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**SIXTH DIVISION**  
July 22, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 02 CR 23251
	)	
FILIMON RESENDEZ,	)	The Honorable
	)	John J. Fleming,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE GARCIA delivered the judgment of the court.  
Justices Cahill and McBride concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The defendant's post-conviction petition was properly dismissed at the first stage where his trial counsel sufficiently investigated his second degree murder defense and was not ineffective when she decided not to present certain evidence or call certain witnesses as a matter of trial strategy.
- ¶ 2 Defendant Filimon Resendez was convicted and sentenced to consecutive prison terms of 20 years for first degree murder and 25 years for personally discharging the firearm that caused the victim's death; his conviction was affirmed on direct appeal. *People v. Resendez*, No.

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1-05-0124 (2008) (unpublished order under Supreme Court Rule 23). The defendant's post-conviction petition alleging ineffective assistance of trial counsel was dismissed as patently without merit. We conclude the defendant's trial counsel's decisions not to introduce medical records or call certain witnesses at the defendant's trial were a matter of sound trial strategy, which are not assailable as deficient representation. We affirm.

¶ 3 BACKGROUND

¶ 4 Luis Sanchez, best friend and drug dealing associate of the defendant, was shot and killed on August 2, 2001. On October 19, 2001, Chicago police detective James O'Brien obtained arrest warrants for the defendant and his friend Brenda Rodriguez.

¶ 5 The defendant was arrested in August 2002, and charged by indictment with six counts of first degree murder. The State opted not to prosecute Rodriguez, who testified on its behalf.

¶ 6 The matter proceeded to a jury trial in September 2004. The defendant's theory of the case was that he had been provoked into a sudden and intense passion upon learning from his nine-year-old daughter that the victim had sexually assaulted her, which triggered his shooting of the victim making him guilty of no more than second degree murder.

¶ 7 On the day of jury selection, counsel for the defendant requested a continuance to speak further with the defendant's daughter and her mother, Rebecca Palma, and to subpoena the daughter's medical records that might corroborate the occurrence of the sexual assault. Counsel indicated that her request was based on evidence she had obtained three days prior. In response, the State made an offer of proof that its own witness, Rodriguez, would testify she had heard the

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defendant's daughter tell the defendant that Sanchez had assaulted her. The trial court found the State's offer of proof obviated the need for a continuance. The court explained:

"[W]hat is relevant and admissible is what the defendant's state of mind is. If the defendant was told that [his daughter had been sexually assaulted] and it was not true, it doesn't matter. The statement of the daughter to him is not being offered for the truth of the matter but merely to show how it reflects on his state of mind.

So the fact that she was or was not actually abused is not at issue, it's not relevant, does not tend to prove the guilt or innocence of the defendant, and therefore it's not a sufficient basis at this late hour to continue the matter for that.

The evidence the Defense wishes to admit is that his daughter told him that. According to the offer of proof by the State, their own witness will testify to that and corroborate that. That's the important thing."

The matter proceeded to trial.

¶ 8 Rodriguez testified on behalf of the State that she went to the defendant's house on the day of the shooting to borrow money. While there, she heard the defendant's daughter tell the defendant that "Luis put his thing on her thing."<sup>1</sup> The defendant responded, "[D]on't worry, \*\*\*

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<sup>1</sup> On cross examination, Rodriguez testified that the daughter said Luis put his "thing *in* her

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everything[']s] gonna be okay." Immediately thereafter, the defendant told Rodriguez he was "gonna go take care of business" and offered her a ride home. As the defendant and Rodriguez rode in the defendant's truck, neither discussed the defendant's daughter's statement.

¶ 9 The defendant drove to a parking lot where they met Sanchez, who entered the defendant's truck. The three then left the lot. After driving for a while, the defendant parked at a trucking dock. Rodriguez remained in her seat while the men walked to the back of the truck. Rodriguez then heard two or three gunshots. When she looked in the side mirror, she saw the defendant pointing a gun to the ground. She lifted herself up to get a view of the ground through the mirror. She saw Sanchez on the ground and heard him say, "No, Filly, no" to which the defendant replied, "I told you." She then heard two more gunshots. The defendant returned to the truck and drove Rodriguez home without mentioning what had just happened.

¶ 10 Angelica Sanchez, Sanchez's girlfriend, testified through an interpreter. She stated that Sanchez sold drugs for the defendant. Earlier on the day of the shooting, the defendant, his daughter, and Rodriguez came to the house Angelica shared with Sanchez. After the defendant mixed cocaine in the kitchen with either Sanchez or Rodriguez, the defendant, his daughter and Rodriguez left. Sanchez later told Angelica that the mixed cocaine was "no good" and could not be sold.

