

No. 1-08-2744

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
March 31, 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. 00 CR 24080
)	
PARRISH LYLE,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE SALONE delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred
in the judgment.

O R D E R

HELD: The dismissal of defendant's post-conviction petition upon the State's motion was proper because his claim of ineffective assistance of counsel for not calling a certain witness at trial was not meritorious.

Following a bench trial, defendant Parrish Lyle was convicted of unlawful use of a weapon by a felon (UUWF) and

escape and was sentenced to concurrent prison terms of nine years. We affirmed that judgment on direct appeal. *People v. Lyle*, No. 1-02-3293 (2004) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the dismissal, upon the State's motion, of his 2004 post-conviction petition as supplemented by counsel. He contends that he stated a meritorious claim of ineffective assistance of counsel for not calling a certain witness at trial and not challenging trial counsel's ineffectiveness on direct appeal.

The evidence at trial was that, at midday in September 2000, two police officers saw defendant riding a bicycle with a shiny object in his waistband. The officers followed defendant and, when they approached him, he dropped the object and ran. While one officer recovered the dropped object, a gun, the other pursued and arrested defendant. A search of defendant found two packets of white powder. While at the station, defendant took advantage of an officer's momentary distraction by hitting the officer in the shoulder and fleeing. He was recaptured just outside the station.

The court granted defendant's motion for a directed finding on the highest count against defendant, armed violence. The court accepted trial counsel's argument that the State's evidence showed that defendant abandoned the gun.

Defendant testified that he approached the officers on the street to retrieve his phone, taken by police in an earlier arrest. However, one of the officers asked him what he had just dropped and took him into custody before searching where defendant had been across the street. When the officer returned, he told his partner that defendant had dropped some bags on the other side of the street. Defendant opined that the officers were framing him, and one of the officers told him that he would be released if he provided contraband, such as a gun. Defendant saw a friend, Robert Ivory, passing by and asked him to get a gun, telling him that the police would release him if he provided a gun. Ivory returned a half-hour later, threw a gun into a nearby trash can, and told the officers that the gun was in the can. The officers recovered the gun from the trash can, and defendant denied that he ever had the gun.

On this evidence, the court found defendant guilty of UUWF, escape, aggravated battery of a peace officer, and possession of a controlled substance (PCS).

Defendant, represented by new counsel, filed a post-trial motion alleging in relevant part that trial counsel was ineffective for not calling Ivory as a witness to corroborate defendant's account though counsel had interviewed Ivory. At the hearing on the motion, trial counsel told the court (not under oath, as the court found it unnecessary to swear in an attorney)

that she spoke with Ivory but did not call him as a witness "because in all honesty I did not believe his story" and thus "chose not to call him as a witness because I did not think strategywise that was the most important thing to do in the case considering [defendant] was charged with an armed violence" count. In response, post-trial counsel argued that, once the armed violence count was directed out and defendant took the stand and testified to his account, it was not a valid strategy to fail to support that account with Ivory's testimony. The court denied the motion, noting that defendant has the right to testify to his account of events, whether "persuasive" or "laughable," and finding that, "[h]ad Mr. Ivory been called and said the same thing I would have considered it equally a story that should be rejected, and it was rejected" at trial.

The court sentenced defendant to concurrent prison terms of nine years each for UUWF and escape and three years for PCS, with the aggravated battery merged into the escape.

On direct appeal, we reversed the PCS conviction and corrected the credit for time served but otherwise affirmed the judgment of the circuit court. Defendant did not raise an ineffective assistance claim regarding Ivory on direct appeal.

In the instant *pro se* PC petition, defendant contended that counsel had been ineffective for not calling Ivory as a witness. Defendant averred in his attached affidavit that he told trial

counsel that Ivory was willing to testify on his behalf. Ivory's affidavit was consistent with defendant's trial testimony, and additionally stated that trial counsel told defendant's family that Ivory was unwilling to testify when he was in fact willing.

Counsel was appointed for defendant and filed a supplemental petition refining defendant's ineffective assistance claim regarding Ivory and adding a claim of ineffective assistance of appellate counsel for not raising the Ivory claim on direct appeal. The motion included a document, entitled Ivory's affidavit but not signed or notarized, consistent with his earlier affidavit and adding that trial counsel had told defendant's family that Ivory was unwilling to testify because there was a warrant against him when there was no warrant. The motion also included an affidavit by counsel to the effect that he interviewed Ivory by telephone and the preceding document was consistent with that interview. Counsel certified, pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984), that the petition as supplemented adequately presented defendant's claims.

