

NOTICE

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2020 IL App (4th) 180663-U

NO. 4-18-0663

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

September 25, 2020
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
ANTHONY L. FOWLER,)	No. 15CF1788
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

PRESIDING JUSTICE STEIGMANN delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court reversed the trial court’s second-stage dismissal of defendant’s postconviction petition and remanded for an evidentiary hearing.

¶ 2 In September 2016, a jury convicted defendant, Anthony L. Fowler, of unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2014). In October 2016, the trial court sentenced defendant to eight years in prison. Trial counsel did not file a notice of appeal.

¶ 3 In February 2018, defendant *pro se* filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). The trial court advanced the petition to the second stage and appointed counsel, who filed an amended petition, alleging, in relevant part, that trial counsel rendered ineffective assistance by failing to (1) call an exculpatory witness at trial and (2) file a notice of appeal. In July 2018, the State filed a motion to dismiss which the court later granted, concluding defendant could not

establish prejudice because the trial evidence was “overwhelming.”

¶ 4 Defendant appeals, arguing the trial court erred by dismissing his amended postconviction petition because it made a substantial showing of a constitutional violation that trial counsel was ineffective for failing to (1) file a notice of appeal and (2) investigate an exculpatory defense witness. We agree, reverse the trial court’s judgment, and remand for an evidentiary hearing.

¶ 5 I. BACKGROUND

¶ 6 A. The Charges and the Jury Trial

¶ 7 In December 2015, the State charged defendant with unlawful possession of a weapon by a felon. 720 ILCS 5/24-1.1(a) (West 2014). In September 2016, the trial court conducted defendant’s jury trial.

¶ 8 Chris Chambers testified he was a police officer with the Champaign Police Department. At about 2:15 a.m. on December 20, 2015, Chambers was on patrol in his squad car when he heard a report of shots fired near the intersection of Fifth Street and Vine Street in Champaign. Chambers began heading to the area and was advised that a person reporting the shots fired stated a white SUV had been seen leaving the area. Chambers arrived in the area about 5 to 10 minutes later and saw a white SUV driving south on Fifth Street. Chambers initiated a traffic stop shortly thereafter when the SUV failed to properly signal a turn.

¶ 9 Chambers testified that several officers arrived at the same time he pulled the vehicle over. Chambers approached the driver’s side with his gun drawn and ordered the driver to put up his hands. Chambers identified defendant in court as the driver. Defendant was the only person in the car.

¶ 10 Chambers stated Officer Jordan Hagemann approached the passenger side and

reported over the radio that he had seen a gun on the passenger seat. Chambers placed the defendant in handcuffs and then looked in the cab of the SUV. Chambers saw a black handgun, easily visible, on the passenger seat. Chambers acknowledged the center console of the vehicle and an armrest blocked his view of the gun when he approached the vehicle, and he had to move to the passenger side of the vehicle to see the gun. However, Chambers stated he could see the gun “[v]ery easily” when he placed his head at the approximate location that a driver’s head would be when operating the vehicle.

¶ 11 Officer Jordan Hagemann testified that he discovered the firearm on the passenger seat of the white SUV and relayed the information to other officers via the radio. Hagemann later seized the weapon, which was a loaded .40 caliber Hi-Point semiautomatic pistol. The rounds in the gun were manufactured by a company named “Blazer.”

¶ 12 Dame-Erste Lacey Davis testified that she had been defendant’s girlfriend for the last five years and they had three young children together. Davis stated she owned a .40 caliber Hi-Point firearm. On December 20, 2015, she and defendant went driving around Champaign-Urbana in a white SUV for several hours to get away from their children for a while. At around 1:20 a.m., Davis got a phone call from Circle K, where she worked, and was asked to come fill in for someone who called in sick. Davis said defendant dropped her off at her apartment on North Cunningham at about 1:25 a.m.

¶ 13 Davis testified that she had her handgun with her in her “hair bag.” Davis explained that she always kept the gun on her, either in her bag or in her car, for protection. Davis further explained that she worked as a hair stylist to make extra money. She had a “hair bag,” similar to a small duffle bag, in which she carried large amounts of hair products and styling equipment. The zipper on the bag was broken and items would fall out from time to time.