¶ 11 Later that evening, after receiving phone calls from the defendant, Angelica went with Sanchez to a parking lot, where Sanchez met the defendant and Rodriguez. Sanchez got into the defendant's truck, which then drove off. Angelica knew it was the defendant's truck because of

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thing." (Emphasis added.)

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the mural on the back which depicted a truck being followed by police cars. When Sanchez failed to return to the parking lot within a half-hour, Angelica walked home. She phoned Sanchez on his cellular phone, but he never picked up.

¶ 12 After the State rested its case-in-chief, the defense moved for a directed verdict, which the circuit court denied. The defense rested without presenting any evidence. Prior to closing arguments, defense counsel told the court that she had received the subpoenaed medical records referenced at the start of trial: "I had a chance to look them over and after looking them over the decision was made not to call any additional witnesses at the time."

¶ 13 The defendant sought a jury instruction on second degree murder over the State's objection. The court allowed the instruction.

"[T]here is sufficient evidence that a reasonable trier of fact could make determinations based on inferences therefrom that there may be a sufficient serious provocation and that would be for the trier of fact to decide and that there is sufficient evidence to require that instruction to be given and that instruction will be given."

The jury found the defendant guilty of first degree murder.

¶ 14 The defendant moved for a new trial, arguing was error for the court to deny his motion for a continuance in light of new evidence his counsel had obtained. Defense counsel stated, "I did review [the medical records]. However, based on the time constraints and the fact that the trial had already begun, I did choose not to introduce the medical records or put on Mr.

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Resendez's daughter." The posttrial motion was denied and the defendant was sentenced to an aggregate prison term of 45 years.

¶ 15 On direct appeal, the defendant argued his trial counsel was ineffective for various reasons, including the failure to investigate and to present evidence that would have supported a second degree murder conviction. He contended counsel should have presented his daughter's medical records and the trial testimony of his daughter and Palma, her mother. The State countered that the second degree instruction should not have been given in the first place. We rejected the State's argument because it disregarded the proceedings below. We found no authority to "disregard \*\*\* that the jury was instructed on second degree murder in evaluating the defendant's claim of ineffectiveness of counsel." *Resendez*, No. 1-05-0124 (unpublished order under Supreme Court Rule 23).

¶ 16 We nonetheless "question[ed] the relevance of the medical records vis-a-vis the defendant's state of mind." *Id.* As the State did not dispute the defendant's claim that the records were relevant, we rejected his contention on the basis that the record contained neither the medical records nor the proposed testimony the defendant's daughter and Palma had they been called to testify. We "decline[d] to engage in speculation in the guise of prejudice to the defendant based on ineffective assistance of counsel unsupported by the record." *Id.* We affirmed the conviction.

¶ 17 On June 3, 2009, the defendant filed the instant *pro se* post-conviction petition, contending his trial counsel was ineffective for failing to investigate the alleged sexual assault of his daughter and failing to present the medical records and witnesses. Attached to the petition

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was a "Suspected Sexual Abuse Form" from the Loyola University Health System dated August 16, 2001, which noted Guadalupe reported "vaginal digital penetration and kissing" and found "minimal hymenal tissue suspicious for trauma as reported." Also attached to the petition were affidavits of Palma and the defendant's daughter. Palma averred that the defendant "was angry when he found out that Luis Sanchez abused and raped our daughter," that Rodriguez caused the murder, and that the defendant was only "20% guilty." The defendant's daughter averred that she told Rodriguez that Sanchez had raped her, and that Rodriguez "told my dad what happened and my dad was furious. It was Brenda's idea to go get him. \*\*\* Since my dad was mad he did what she said."

¶ 18 In a thorough, eight-page order, Judge John Fleming dismissed the defendant's petition at the first stage as frivolous and patently without merit. The court found defense counsel's decisions were matters of trial strategy and that the medical records and affidavits attached to the petition did not "provide any new evidence" supporting the defendant's second degree murder theory. The court reiterated that "whether the sexual assault occurred is not the issue. Rather, the issue was petitioner's state of mind at the time he shot the victim. Nothing petitioner has now presented in his petition contradicts the evidence presented at his trial." This timely appeal followed.

#### ¶ 19 ANALYSIS

¶ 20 Because the State makes no claim that *res judicata* bars our consideration of the defendant's postconviction claim of ineffective assistance of trial counsel given our decision on direct appeal, we address the claim on its merits.

