

2020 IL App (1st) 171278-U
No. 1-17-1278
Order filed December 4, 2020

Fourth Division

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 03 CR 5600
)	
SHAUN HENDERSON,)	Honorable
)	Nicholas Ford,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed trial court's summary dismissal of defendant's *pro se* postconviction petition where it failed to raise the gist of a constitutional argument that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal because consecutive sentencing was proper based on the evidence.

¶ 2 Following a bench trial, defendant Shaun Henderson was convicted of the first degree murder of Terrell Williams, and three counts of attempted first degree murder of Steve Hunt, Darius Ballard, and Nathaniel Holt, arising from a shooting on July 7, 2002, in Chicago. Defendant

was sentenced to an aggregate 120-year prison term: 60 years for first degree murder; a consecutive term of 30 years' for the attempted murder of Holt; and two 30-year terms for the attempted murders of Hunt and Ballard, to run concurrently to each other, but consecutive to the other two sentences.

¶ 3 Defendant's convictions and sentences were affirmed by this court on direct appeal. *People v. Henderson*, 2015 IL App (1st) 112519-U (unpublished opinion pursuant to Illinois Supreme Court Rule 23). His *pro se* postconviction petition was summarily dismissed in a written opinion by the trial court, and defendant has appealed.

¶ 4 On appeal, defendant contends that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal for failing to object to defendant's consecutive sentence for attempted murder of Holt where the evidence did not establish severe bodily injury, or raise it in a post-sentencing motion. For the following reasons, we affirm.

¶ 5 **BACKGROUND**

¶ 6 As the facts related to defendant's underlying conviction were set forth fully on direct appeal, we will only recite such facts as are necessary for resolution of this appeal.

¶ 7 On July 3, 2002, defendant's car was hijacked while it was driven by his cousin and codefendant, Trevor Jackson. Four days later, on July 7, 2002, the victim, Williams, saw a burned car in a vacant lot near his home. As Williams subsequently removed the tires and rims from the burned car, another car with a man and woman inside arrived and confronted him, stating that the burned car was theirs. Williams asked if they wanted the tires and rims, and they said that he could take them. The man and woman left, Williams finished removing the tires and rims, and eventually went back to his house, where he unloaded them at approximately 3 p.m.

¶ 8 Later that evening, a group including Hunt, Ballard and Holt gathered to celebrate Williams' birthday on Holt's porch. As Hunt started to leave through a gate that was approximately five feet from the porch, he saw three men, including defendant, standing at the gate. Defendant asked Hunt if he knew anything about some rims, to which Hunt responded that he did not, but someone on the porch might. Hunt walked back to the porch with the men. A woman across the street yelled something to the three men, and Hunt saw defendant shoot Williams in the head. The other men with defendant started shooting their guns at the group while backing out of the gate. Hunt made it up the porch, and Holt "snatched" him inside of the house. The paramedics subsequently arrived but were unable to save Williams.

¶ 9 Both Ballard's and Holt's trial testimony was substantially similar to Hunt's. Holt additionally testified that when the men started shooting, he hit the ground and then got into the building before he realized that he had been shot in the "butt." He was subsequently treated for his wound at the hospital.

¶ 10 At the close of defendant's trial, he was convicted of first degree murder and three counts of attempted first degree murder. After trial, defendant submitted a *pro se* letter to the trial court, alleging that his trial counsel was ineffective. The trial court appointed a public defender, who filed a motion for a *Krankel* hearing, which the trial court denied.

¶ 11 At the sentencing hearing, the State noted that defendant was found guilty of first degree murder with a firearm enhancement, attempted murder of Holt who was struck and wounded by a bullet, and attempted murder of both Ballard and Hunt, who were not struck. The State argued for consecutive sentencing on the attempted murder of Holt based on severe bodily injury. Defendant's posttrial counsel presented motions in opposition to consecutive sentencing and the

sentencing enhancement, which were denied by the trial court, who explicitly found that the required elements for consecutive sentencing were present. Defendant was then sentenced to an aggregate 120-year sentence: 60 years for first degree murder; a concurrent term of 30 years' for the attempted murder of Holt; and two 30-year terms for the attempted murders of Hunt and Ballard, to run concurrently to each other, but consecutive to the other two sentences.