Her gun was heavy and typically fell to the bottom of the bag; but the bag was also very heavy because of the amount of supplies she kept in it.

¶ 14 Davis testified that she bought the gun at Rural King and picked it because it was on sale. She had never fired the weapon and did not know how many rounds it held, but she kept it fully loaded. Davis admitted she kept a round in the chamber and that she did not have a concealed carry license. She also admitted that she was not allowed to keep the gun in the manner she did and that doing so was dangerous. Davis believed the ammunition she used was made by Winchester. She did not keep extra rounds in her bag or on her person.

¶ 15 Davis further testified that she did not notice her gun was missing until defendant called her from jail. Davis never told defendant about the gun because she knew he was not allowed to possess one. Davis believed the gun must have accidentally fallen out of her bag because she did not take it out that night. However, Davis did not understand how the gun ended up on the passenger seat because she had left her bag on the floor of the vehicle and never put it on the seat.

¶ 16 On cross-examination, Davis stated that the SUV had dark tinted windows and she noticed that the interior lights did not come on when she entered or exited the vehicle. Davis identified the receipt from Rural King where she purchased the gun.

¶ 17 The State then presented the following evidence by stipulation with defendant. First, defendant had previously been convicted of felony. Second, the police had sent the gun, magazine, and rounds to be tested for fingerprints and DNA. If called to testify, forensic experts in fingerprints and DNA would have stated that (1) no latent prints were located and (2) DNA discovered was insufficient for comparison. The experts would have further testified that the lack of fingerprints or DNA did not mean that someone had not touched the items tested.

¶ 18 Defendant did not present any evidence, and the jury found him guilty of unlawful possession of a weapon by a felon.

¶ 19 B. Defendant's Posttrial Motion and Sentencing Hearing

¶ 20 In October 2016, defendant filed a motion for a new trial, arguing, in relevant part, that the State untimely provided supplemental discovery disclosing a new witness that could have assisted defendant at trial. Defense counsel explained in the motion that he received supplemental discovery just two days prior to trial and in that discovery was a statement from the owner of the SUV, Curtis Hairston. According to the motion, Hairston said in the statement that he was with defendant "immediately prior to his contact with police," and denied seeing a gun in the vehicle.

¶ 21 Later that month, the trial court conducted a hearing on defendant's motion for a new trial at which defense counsel argued that, although he was able to review the supplemental discovery prior to trial, he did not have enough time to digest it and follow up. Counsel claimed he did not appreciate the significance of Hairston's testimony and, in any event, did not have time to contact Hairston, conduct an interview, or otherwise adequately investigate the supplemental discovery. Counsel represented that Hairston had been in the car with defendant immediately prior to the shooting and was also unaware that there was a gun in the car, corroborating defendant's claim. The court denied the motion for a new trial.

¶ 22 Thereafter, the trial court sentenced defendant to eight years in prison. We note that the court advised defendant of his appellate rights before announcing the sentence and explaining the court's reasoning. The court did not ask defendant if he wished to appeal. The record demonstrates that a notice of appeal was never filed.

¶ 23 C. The Postconviction Petition

¶ 24 In February 2018, defendant *pro se* filed a postconviction petition. The trial court advanced the petition to the second stage and appointed counsel. In June 2018, defendant, through counsel, filed an amended petition, alleging, in relevant part, that trial counsel was ineffective for failing to (1) file a notice of appeal and (2) investigate and present the testimony of Hairston, an exculpatory witness. Defendant supported his petition with his own affidavit, which stated that he twice asked his counsel to file a notice of appeal, but counsel never did so. Defendant further supported his petition with a letter from Davis that confirmed defendant asked his attorney to file a notice of appeal. Defendant also attached to the petition his posttrial motion and the transcript from the hearing on that motion to support his claim that trial counsel failed to investigate Hairston's information.