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¶ 21 The defendant contends first-stage dismissal was erroneous because his trial counsel was ineffective for failing to "diligently investigate Luis Sanchez's sexual assault" of the defendant's daughter and for not calling his daughter, Palma, and the physician who examined the daughter to testify at trial. He also argues the trial court applied the incorrect standard to his petition by treating his claim as if it were made on direct appeal. He therefore asks that a different trial judge hear his case on remand. The State once again urges that the defendant could not have been found guilty of second degree murder, which makes his ineffective assistance claim baseless. In any event, the State contends neither the medical records nor the affidavits attached to the defendant's petition support the claim that defense counsel was ineffective.

¶ 22 "The [Postconviction Hearing] Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *Hodges*, 234 Ill. 2d 1, 9 (2009). Our review of the circuit court's dismissal of the defendant's petition is *de novo*. *Id.* A petition is subject to dismissal at the first stage only if it is "frivolous or is patently without merit." *Id.* at 10, quoting 725 ILCS 5/122-2.1(a)(2) (West 2006). A petition is frivolous or patently without merit "if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 12. Under *Hodges*, when a postconviction defendant asserts a constitutional claim of ineffective assistance of counsel, we ask whether "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id.* at 17.

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¶ 23 The State contends defense counsel could not have been ineffective for failing to investigate and present mitigation evidence because the defendant was not eligible for a second degree murder conviction as a matter of law. It cites *People v. Yarbrough*, 269 Ill. App. 3d 96 (1994), for the proposition that such a conviction is not available where a defendant kills in response to learning of a sexual assault. We rejected this precise argument on direct appeal.

"In effect the State argues that we can disregard \*\*\* that the jury was instructed on second degree murder in evaluating the defendant's claim of ineffectiveness of counsel. We decline the State's invitation to do so, absent direct and persuasive authority for the State's position, which they have not provided." *Resendez*, No. 1-05-0124 (unpublished order under Supreme Court Rule 23).

The State's argument is no more persuasive the second time around.

¶ 24 In the context of this case, the State's argument would have force if it were couched in terms of the prejudice-prong for ineffective assistance of counsel. See *Yarbrough*, 269 Ill. App. 3d at 102 (trial court correctly refused to issue second degree murder instruction where "defendant did not personally witness the sexual assault [of his girlfriend, and] a significant period of time passed between the act and his being told of it"). Thus, a dispositive question before us is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694.

¶ 25 We turn to the defendant's claim that his trial counsel was ineffective for failing to sufficiently investigate his provocation defense and present additional evidence to mitigate the offense of first degree murder to second degree murder. "Whether defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented." *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). We therefore look to the value of the evidence identified by the defendant, which he contends supports a finding that he "act[ed] under a sudden and intense passion resulting from serious provocation by the individual killed." 720 ILCS 5/9-2(c) (West 2008).

¶ 26 The defendant claims his daughter's medical records and testimony from his daughter and Palma would have confirmed that the assault took place, which would have supported that he acted under serious provocation from Sanchez. With the introduction of such evidence, the defendant asserts in his brief that the State could not have argued during closing argument that it was " 'very important' " that the jury heard " 'absolutely no evidence' " that the defendant's daughter was actually sexually assaulted by Sanchez. We address separately the defendant's claims that the omission of the medical records and the failure to call the witnesses that provided affidavits provide arguable support that trial counsel was ineffective.

#### ¶ 27 Medical Records

¶ 28 The defendant acknowledges that "[t]he definition of second-degree murder focuses on the defendant's state of mind at the time of the killing." (Emphasis omitted.) *People v. Lindsay*, 247 Ill. App. 3d 518, 528 (1993). The medical records could not have had any bearing on the

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defendant's state of mind at the time of the murder because the records did not exist until two weeks after the murder. We reject out-of-hand the defendant's contention that these later-created records could somehow have supported his claim that he acted under a sudden and intense passion resulting from claimed serious provocation by Sanchez in the absence of clear authority to the contrary. Because the medical records did not exist at the time of the killing, they could not have affected the defendant's mental state. We note also the defendant assumes the relevance and admissibility of these post-occurrence records, without demonstrating either.

¶ 29 Testimony of Daughter and Palma

¶ 30 The defendant contends counsel was ineffective for failing to elicit testimony from the defendant's daughter and Palma that the defendant was "angry" or "furious" after learning of the sexual assault. "Counsel's decision on whether to present a particular witnesses is a matter of trial strategy." *People v. Vernon*, 276 Ill. App. 3d 386, 392 (1995). "Accordingly, counsel's strategic choices, made after investigating the law and the facts, are virtually unchallengeable." *People v. Caffey*, 205 Ill. 2d 52, 123 (2001).

¶ 31 Once again, we reject out-of-hand, the defendant's claim that counsel's decision not to call Palma was objectively unreasonable. Palma did not observe or converse with the defendant before or "at the time of the killing." *Lindsay*, 247 Ill. App. 3d at 528. Nor was she present when the defendant's daughter made her outcry to the defendant. There is nothing in the petition or supporting materials that Palma had relevant testimony to give regarding the defendant's state of mind at the time of the murder.

