

No. 1-09-2354

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).

FOURTH DIVISION
JUNE 9, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

| | | |
|--------------------------------------|---|---------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Cook County. |
| |) | |
| v. |) | No. 02 CR 16005 |
| |) | |
| EDDIE DAVIS, |) | Honorable |
| |) | Carol A. Kipperman, |
| Defendant-Appellant. |) | Judge Presiding. |

JUSTICE STERBA delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in
the judgment.

ORDER

Held: Summary dismissal of post-conviction petition affirmed over defendant's claim that the trial court abused its discretion by prohibiting counsel from speaking at the first stage of proceedings; ineffective assistance of trial counsel claim had no arguable basis in law or in fact.

Defendant Eddie Davis appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). He contends that the circuit court abused its discretion by prohibiting counsel

from speaking at the first stage of proceedings on his petition and on his motion for post-conviction discovery; and, secondly, that he set forth a cognizable claim of ineffective assistance of trial counsel requiring further proceedings under the Act.

The record shows, in relevant part, that in October 2005, defendant was convicted by jury of the first-degree murder of Margaret Coder, which occurred in 1992, and was sentenced to 50 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Davis*, No. 1-06-0146 (2008) (unpublished order under Supreme Court Rule 23).

On June 24, 2009, defendant, through private counsel, filed a petition for post-conviction relief alleging ineffective assistance of trial counsel. He claimed that trial counsel was ineffective for, *inter alia*, failing to hire a forensic scientist to conduct an independent examination of the victim's coat and the drop of blood found on it, or to have a forensics expert review the impounded evidence, such as the victim's fingernail clippings, for DNA that could belong to someone other than the victim. Defendant also claimed that despite trial counsel's professed lack of available funds for such an investigation, counsel never asked defendant or his family for the money, and that his wife would have obtained the necessary funds had she known that the testing was not done.

In support of these allegations, defendant attached to his petition the affidavit of trial counsel, Steven A. Greenberg, who averred, in relevant part, that he filed a pretrial motion requesting funds to have an independent laboratory retest the DNA from the blood stain on the victim's clothing and the buccal swab of defendant, and to have the methodology of the State's testing independently reviewed. The trial court awarded defendant a maximum \$2,000 because he was indigent, but counsel stated that this was not enough money to retest the DNA, and was only enough to have the methodology of the State's DNA testing reviewed.

Defendant also attached the affidavit of his wife, Christina Davis, who averred, in relevant part, that she and counsel had discussed the importance of DNA in defendant's case, the fact that the victim's coat with the drop of blood on it was the "centerpiece" of the case, and that the theory of the case would be that defendant's DNA ended up on the victim's coat either during a visit or while defendant was living with her. She stated that counsel had told her that much of the evidence from the crime scene had not been tested, including fingernail clippings, and that he would be requesting money from the court for DNA testing.

Christina further averred that her discussions with counsel led her to believe that he would: (1) have defendant's DNA independently tested to determine whether it matched the DNA

found on the coat; (2) have the coat further examined for additional DNA evidence and other relevant evidence; and (3) have other evidence tested for DNA, including the fingernail clippings. Although counsel told her that the money he received was insufficient to perform "all" the DNA testing, she thought, nonetheless, that he had the coat examined and defendant's DNA retested. She stated that if counsel had told her that the \$2,000 was not enough for those tests, she would have obtained the necessary funds, and would do so now if her attorney could access the inventoried items.

Lastly, defendant attached to his petition the joint affidavit of Pravatchai W. Boonlayangoor, Ph. D., and Karl A. Reich, Ph. D., of Independent Forensics of Illinois. They averred, in relevant part, that fingernail clippings caked in the victim's blood can contain relevant DNA evidence. They also averred that in several cases where they had reviewed evidence that had previously been tested by the Illinois State Police Crime Laboratory, they found errors in the protocol or testing used by the laboratory, and have also found, in some cases, relevant DNA material on evidence that the lab did not test for DNA.

