

NOTICE

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2019 IL App (4th) 170651-U

NO. 4-17-0651

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
January 11, 2019
Carla Bender
4th District Appellate
Court, IL

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | McLean County |
| JAMES RAY MANUEL, |) | No. 10CF1156 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Scott D. Drazewski, |
| |) | Judge Presiding. |

JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed, finding the trial court did not err in denying defendant postconviction relief following an evidentiary hearing.

¶ 2 After a consolidated bench trial with codefendant Clarence Thompkins, the trial court found defendant, James Ray Manuel, guilty of home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2008)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). The court sentenced defendant to concurrent prison terms of 45 years. In February 2017, appointed counsel filed an amended postconviction petition. After an evidentiary hearing in August 2017, the court denied defendant postconviction relief.

¶ 3 On appeal, defendant argues the trial court erred in denying his amended postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In December 2010, defendant and his codefendant, Clarence Thompkins, were charged with home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2008)) and armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). The State alleged the offenses occurred on July 29, 2008, and the victims were Barbara and Richard Hopper.

¶ 6 In September 2011, a consolidated bench trial was held. On July 29, 2008, two assailants, identified as young black males wearing masks, entered the Hopper residence and declared, “[T]his is a robbery.” The assailants stole a number of guns from Richard’s collection and left after placing the guns in a “dark, maybe green” duffel bag or “knapsack.” Barbara testified the stature of one of the assailants matched one of the men who worked for North American Van Lines, whom the Hoppers hired to move them into their home five months earlier. Records demonstrated Clarence worked for North American Van Lines and assisted with the Hoppers’ move. Richard testified one of the men had a tattoo on his right forearm. Richard, who had suffered a traumatic head injury years before the offense, described the tattoo as “strange looking,” appearing to him “like two worms crisscrossing.” When Clarence and defendant showed Richard their forearms at trial, he did not recognize the tattoos.

¶ 7 Testimony supporting defendant’s conviction included statements indicating Clarence and defendant were friends. Defendant’s former girlfriend, Megan Bachman, testified Clarence brought a hunter-green duffel bag to the basement of a residence she and defendant shared. She believed this occurred in “[m]aybe May,” and she had also seen defendant and Clarence with weapons. Another witness, Daniel Diciaula, who was awaiting sentencing on three federal charges, testified he purchased weapons belonging to Richard from a man in a basement with a woman upstairs. Diciaula picked out defendant in a photographic lineup but was unable to identify him at trial.

¶ 8 At the close of evidence, the trial court found the evidence stronger against Clarence than defendant. The court observed the men fit the two general descriptions, as both were young black males. The court observed defendant had two tattoos on his arm. One was a cross, the other had “calligraphy-like” lettering and “a lot of curlicues.” The court concluded it was an “amazing coincidence” defendant had a tattoo in the area Richard saw tattoos and defendant’s tattoo “could well fit the description” Richard provided. Before reaching a verdict, the court found defendant fit “the description and [had] tattoos on his lower arm,” which implicated him when considered with the rest of the evidence. At sentencing, the court sentenced defendant to concurrent terms of 45 years’ imprisonment.

¶ 9 On direct appeal, this court affirmed defendant’s conviction. *People v. Manuel*, 2013 IL App (4th) 120017-U, ¶ 2.

¶ 10 In June 2014, defendant filed a *pro se* petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). Defendant argued (1) he was denied the effective assistance of counsel when counsel failed to conduct a pretrial investigation to obtain business records from a tattoo parlor to demonstrate the victim described an assailant other than petitioner; (2) he was denied a fair trial when the State failed to provide the defense a written statement identifying the tattoo on the forearm of an assailant; and (3) appellate counsel provided ineffective assistance by not raising trial counsel’s ineffectiveness on direct appeal. The trial court dismissed the petition, finding it frivolous and patently without merit.

¶ 11 On appeal, this court reversed the trial court’s first-stage dismissal. *People v. Manuel*, 2015 IL App (4th) 140744-U, ¶ 3. Noting the low threshold for surviving the first stage of postconviction proceedings, this court found it was at least arguable trial counsel was

ineffective for not investigating defendant's claim he did not have tattoos on his forearm at the time of the offense. *Id.* ¶ 22. We remanded for second-stage proceedings. *Id.* ¶ 24.

¶ 12 In February 2017, appointed counsel filed an amended postconviction petition. Defendant argued trial counsel was ineffective for failing to (1) investigate the tattoo on his forearm and (2) present evidence it was his co-defendant who wore gold-rimmed glasses to rebut the victim's testimony the individual with the tattoo wore gold-rimmed glasses. Defendant argued his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness, asserting trial counsel failed to (1) "continuously object" to the State's late disclosure of the victim's statement the tattoo was on defendant's left arm and (2) use the improperly admitted evidence to impeach the witness's credibility.