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¶ 32 Similarly, counsel's decision not to call the defendant's nine-year-old daughter was not objectively unreasonable, notwithstanding the daughter's affidavit that she witnessed her father's demeanor before the murder, which she described as "furious." The defendant has not overcome the strong presumption that counsel's decision not to call the daughter was sound trial strategy. *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

¶ 33 The State correctly points out that the daughter's affidavit fails to assert that she *told* defense counsel her father was furious or that she would have testified that he was furious had she been called at trial. The "highly deferential scrutiny" that we apply to counsel's decisions must be "free of the 'distorting effects of hindsight.'" *People v. Denzel W.*, 237 Ill. 2d 285, 303 (2010), quoting *Strickland*, 466 U.S. at 689. It may be evident today that the defendant's daughter observed the defendant in a furious state, but without more, it would be an indulgence in hindsight and speculation to attribute knowledge of that evidence to counsel at the time of trial. See *People v. Jacobazzi*, 398 Ill. App. 3d 890, 893-94 (2009) (ineffective assistance claim is insufficient when it "simply employ[s] hindsight to question defense counsel's performance, without considering the circumstances as known to defense counsel at the time" (Internal quotations omitted.)).

¶ 34 As the circuit court made clear in its ruling, any evidence the daughter could have provided was available through Rodriguez. Rodriguez was present when the daughter made her complaint to the defendant and had the opportunity to observe the defendant's demeanor when she accompanied the defendant to his meeting with Sanchez. To the extent the defendant demonstrated "an intense and sudden passion" upon learning of his daughter's assault by

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Sanchez, supporting evidence was available through Rodriguez's testimony. We will not second-guess defense counsel's decision not to call the defendant's daughter to corroborate Rodriguez's testimony. See *Caffey*, 205 Ill. 2d at 123 ("counsel's strategic choices, made after investigating the law and the facts, are virtually unchallengeable").

¶ 35 We note defense counsel made use of Rodriguez's testimony during closing arguments to support the defendant's second degree murder theory:

"The State's own witness told you, Brenda Rodriguez, who the State just told you is very credible, her story was corroborated by the detectives, by the medical examiner. Now they're asking you to not believe what she told you, and what she told you was that he [the defendant] did act under a sudden and intense passion."

¶ 36 We reject the defendant's contention that defense counsel was objectively unreasonable or that the defendant suffered prejudice from counsel's decision to not call the defendant's daughter to testify at trial.

¶ 37 The case cited by the defendant, *People v. Bates*, 324 Ill. App. 3d 812, 816 (2001), is factually inapposite. Counsel in *Bates* was ineffective for failing to call the single witness who could have testified to the overriding issue in the case. That is not the situation presented by the instant case.

¶ 38 In a last-ditch effort to call into question defense counsel's failure to call the defendant's daughter, the defendant argues that her absence as a defense witness permitted the State to argue that it was not clear that the "Luis" identified by the defendant's daughter in Rodriguez's

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testimony was in fact Luis Sanchez. This argument by the State is simply too insubstantial to warrant further consideration in the context of the defendant's ineffective assistance of counsel claim in this postconviction appeal, except to note that no other "Luis" than Sanchez was identified by either party during the trial.

¶ 39 Finally, the defendant argues "the circuit court failed to apply the proper dismissal standard" in rejecting his petition. He contends the trial court issued its ruling "as if it were being made on direct appeal." However, this argument is directly contradicted by the circuit court's written order. The circuit court identified the defendant's petition as a *pro se* "collateral attack on a prior conviction" that "may be summarily dismissed as frivolous or patently without merit during the first stage of post-conviction review unless the allegations in the petition, taken as true and liberally construed, present the 'gist' of a valid constitutional claim." The court ruled, "the issues raised and presented by petitioner are frivolous and patently without merit."

¶ 40 In any event, under our *de novo* review of the summary dismissal, we agree with the circuit court's assessment of the defendant's ineffectiveness of counsel claims in his postconviction petition. The claims are frivolous and patently without merit.

¶ 41 Because no arguable claim of ineffective assistance of counsel is made in the defendant's postconviction petition, we do not consider his request that we direct "another judge preside over the proceedings" on remand.

¶ 42

CONCLUSION

¶ 43 Trial counsel was not ineffective in failing to introduce the daughter's medical records or in failing to call the daughter or Palma at the defendant's trial. The circuit court properly concluded that both decisions were sound trial strategy, not assailable as deficient performance.

¶ 44 Affirmed.