¶ 12 On direct appeal, defendant contended that the State's identification witnesses, Hunt and Ballard, provided unreliable testimony, and that their testimony could not be the basis for finding him guilty beyond a reasonable doubt. He further argued that two additional witnesses were unreliable and irrelevant. We affirmed defendant's convictions, finding the evidence sufficient to prove defendant's guilt beyond a reasonable doubt. *Henderson*, 2015 IL App (1st) 112519-U, ¶¶ 32-34.

¶ 13 On June 27, 2016, defendant filed a *pro se* postconviction petition claiming ineffective assistance of trial and appellate counsel. Of relevance to this appeal, defendant claimed that appellate counsel was ineffective for not raising trial counsel's failure to object to his 120-year sentence on direct appeal as a violation of 730 ILCS 5/5-8-4 (West 2016). Specifically, defendant claimed that the attempted murder of Holt should not have triggered consecutive sentencing because the record did not prove beyond a reasonable doubt that he suffered severe bodily injury after being shot in the buttocks. Defendant argued that his trial counsel was unreasonable for not objecting and if he had objected, his sentence would have been 90 years instead of 120 years.

¶ 14 On September 22, 2016, the trial court summarily dismissed defendant's *pro se* petition as frivolous and patently without merit in a written opinion. The court rejected defendant's claim of trial counsel's ineffectiveness for failure to object to the sentence, likening it to an *Apprendi*

violation, finding that there was no *Apprendi* violation because it does not apply to whether a sentence is concurrent or consecutive, and further that severe bodily injury is not an element of the crime. The trial court then concluded that because the issue lacked merit, there was no ineffective assistance of appellate counsel.

¶ 15 Defendant's motion to reconsider the summary dismissal was denied on November 7, 2016. This court granted defendant leave to file a late notice of appeal on June 5, 2017.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant contends that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness on direct appeal for failing to object to defendant's consecutive sentence for attempted murder of Holt where the evidence did not establish severe bodily injury, or raise it in a post-sentencing motion. Specifically, defendant contends that the evidence presented at trial did not show that Holt suffered severe bodily injury warranting consecutive sentencing because gunshot wounds are not necessarily severe, and the State presented minimal evidence of Holt's gunshot wounds.

¶ 18 Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). A petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision prejudiced petitioner. *Id.* We therefore must determine whether defendant's ineffective assistance of posttrial counsel claim would have been successful if raised on direct appeal.

¶ 19 Here we find that defendant's ineffective assistance claim of posttrial counsel is meritless. A defendant's claim of ineffective assistance of counsel is analyzed under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Henderson*, 2013 IL 114040, ¶ 11. To prevail on such a claim, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *People v. Thomas*, 2017 IL App (4th) 150815, ¶ 10.

¶ 20 To establish deficient performance, the defendant must show that his attorney's performance fell below an objective standard of reasonableness. *Id.* (citing *People v. Evans*, 209 Ill. 2d 194, 219 (2004)). Effective counsel refers to competent, not perfect representation. *Id.*

¶ 21 To establish the second prong of *Strickland*, a defendant must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Id.* at ¶ 11 (citing *People v. Houston*, 229 Ill. 2d 1, 4 (2008)). A "reasonable probability" has been defined as a probability which would be sufficient to undermine confidence in the outcome of the trial. *Id.* A defendant must satisfy both prongs of the *Strickland* test and a failure to satisfy any one of the prongs precludes a finding of ineffectiveness. *People v. Simpson*, 2015 IL 116512, ¶ 35.

¶ 22 The ultimate question of whether trial counsel's actions support a claim for ineffective assistance of counsel is subject to *de novo* review on appeal. *People v. Max*, 2012 IL App (3d) 110385, ¶ 64.

¶ 23 We find that posttrial counsel's failure to object to his consecutive sentencing or file a corresponding post-sentencing motion based on insufficient evidence of severe bodily harm of

Holt did not amount to deficient performance because consecutive sentences were mandatory based on the evidence.

¶ 24 Section 5-8-4(a) of the Unified Code of Corrections (Code), stated at the relevant time, in pertinent part:

“The court shall impose consecutive sentences in each of the following circumstances:

- (1) One of the offenses for which the defendant was convicted was first degree murder or a Class X or Class 1 felony and the defendant inflicted severe bodily injury.” 730 ILCS 5/5-8-4(d)(1) (West 2014).