¶ 13 In support of his petition, defendant attached numerous affidavits. Defendant averred he (1) was not prescribed eyeglasses at the time of the offense, (2) did not have tattoos on his forearm at the time of the offense, and (3) asked trial counsel to contact the tattoo shop to confirm defendant did not have tattoos on his forearm at the time of the offense.

¶ 14 Employees of the tattoo shop filed affidavits averring defendant got tattoos at the shop in Old English-style lettering and signed a dated "release of liability" before getting the tattoos. The release established defendant got the tattoos after the offense date. One of the employees averred in 2011 she received a call from a person whose name she could not recall asking about defendant's tattoos.

¶ 15 The State filed an answer to defendant's amended petition, and in August 2017, the trial court conducted an evidentiary hearing on the amended petition.

¶ 16 The owner of the tattoo shop testified regarding a "release of liability." She explained the release was filled out in her boyfriend's handwriting and defendant had to have

signed the release before getting the tattoos. She also testified in 2011 or 2012 she spoke to an attorney regarding defendant's tattoos and offered to help but did not hear anything further. The attorney indicated he represented defendant.

¶ 17 An employee of the tattoo shop testified he filled out the release of liability and had defendant sign and date it before giving him the tattoos. He explained the description on the release, "outline old E," referenced a tattoo in Old English-style lettering. After viewing the Old English-style tattoos on the back of defendant's forearm, he testified it appeared they were done at the same time.

¶ 18 Defendant's former girlfriend and his mother testified defendant was not prescribed eyeglasses at the time of the offense and he got the Old English-style forearm tattoos on the back of his forearms after the date of the offense to commemorate his daughter's birth.

¶ 19 Defendant's trial counsel testified the State disclosed in writing during initial discovery the male victim reported seeing a tattoo on an assailant's forearm. Trial counsel discussed the victim's description of the tattoo with defendant, which trial counsel believed was inconsistent with the tattoos on defendant's arm. Trial counsel explained his trial strategy was to attempt to get the male victim to admit he did not recognize the tattoo, as the victim ultimately did. Trial counsel stated defendant did not tell him he did not have the tattoos at the time of the offense and did not ask trial counsel to contact the tattoo shop.

¶ 20 Defendant testified, right before his trial, counsel told him the male victim had recently recalled seeing a tattoo. Defendant testified he told counsel he did not have tattoos at the time of the offense and asked counsel to attempt to retrieve records from the tattoo shop. Defendant testified although he was presently prescribed eyeglasses, he was not prescribed eyeglasses at the time of the offense.

¶ 21 On cross-examination, defendant admitted, consistent with trial counsel's strategy, the victim did not recognize the tattoos. Defendant acknowledged the tattoos he got after the offense were not his only tattoos but testified he did not have a tattoo on his forearm at the time of the offense.

¶ 22 The State then asked defendant if he recalled being arrested for "a minor cannabis offense" in 2006. Defense counsel objected, but the trial court allowed the question, explaining it understood where the State was going. Defendant testified he did not recall an arrest in 2006 and could not recall if he had the cross tattoo on his forearm at that time.

¶ 23 Defendant testified, in reference to his "entire arm," he had no tattoos at the time of the 2008 offense, including the cross on his forearm.

¶ 24 A detective from the Normal Police Department testified he arrested defendant in 2006. While booking defendant into the McLean County jail, he observed and memorialized in the computer system defendant had a cross tattoo on his right forearm. The cross tattoo on defendant's forearm was also referenced in police reports.

¶ 25 The trial court denied defendant's amended postconviction petition, noting: (1) the fact defendant got the Old English-style tattoos approximately one month after the robbery was not in dispute, (2) it was "clear" trial strategy to secure an admission from the male victim he did not recognize the tattoos, (3) trial counsel was credible when he testified defendant never advised him he did not have forearm tattoos at the time of the robbery, and (4) it was significant defendant omitted the fact he had the cross tattoo on his forearm at the time of the robbery.

¶ 26 The trial court noted defendant (1) matched the victims' description of the robbers; (2) was seen in possession of the stolen guns just after the home invasion; and (3) sold some of the stolen guns just after the home invasion. Although the victim did not recognize the

tattoos, the court found most significant defendant had a tattoo on his forearm as the victim recalled three years after the home invasion.

¶ 27 The trial court found (1) defendant could not demonstrate a reasonable likelihood he would have been found not guilty if trial counsel presented evidence defendant did not have Old English-style tattoos on the date of the robbery, (2) trial counsel did not perform deficiently, (3) it was not significant defendant was not prescribed eyeglasses at the time of the robbery, and (4) the State properly disclosed the male victim's statement defendant had a forearm tattoo.

¶ 28 This appeal followed.

¶ 29 II. ANALYSIS

¶ 30 The Act “provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions.” *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 31 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. At the first stage, the trial court must review the postconviction petition and determine whether “the petition is frivolous or is patently without merit ***.” 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not dismissed at the first stage, it advances to the second stage. 725 ILCS 5/122-2.1(b) (West 2012).