¶ 25 In July 2018, the State filed a motion to dismiss. Regarding counsel's failure to investigate Hairston, the State argued defendant did not explain how his testimony would have changed the outcome of the trial. The State asserted that (1) defendant was not contending that Hairston was present at the time of arrest and (2) Hairston would simply testify that he had no knowledge of the gun. The State pointed out that Davis claimed to be the gun's owner and defendant was the sole occupant of the vehicle when it was pulled over. Because Hairston's testimony would have conflicted with defendant's theory at trial, the State asserted defendant had failed to demonstrate prejudice. Regarding defense counsel's failure to file a notice of appeal, the State wrote in its motion to dismiss that the "defendant has alleged and supported by affidavit a claim that he directed trial counsel to file an appeal, [thereby creating] at least an implication that the trial counsel was responsible to do so, and that trial counsel failed to do so. *** [I]t may be appropriate to set *this limited claim* for evidentiary hearing." (Emphasis in original.)

¶ 26 In September 2018, the trial court entered a written order granting the State's

motion to dismiss. (We note that the trial court did not conduct a hearing on the State’s motion.) The court concluded that “[t]he evidence against the Defendant in this case was overwhelming,” and defendant could not establish prejudice. The court further stated that “[a] reversal by the Appellate Court was unlikely.”

¶ 27 The trial court dismissed defendant’s postconviction petition, and this appeal followed.

¶ 28 II. ANALYSIS

¶ 29 Defendant appeals, arguing the trial court erred by dismissing his amended postconviction petition because it made a substantial showing of a constitutional violation that trial counsel was ineffective for failing to (1) file a notice of appeal and (2) investigate an exculpatory defense witness. We agree, reverse the trial court’s judgment, and remand for an evidentiary hearing.

¶ 30 A. The Applicable Law

¶ 31 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights that occurred in his original trial or sentencing. *People v. Crenshaw*, 2015 IL App (4th) 131035, ¶ 23, 38 N.E.3d 1256; 725 ILCS 5/122-1 (West 2016). The Act contains a three-stage procedure for relief. *People v. Allen*, 2015 IL 113135, ¶ 21, 32 N.E.3d 615; 725 ILCS 5/122-2.1 (West 2016). At the second stage, the trial court appoints counsel who must then investigate the defendant’s claims and make any amendments necessary for an adequate presentation of the defendant’s contentions. Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). The State may file a motion to dismiss the petition, and the petition advances to a third-stage evidentiary hearing only if the defendant makes a “substantial showing of a constitutional violation.” *People v. Buffer*, 2019 IL 122327, ¶ 45, 137 N.E.3d 763.

¶ 32 The Illinois Supreme Court has described proceedings at the second stage as follows:

“The second stage of postconviction review tests the legal sufficiency of the petition. Unless the petitioner’s allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish or ‘show’ a constitutional violation. In other words, the ‘substantial showing’ of a constitutional violation that must be made at the second stage [citation] is a measure of the legal sufficiency of the petition’s well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief.” (Emphasis in original.) *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767.

The appellate court reviews a trial court’s dismissal of a petition at the second stage *de novo*. *People v. Sanders*, 2016 IL 118123, ¶ 31, 47 N.E.3d 237.

¶ 33 To establish a claim of ineffective assistance of counsel, the defendant must show that counsel’s performance (1) fell below an objective standard of reasonableness and (2) was prejudicial. *People v. Brown*, 2017 IL 121681, ¶ 25, 102 N.E.3d 205. “[W]hen counsel’s constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal.” *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

¶ 34 The Illinois Supreme Court has explained that in the failure-to-appeal context, the *Strickland* test still applies, but it is tailored to fit the context. *People v. Ross*, 229 Ill. 2d 255, 261, 891 N.E.2d 865, 869 (2008). “Regarding performance, it is professionally unreasonable to disregard specific instructions from the defendant to file a notice of appeal.” *Id.* Prejudice “may

be presumed when defense counsel’s ineffectiveness rendered appellate proceedings nonexistent, essentially denying defendant’s right to appeal.” *Id.* at 262. “[A] criminal defendant must at some point be afforded the equivalent of direct review and an appellate advocate; a court cannot deny a defendant an attorney-assisted appeal by examining the record and determining that defendant would not have succeeded on appeal in any event.’ ” *Id.* at 263 (quoting *People v. Moore*, 133 Ill. 2d 331, 339, 549 N.E.2d 1257, 1261 (1990)). “[W]hen a postconviction petitioner demonstrates that defense counsel was ineffective for failing to file a notice of appeal, the trial court may allow the petitioner leave to file a late notice of appeal.” *Id.* at 271.