Defendant also filed a motion requesting leave to subpoena police, laboratory, and inventory reports from the Chicago Police Department, and to examine and photograph the impounded evidence

from his case. Defendant asserted, *inter alia*, that he was seeking post-conviction DNA and fingerprint testing and evidence from his trial to support his post-conviction claims of ineffective assistance of trial counsel and actual innocence, as well as evidence to support the filing of a motion for post-conviction DNA testing under section 116-3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/116-3 (West 2008)). He also sought independent review of the testing methods used by the State Police Crime Laboratory for testing his DNA and that found on the victim's coat.

On August 28, 2009, the circuit court conducted its initial review of the post-conviction proceedings and defendant's discovery motion when counsel for defendant was present. The circuit court began by denying his motion for discovery without noting its reasons for doing so.

The court then turned to defendant's post-conviction petition, noting, *inter alia*, that defendant claimed that an expert could have impeached the State's witnesses on the condition of the victim's coat, but that he did not provide an affidavit from an expert. At that point, counsel interjected, "Your Honor, if I might interrupt? There is an affidavit attached from an expert." The court responded, "First of all, you are not to say a word." The court found defendant's claim speculative, noting that the affidavit only stated that the

expert could conduct tests, and dismissed his petition as "speculative and unsupported." Counsel then informed the court that she intended to file a "16-3," and the court responded, "You can file whatever you want to file, but don't tell me, on the record, because this is my ruling within 90 days, with no input from the attorneys." This appeal followed.

The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings under the Act are initiated by the filing of a petition verified by affidavit in the circuit court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2008). The Act further requires that the petition be supported by "affidavits, records, or other evidence," or state why they are not attached (725 ILCS 5/122-2 (West 2008)). *Delton*, 227 Ill. 2d at 253.

At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2008)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a post-conviction

petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

Defendant first contends that the trial court abused its discretion in prohibiting counsel from speaking when the court considered defendant's post-conviction petition and motion for post-conviction discovery. He claims that the court's failure to allow her to argue and explain the petition and motion was "improper."

Defendant has not cited any authority supporting his position that counsel is entitled an opportunity to speak during first-stage, post-conviction proceedings. Instead, he suggests that the petition was "hastily prepared" and that counsel should have been afforded an opportunity to provide any additional explanation. We note that counsel filed a petition which was 28 pages in length, and included citations to legal authority, and three affidavits. As such, there is no indication that the petition suffered from hasty preparation.

In any event, the Act provides that the circuit court has 90 days to review a petition and either docket it for further proceedings or dismiss it in a written order as frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2), (b) (West 2008). The Act sets forth no requirement that the court allow counsel an opportunity to argue the petition, and in fact, the supreme court has explicitly held that the circuit court's review

at the first stage of proceedings is independent, *i.e.*, without any further pleadings from defendant, or any motions, responsive pleadings, or other input from the State. *People v. Jones*, 211 Ill. 2d 140, 144 (2004). The same court also stated that there was no difference between a petitioner who is represented by counsel and one who is not, as either is subject to dismissal if his petition is found to be frivolous and patently without merit. *People v. Porter*, 122 Ill. 2d 64, 77 (1988).

Here, defendant filed a post-conviction petition and a discovery motion seeking information to support his post-conviction claims and the filing of a section 116-3 motion which "amounted to nothing more than a fishing expedition." *People v. Hickey*, 204 Ill. 2d 585, 598 (2001). The court timely reviewed defendant's petition without input from either him or the State, and dismissed it as speculative and unsupported, *i.e.*, defendant failed to state the gist of a constitutional claim. *Delton*, 227 Ill. 2d at 254. We therefore find no error by the circuit court in conducting an independent review of the content of the petition at the first stage of proceedings without input from either side. *Jones*, 211 Ill. 2d at 144.

Defendant, in his reply brief, also claims that the court erred in denying his motion for post-conviction discovery. However, defendant did not raise or argue that issue in his initial brief; rather, he challenged the manner in which the

motion, along with his post-conviction petition, was denied by the trial court. We thus find the issue waived. Ill. S. Ct. R. 341(h)(7) (eff. Jul. 1, 2008).