¶ 32 At the second stage, the trial court may appoint counsel, who may amend the petition to ensure defendant's contentions are adequately presented. *People v. Pendleton*, 223

Ill. 2d 458, 472, 861 N.E.2d 999, 1007 (2006). Also at the second stage, the State may file an answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2012). A petition may be dismissed at the second stage “only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation.” *People v. Hall*, 217 Ill. 2d 324, 334, 841 N.E.2d 913, 920 (2005).

¶ 33 If “a substantial showing of a constitutional violation is established, the petition proceeds to the third stage for an evidentiary hearing.” *People v. Harris*, 224 Ill. 2d 115, 126, 862 N.E.2d 960, 967 (2007). In this case, the trial court denied postconviction relief following an evidentiary hearing. “Following an evidentiary hearing where fact-finding and credibility determinations are involved, the trial court’s decision will not be reversed unless it is manifestly erroneous.” *People v. Beaman*, 229 Ill. 2d 56, 72, 890 N.E.2d 500, 509 (2008).

¶ 34 The trial court determined defendant had failed to demonstrate a substantial denial of his constitutional rights as it related to trial and appellate counsel’s conduct. See *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008 (at the third stage, defendant has the burden of proving a substantial showing of a constitutional violation). To prevail, defendant was required to demonstrate counsels’ conduct was deficient, falling below an objective standard of reasonableness, and defendant was prejudiced by counsels’ errors. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 35 A. Improper Impeachment Evidence

¶ 36 Defendant argues the trial court abused its discretion by allowing the State to impeach defendant with evidence of a cannabis arrest. We disagree.

¶ 37 At a third-stage evidentiary hearing, the trial court serves as the fact finder, and, therefore, it is the court’s function to determine witness credibility, decide the weight to be given

testimony and evidence, and resolve any evidentiary conflicts. *People v. Domagala*, 2013 IL 113688, ¶ 34, 987 N.E.2d 767.

¶ 38 The trial court did not admit evidence of “a minor cannabis offense” for impeachment nor did the State use the evidence to impeach defendant. The State used the arrest as foundation for the admission of police reports and booking information to establish defendant had a cross tattoo on his forearm in 2006, before the July 2008 home invasion. The State only referenced the arrest after defendant repeatedly claimed he did not have any tattoos at the time of the offense. The trial court did not abuse its discretion in allowing the State to elicit foundational evidence of defendant’s 2006 arrest.

¶ 39 B. Manifest Error

¶ 40 Defendant next argues the trial court erred in relying on an “incorrect recollection of the evidence” presented at defendant’s bench trial to dismiss defendant’s postconviction petition. Defendant challenges as against the manifest weight of the evidence multiple findings of fact established during his bench trial. It is well established, however, the purpose of the Act is not to relitigate the defendant’s innocence or guilt. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010).

¶ 41 Defendant also challenges the trial court’s finding after the evidentiary hearing that trial counsel was credible when testifying defendant never advised him he did not have any tattoos at the time of the offense. However, as the court explained, even if counsel had called the shop and even if counsel had presented evidence defendant did not have Old English style tattoos at the time of the offense, the result would not have been different. Defendant’s tattoos were only part of the coalescence of “amazing coincidence[s]” leading to the court’s finding of guilt. Defendant matched the victim’s description, and just after the home invasion, defendant was

seen in possession of the stolen guns and then sold some of the stolen guns. Moreover, the victim did not recognize the tattoos, which would not have changed even if counsel established defendant did not have the Old English style tattoos at the time of the offense. The court found most significant the fact defendant had a tattoo on his forearm at the time of the offense, just as the victim recalled three years after the home invasion. Even if the trial court's credibility determination was erroneous and even if counsel's performance was deficient, defendant cannot establish prejudice. See *People v. Evans*, 186 Ill. 2d 83, 94, 708 N.E.2d 1158, 1164 (1999) ("A defendant must satisfy both prongs of the *Strickland* test.") The trial court did not rely on an incorrect recollection of the evidence to dismiss defendant's postconviction petition.

¶ 42 C. Discovery

¶ 43 Defendant next argues the trial court's dismissal of his postconviction petition after the evidentiary hearing was manifestly erroneous where the court concluded the State complied with discovery. Defendant argues "the State deliberately failed to reduce [the victim's] oral statement [that defendant had a forearm tattoo] to writing."

¶ 44 As stated above, this court will not reverse the trial court's ruling on a postconviction petition after conducting an evidentiary hearing unless the ruling is manifestly erroneous. *Beaman*, 229 Ill. 2d at 72, 890 N.E.2d at 509. A ruling is manifestly erroneous if it is arbitrary, unreasonable, and not based on the evidence. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49, 969 N.E.2d 482.

¶ 45 Illinois Supreme Court Rule 412(a)(i) provides "the State shall, upon written motion of defense counsel, disclose to defense counsel *** memoranda containing substantially verbatim reports of [witnesses'] oral statements ***." Ill. S. Ct. R. 412(a)(i) (eff. Mar. 1, 2001). Here, the trial court correctly held the victim's disclosure that an individual who perpetrated the