¶ 35

B. This Case

¶ 36 Here, defendant’s affidavit states he requested trial counsel file a notice of appeal, but no such notice was ever filed. Davis also provided a notarized statement explaining that she too asked counsel to file a notice of appeal at defendant’s request, but counsel told her “it was too late.” Even the State, in its motion to dismiss, admitted that defendant had made a substantial showing regarding this contention.

¶ 37 On appeal, the State attempts to defend the trial court’s reasoning, arguing that defendant failed to show prejudice because the evidence against him was overwhelming. The State misses the point. Defendant had an absolute right to a direct appeal, if he requested one, no matter how strong the evidence against him or how procedurally flawless the trial may have been. *Id.* at 268-69.

¶ 38 The State also suggests that (1) prejudice is “presumed” only at the first stage of proceedings and (2) defendant received adequate substitute proceedings because he had a second-stage hearing. The State is simply incorrect; the supreme court held exactly to the contrary in *Ross*. *Id.* at 269 (“A defendant whose attorney never filed a notice of appeal is

entitled to that appeal, not its functional equivalent.”).

¶ 39 Because defendant’s petition and supporting documents made a substantial showing that trial counsel did not file a notice of appeal as requested by defendant, the trial court erred by dismissing his petition. Accordingly, we remand for an evidentiary hearing, at which defendant may introduce evidence that he requested an appeal be filed. If the trial court concludes that the defendant’s evidence is sufficient to meet his burden of proof on this claim, then the court should enter an order granting defendant the right to file a late notice of appeal.

¶ 40 C. Defendant’s Remaining Claim

¶ 41 Defendant also claims he made a substantial showing that trial counsel failed to investigate a witness. Defendant contends that trial counsel admitted to the trial court that he received the State’s supplemental discovery shortly before trial and did not understand the significance of Hairston’s testimony. Defendant suggests that counsel had a duty to investigate and defendant was prejudiced by counsel’s failure because Hairston could have supported defendant’s claim that he did not know there was a gun in the car.

¶ 42 The State argues that defendant cannot show prejudice because Hairston’s testimony conflicts with the testimony of Davis, who stated she had been in the car the entire night with defendant and that the gun was hers. As such, Hairston’s claim was inconsistent with the theory of the defense and potentially damaging to Davis’s credibility.

¶ 43 According to defendant’s allegations, Hairston was with defendant shortly before the shooting occurred, which was about an hour after defendant had dropped Davis off at home. Because trial counsel did not investigate Hairston further, we do not know what the substance of his testimony would be other than counsel’s representations at the hearing on defendant’s posttrial motion. Although we believe the State’s position may have merit, in light of our

decision to remand for a third-stage evidentiary hearing, we conclude that the interests of judicial economy are best served by defendant's receiving an evidentiary hearing on this additional claim. If defendant is able to prove his ineffective assistance of counsel claim pertaining to Hairston at a third-stage hearing, he would be entitled to a new trial, obviating the need for a determination on whether he was denied a direct appeal.

¶ 44

III. CONCLUSION

¶ 45 For the reasons stated, we reverse the trial court's dismissal of defendant's amended postconviction petition and remand for a third-stage evidentiary hearing on defendant's claims. In the event that defendant does not receive a new trial but does demonstrate trial counsel was ineffective for failing to file a notice of appeal, we direct the trial court to enter an order permitting the defendant to file a late notice of appeal. Further, the court shall inquire of defendant under those circumstances if he wishes to appeal, and if he says yes, also inquire if he wishes to have counsel appointed to represent him on appeal. If defendant answers yes to both questions, then the court should direct the filing of a notice of appeal on defendant's behalf and appoint counsel for his appeal.

¶ 46

Reversed and remanded with directions.