Defendant next contends that he set forth a claim of ineffective assistance of trial counsel in his post-conviction petition warranting further proceedings under the Act. The State responds that defendant has forfeited this claim by failing to raise it on direct appeal. Although defendant's claim of ineffective assistance of trial counsel is based on counsel's failure to test evidence that was of record, he now relies on affidavits attached to his petition in support of his claim. We thus decline to impose forfeiture where the evidence of trial counsel's alleged ineffectiveness was outside the trial record and could not have been considered on direct appeal. *People v. Taylor*, 237 Ill. 2d 356, 372-73 (2010).

To establish a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of

Strickland must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

Defendant claims that trial counsel was ineffective for failing to retest the DNA recovered from the victim's coat because it could have proved the State's testing faulty and exonerated him. He also claims that counsel should have conducted DNA testing on the fingernail clippings of the victim because such testing could have revealed the presence of individuals, other than him, at the crime scene.

In reviewing a claim of ineffective assistance of trial counsel, we accord great deference to the judgment of counsel and strongly presume that his conduct falls within the range of reasonable professional assistance. *People v. Richardson*, 189 Ill. 2d 401, 413 (2000). The strategic choices of counsel are, therefore, virtually unchallengeable. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). We further note that when determining whether counsel's performance was deficient, counsel's conduct is to be evaluated from his perspective at the time, thereby eliminating the distorting effects of hindsight. *People v. Bailey*, 232 Ill. 2d 285, 296 (2009).

Here, the record shows that counsel filed a motion requesting funds to conduct DNA testing because defendant was indigent. The trial court granted a maximum \$2,000 for that

purpose; however, counsel averred that this was insufficient to retest the DNA from the blood stain on the victim's coat and the buccal swab taken from defendant. Under these circumstances, we find counsel's conduct reasonable in that he used the limited funds available to have the State's DNA testing method reviewed. *Strickland*, 466 U.S. at 687-88.

Defendant takes issue with this conclusion, however, claiming that counsel's decision to forego additional DNA testing on the victim's coat and fingernail clippings was not a strategic decision, but rather, a financial one. This is a distinction without a difference. Counsel clearly had to decide how best to make use of the limited funds available to him, and his decision, in that respect, was a matter of trial strategy entitled to great deference. *Richardson*, 189 Ill. 2d at 413.

He also claims that counsel's decision was not strategic where his wife, Christina, would have provided the money for the DNA retesting, but counsel instead misled her into believing it had already been done. This claim is belied by the record. First, there is no evidence that counsel misled Christina, who never stated that she was told the DNA retesting had been done, but rather, inferred that from her discussions with counsel. Secondly, the record shows that the motion seeking funds to conduct DNA testing stated, "The Defendant is without funds to conduct his own testing." If Christina had been able, and

willing, to put up the money to conduct the DNA retesting, there would have been no need for defendant to file this motion claiming to be without the necessary funding. We thus find no merit to his claim.

Moreover, defendant cannot establish prejudice resulting from counsel's failure to conduct additional DNA testing. Defendant testified that during the time he lived at the victim's house in 1989 and 1990, he would wrestle there with the victim's son and come home with cuts and bruises from playing football at the park, suggesting that his blood may have ended up on the victim's coat because he shared the same coat rack with her. However, Michael Coder, the adopted son of the victim and a friend of defendant, testified that while defendant lived with him, they never wrestled inside the house, never played a lot of football outside where defendant became injured and bled, and never did anything physical where he saw defendant get injured.

Furthermore, the victim's daughter, Michelle Coder, testified that she recognized the coat as belonging to her mother, and stated "I can't say whether she had it very long because I didn't recognize it immediately," but that "[i]t had to have been new that winter." She testified that her mother had lost weight and purchased new clothes as a result, and that the coat was "[p]robably" new too, although she could not say so conclusively. Under the circumstances, we find that defendant

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has not demonstrated prejudice resulting from counsel's decision to not conduct additional DNA testing or retest the blood stain found on the victim's coat. *Strickland*, 466 U.S. at 687, 694.

Accordingly, we find that defendant has failed to set forth a cognizable claim of ineffective assistance of trial counsel (*Flores*, 153 Ill. 2d at 283), to warrant further proceedings under the Act, and we affirm the summary dismissal of his post-conviction petition by the circuit court of Cook County.

Affirmed.