The State filed a motion to dismiss the petition, noting that defendant's claim regarding Ivory was raised in his post-trial motion and arguing that it was now barred by *res judicata* and waiver. The State argued from the fact that trial counsel interviewed Ivory that counsel made a strategic decision not to call him at trial and from the trial court's rejection of the

defendant-Ivory account of events as unbelievable that calling Ivory would not have affected the trial. The State also argued that the document attached to the supplemental petition was not a properly-signed affidavit and that Ivory's evidence would not affect defendant's conviction for escape.

Defendant responded to the motion to dismiss, attaching a signed and notarized version of Ivory's supplemental affidavit and noting that Ivory's earlier properly-notarized affidavit was attached to the original petition. Defendant argued that Ivory's testimony would have allowed the trial court to assess his personal credibility rather than simply concluding that the defendant-Ivory account was incredible, so that Ivory's testimony was necessary and could have affected the trial especially as the evidence was closely-balanced. Defendant also argued that only appellate decisions constitute *res judicata* and that his claim was not forfeited because he was also claiming ineffectiveness against direct appeal counsel.

On August 12, 2008, following arguments on an earlier date, the court granted the State's motion and dismissed defendant's petition. The court found that trial counsel sufficiently explained the decision not to call Ivory as a witness so that her decision was a matter of conscious strategy. The court also found that Ivory's testimony would not have affected the trial

because the trial court expressly stated so in denying defendant's post-trial motion.

Defendant timely moved for reconsideration, noting that the trial court did not have an affidavit by Ivory and thus could not consider the specifics of his account in denying the post-trial motion. Defendant also reiterated his argument that the evidence was closely-balanced and thus Ivory's testimony was necessary to defendant's case and could have affected the trial. The court denied the motion to reconsider on September 18, 2008, and this appeal timely followed.

On appeal, defendant contends that his petition as amended stated a meritorious claim of ineffective assistance of counsel for not calling Ivory as a trial witness and not challenging trial counsel's ineffectiveness on direct appeal.

When a post-conviction petition is not summarily dismissed within 90 days of filing, counsel is appointed for an indigent defendant, the petition may be amended, and the State may answer or move to dismiss the petition. 725 ILCS 5/122-2.1, -4, -5 (West 2008). Such a petition may be dismissed when, liberally construed in light of the trial record, it fails to make a substantial showing of a constitutional violation. *People v. Mescall*, 403 Ill. App. 3d 956, 961 (2010). If a petition is not thus dismissed, an evidentiary hearing is held. *Mescall*, 403 Ill. App. 3d at 961. Claims that were raised on direct appeal

are barred as *res judicata*, and claims that could have been raised on direct appeal are defaulted or waived. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). A constitutionally-based claim not raised in a post-conviction petition as amended or supplemented is waived. 725 ILCS 5/122-3 (West 2008).

Claims of ineffective assistance of counsel are evaluated under the familiar two-part test requiring a defendant to show both that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that the result of the proceeding would have been different without counsel's error. *People v. Clendenin*, 238 Ill. 2d 302, 319 (2010). A defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy rather than incompetence. *Clendenin*, 238 Ill. 2d at 319. Thus, strategic choices made after investigation of the law and the facts are "virtually unassailable." *People v. Ramsey*, No. 105942, slip op. at 70 (Ill. Oct. 7, 2010).

Here, in the context of a post-trial claim of ineffective assistance presented by new counsel, trial counsel informed the trial court that she decided not to call Ivory as a witness after interviewing him because his account was not credible. Stated another way, trial counsel made it clear that it was her conscious strategic decision, made after investigation of the facts, not to call Ivory. While defendant argues that he did not

have an opportunity to question trial counsel under oath and thus should have that opportunity in post-conviction proceedings, the court did not in any way bar post-trial counsel from asking trial counsel questions, and trial counsel was not under oath because the court did not feel an oath was necessary from an attorney, an officer of the court.

While defendant argues that it was not a valid strategy for counsel to not call Ivory after defendant himself testified, the trial court correctly observed that it was defendant's personal right to testify but a matter of counsel's discretion whether to call other witnesses. *Clendenin*, 238 Ill. 2d at 320. Moreover, the trial court -- the court most intimately familiar with the trial evidence -- found in denying post-trial relief that Ivory's testimony would not have affected the outcome of the trial, which is precisely the issue under the second prong of the ineffective assistance test. We find that the instant claim was refuted by the trial record on both of the requisite elements of an ineffective assistance claim and that defendant failed to make a substantial showing that his constitutional rights were violated. The circuit court did not err in dismissing defendant's petition.

Accordingly, the judgment of the circuit court is affirmed.

Affirmed.