¶ 25 Our supreme court has previously determined that consecutive sentences imposed under section 5-8-4 of the Code do not violate the due process rights of defendants, and that the United States Supreme Court’s *Apprendi* decision does not apply to such sentences. *People v. Carney*, 196 Ill. 2d 518, 536 (2001). The court reasoned that consecutive sentences do not expose a defendant to punishment exceeding the statutory maximum for each conviction. *Id.* at 536. Additionally, the finding of severe bodily harm is a factual finding to be determined by the trial court for purposes of sentencing (*People v. Alvarez*, 2016 IL App (2d) 140364, ¶ 19), not an element of the offense that requires proof beyond a reasonable doubt (*People v. Kelley*, 331 Ill. App. 3d 253, 256 (2002)).

¶ 26 In this case, defendant was convicted of first degree murder and three counts of attempted first degree murder. The attempted first degree murder of Holt was based on a gunshot wound to his buttocks, for which he was treated in the hospital. The trial court found that the gunshot wound

constituted severe bodily injury to Holt. At the time, attempted first degree murder was a Class X felony.

¶ 27 A trial court's determination that a bodily injury is "severe" for purposes of consecutive sentencing may be reversed only if it is against the manifest weight of the evidence. *People v. Deleon*, 227 Ill. 2d 322, 332 (2008). A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding is unreasonable, arbitrary, or not based on the evidence presented. *Id.* Under the manifest weight of the evidence standard, we give deference to the trial court as the finder of fact because it was in the best position to observe the conduct and demeanor of the parties and witnesses. *Id.* A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *Id.*

¶ 28 The evidence presented at trial established that defendant first fired at Williams, hitting him in the head, and he subsequently died from his injury. Subsequently, his codefendants began shooting at the victims while all three codefendants simultaneously backed away from the group, before running off. Holt testified that he "hit the ground" and then made it indoors before he realized that he had been "shot in the butt." Holt had to go to the hospital where he received treatment.

¶ 29 Gunshot wounds have previously been found by both our supreme court and this court to constitute "severe bodily injury" for purposes of the mandatory sentencing statute. See *Deleon*, 227 Ill. 2d at 332; *People v. Johnson*, 149 Ill. 2d 118, 149 (1992); *People v. Primm*, 319 Ill. App. 3d 411, 427 (2000); *People v. Kelley*, 331 Ill. App. 3d 253, 260 (2002). In this case, the trial court specifically found that the attempted murder of Holt involved a severe bodily injury that subjected

him to consecutive sentencing over defendant's posttrial counsel's objection. While we agree with defendant that not all gunshot wounds are necessarily severe (See *People v. Durham*, 312 Ill. App. 3d 413, 421 (2000) (gunshot wound that grazed victim not severe in case of aggravated battery with a firearm)), there was no evidence that Holt's gunshot wound was not severe.

¶ 30 Holt was shot in the buttocks as he and his friends tried to escape gunshots fired by defendant and his codefendants from less than five feet away. At the least, a gunshot wound to the buttocks would require some sort of surgery to remove the bullet if possible, and would cause severe discomfort and disruption to the victim's mobility as he would have presumably been unable to sit or lie down on his back while his wound healed. As previously noted, a trial court is in the best position to determine whether or not the injuries were severe. See *People v. Austin*, 328 Ill. App. 3d 798, 809 (2002). We find that the trial court's finding of severe bodily harm to Holt in support of defendant's consecutive sentencing was not against the manifest weight of the evidence.

¶ 31 Since there was no error in finding severe bodily harm to support the imposition of consecutive sentences, trial counsel could not be ineffective for failing to make such objection or to raise it in a post-sentencing motion. It follows then that if trial counsel was not ineffective, appellate counsel could not be ineffective for failing to raise this issue on direct appeal when it was meritless.

¶ 32 We affirm the summary dismissal of defendant's *pro se* postconviction petition for failing to raise the gist of a meritorious constitutional claim.

¶ 33 CONCLUSION

¶ 34 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

No. 1-17-1278

¶ 35 Affirmed.