate or reconsider the sentence. The August 2018 motion alleged, *inter alia*, that Lukis erroneously told defendant prior to trial that

any sentence he would receive would be served at 50%. Defendant claimed he would not have gone to trial if he knew his sentence would be served at 85%. The motion also claimed trial counsel was ineffective for failing to call Wells, who stated in his affidavit that defendant was not present when the shooting occurred. Defendant stated he told counsel about Wells and claimed Wells was willing to testify but was never issued a subpoena.

¶ 27 At the hearing on the motion, defendant testified he provided Wells's contact information to Lukis prior to trial and asked that Wells be called as a witness. Wells could have provided an alibi because "he knew that [defendant] wasn't there." Defendant also testified he was under the impression any convictions on counts I and II would be served at 50%. He received an offer from the State to plead guilty to count I for a 10-year sentence, and Lukis told him this was a 50% sentence. Had he known the sentence would be served at 85%, he would not have wanted to risk spending that many years in prison.

¶ 28 On cross-examination, defendant testified Wells called him after the shooting and reported the incident to him. He believed Wells was in the area after having been released from the county jail on a drug case. When asked on redirect examination why he did not accept the plea offer of 10 years in prison but instead wanted to go to trial, defendant stated he would not have been found guilty if Wells had testified.

¶ 29 Called by the State, Lukis testified he talked with defendant about the two charges and explained any convictions would be served at 85%. He said defendant "was pretty adamant about wanting this case to be a bench trial." When asked about the incriminating jail calls, defendant "stated in general that he had heard" about the shooting and "sort of involved himself in the story." Lukis stated Wells never came up during his conversations with defendant. Lukis could not recall whether the State made an offer but stated it "was the common practice." He did

not remember how many times he talked with defendant about the issue of serving 85% of his sentence. Lukis testified he was suspended from the practice of law for 30 days in 2017 by the Attorney Registration and Disciplinary Commission (ARDC) because, as the prosecutor described it, he "let a couple of cases get away" from him and lied to a client about the status of a case.

¶ 30 On cross-examination, Lukis stated that although he did not remember the State's offer, it was common practice for him to discuss any offers with his clients. He also did not recall telling defendant both counts would be served at 85%. On redirect examination, Lukis stated he was relatively certain he discussed plea offers with defendant and discussed whether the sentence would be served at 50% or 85%.

¶ 31 On the issue of defendant serving 85% of his sentence, the trial court noted it was confronted with "a credibility issue," as defendant said he was not informed about the matter and Lukis, although his testimony regarding what transpired 3½ years ago "was a little bit vague," indicated he did inform him of the 85% requirement. The court found Lukis credible in stating that he did inform defendant about the charge being an 85% case. The court also found nothing in the record to show defendant would have taken a plea rather than go to trial. On this issue of calling Wells to testify, the court found Lukis more credible than defendant and stated "there is a reasonable likelihood that [Lukis] would not have called Mr. Wells based on his prior convictions." As Lukis was not ineffective, the court denied the amended motion. This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 Defendant argues the trial court's determination on the merits of his ineffective-assistance-of-counsel claim was manifestly erroneous. We disagree.

¶ 34 "If the trial court has reached a determination on the merits of a defendant's ineffective assistance of counsel claim in a *Krankel* inquiry case, we will reverse only if the trial court's action was manifestly erroneous." *People v. McLaurin*, 2012 IL App (1st) 102943, ¶ 41, 982 N.E.2d 832; see also *People v. Reed*, 2018 IL App (1st) 160609, ¶ 50, 118 N.E.3d 642. Our supreme court has stated "[t]he term 'manifest error' has been interpreted to mean error which is clearly evident, plain, and indisputable." *People v. Ruiz*, 177 Ill. 2d 368, 384-85, 686 N.E.2d 574, 582 (1997). "Thus, a decision is manifestly erroneous when the opposite conclusion is clearly evident." *People v. Coleman*, 2013 IL 113307, ¶ 98, 996 N.E.2d 617. In the case *sub judice*, the trial court reached a determination on the merits of defendant's claim of ineffective assistance of counsel. Thus, we review the court's determination for manifest error.

¶ 35 A defendant's claim of ineffective assistance of counsel is analyzed under the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29, 89 N.E.3d 366. To prevail on this type of claim, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show "counsel's performance 'fell below an objective standard of reasonableness.' " *People v. Valdez*, 2016 IL 119860, ¶ 14, 67 N.E.3d 233 (quoting *Strickland*, 466 U.S. at 688). Prejudice is established when a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010).

¶ 36 Here, the two main issues raised by defendant in his amended motion concerned trial counsel's alleged ineffectiveness for (1) failing to call Wells to testify as an alibi witness and (2) not telling defendant about having to serve at least 85% of his sentence if convicted.

¶ 37 On the first issue, defendant stated he gave Wells's name and phone number to Lukis prior to trial and asked that he be called as an alibi witness. Lukis stated Wells never came up during conversations with defendant.

¶ 38 On the second issue, defendant testified he thought any convictions on the two counts would be served at 50%. He also stated Lukis told him a conviction on count I would be served at 50% and had he known the sentence would be served at 85%, he would not have gone to trial. Lukis stated he explained any convictions would be served at 85%.

¶ 39 The trial court found both issues involved a credibility determination. The court found Lukis credible in stating that he told defendant about the offense being an 85% case. The court also found Lukis more credible than defendant on the issue of calling Wells as a witness.

¶ 40 "In matters heard without a jury it is the function of the trial judge to resolve conflicts in testimony and to determine the credibility of the witnesses, and a reviewing court may not substitute its judgment for that of the trier of fact." *People v. Evans*, 54 Ill. App. 3d 883, 886, 370 N.E.2d 284, 286 (1977); see also *People v. Moody*, 2016 IL App (1st) 130071, ¶ 52, 54 N.E.3d 183 (stating "it is not the duty of the reviewing court to substitute our judgment for that of the trier of fact on questions involving the weight to be assigned the evidence or the credibility of witnesses").

¶ 41 Here, the trial court heard the conflicting testimony from defendant and Lukis. On the 85% issue, Lukis stated he informed defendant of the time he would have to serve upon conviction and noted defendant was adamant about having a bench trial. Upon hearing the

testimony, the court could find defendant's claim was less than credible and based on his disappointment with the outcome of the case. On the Wells issue, the court could find defendant's claim that he provided Wells's information to Lukis prior to trial was less than credible, considering defendant was convicted in March 2015, he did not mention Wells in his June 2015 *pro se* motion to reconsider his sentence, and his "friend" Wells did not provide an affidavit until January 2017 (which the prosecutor stated was filed beyond the statute of limitations and defendant did not attach until his May 2018 *pro se* motion to reconsider his sentence and for a new trial). As stated, the court had before it conflicting testimony, and it was fully aware of Lukis's ARDC suspension. Given the deference to be afforded a trial court's credibility determinations, and as the opposite conclusion is not clearly evident, we find the court's rejection of defendant's ineffectiveness claim is not manifestly erroneous.

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the trial court's judgment.

¶ 44 Affirmed.