No. 1-09-2322

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FIFTH DIVISION
March 25, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 06 CR 314
	)	
ANDREW WESLEY,	)	Honorable
	)	Michael Brown,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Joseph Gordon concurred in the judgment.

O R D E R

HELD: Where defendant failed to allege the gist of a constitutional claim that his trial counsel provided ineffective assistance by failing to call several alibi witnesses, or by failing to use a peremptory challenge to strike an allegedly biased juror, the circuit court properly summarily dismissed the petition as frivolous and patently without merit.

_____Defendant Andrew Wesley appeals from the trial court's order summarily dismissing his *pro se* petition for relief under the

Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant contends his petition alleged the gist of a constitutional claim that his trial counsel provided ineffective assistance. For the reasons that follow, we affirm the trial court's order.

BACKGROUND

On May 15, 2005, Leroy Graham and the victim, Malik Jones, began arguing over whether Jones could continue to sell marijuana at the parking lot of the Three Stooges liquor store. While the two men argued, a group of people gathered around them. When Jones turned and started to walk away, a black man wearing a black "hoodie" with braids in his hair stepped out of the crowd and shot Jones five to six times. Jones died as a result of the gunshot wounds.

Four eyewitnesses, Marcus Scott, Gregory Jenkins, Demetrius Clair and Deborah Johnson, subsequently identified defendant as the shooter in a line-up. Both Demetrius Clair and Deborah Johnson also identified defendant in court. Johnson admitted, however, that she initially told police her eight-year-old son was with her when the shooting occurred. Johnson subsequently testified her son was at home at the time of the shooting. Johnson also admitted she lied to police when she said she did not know why Graham and Jones were arguing.

At defendant's trial, both Marcus Scott and Gregory Jenkins recanted their prior identification of defendant as the shooter. Although Scott denied at trial that he was present at the shooting and denied providing a written statement to the police, he admitted he signed each page of the written statement. Portions of both his statement to the police and his grand jury testimony identifying defendant as the shooter were read into evidence. Scott testified he had previously been arrested on drug conspiracy charges on September 14, 2005, and had only agreed to testify at the grand jury hearing in exchange for dismissal of his drug conspiracy charges.

Jenkins testified at defendant's trial that he was arrested for possession of a controlled substance on May 28, 2005. Jenkins said he was not charged with the crime because he offered information related to Jones' murder. Although Jenkins admitted he gave the written statement to the police, he said the facts in his statement were not true, and that he only made the statement in exchange for the police dropping his drug charge. Jenkins' written statement and grand jury testimony implicating defendant as the shooter were read to the jury.

Chicago Police Officer Jankowski testified that when he responded to the scene of the shooting, he remembered seeing defendant there but did not place him in custody.

On July 11, 2005, defendant was arrested for Jones' murder. Detective Patrick Golden testified he interviewed defendant on July 12, 2005. After waiving his *Miranda* rights, defendant told Detective Golden that he was not Graham's friend, and that he was not at the Three Stooges liquor store when defendant was shot. During his second interview, defendant again denied any knowledge regarding Jones' shooting. Following Deborah Johnson's and Gregory Jenkins' line-up identification of defendant as the shooter, Detective Golden re-interviewed defendant. Detective Golden testified that during the third interview, he "advised [defendant] that several individuals had identified him as the shooter." At that point, defendant admitted he was untruthful in his first two initial statements.

Defendant then admitted to Detective Golden that he was present at the Three Stooges liquor store and witnessed the fight between Graham and Jones. Defendant was standing next to Graham until he went into the liquor store twice. When defendant came out of the liquor store for the second time, he saw Deborah Johnson attempting to get Jones to leave the crowd "when an unknown individual approached out of the crowd who had a black hoodie sweatshirt on, raised his arm, produced a handgun, and shot [the victim] five to six times." Defendant told everyone to leave the parking lot before the police arrived. Defendant

denied he shot Jones. Defendant admitted he wore braids in his hair at the time of the murder.

Assistant State's Attorney Bryan Hofeld also interviewed defendant. Defendant told ASA Hofeld that he was at the Three Stooges liquor store when the shooting occurred. Defendant was unable to see who the shooter was. When ASA Hofeld asked why defendant would lie to the police if he was not involved in the shooting, and why people would identify defendant as the shooter if he was not the shooter, defendant was unable to offer an explanation.

The jury found defendant guilty of murder. He was sentenced to a 55-year prison term. We affirmed defendant's conviction and sentence in *People v. Wesley*, 382 Ill. App. 3d 588 (2008).

On April 29, 2009, defendant filed a *pro se* post-conviction petition. In his petition, defendant alleged his trial counsel was ineffective for failing to investigate or call four alibi witnesses to testify at his trial. Defendant alleged he twice told counsel prior to his trial that Melissier Shields and Tiffany Wilson would be willing to testify regarding his alibi. Trial counsel twice responded that although he had not investigated or interviewed the witnesses, he would do so prior to trial. In support of his allegation, defendant attached an affidavit from himself and the four alibi witnesses--Loretta

Wesley, Melissier Shields, Tiffany Wesley and Ira Hamilton. Defendant also alleged his counsel was ineffective for failing to use a peremptory challenge on a biased juror who said during *voir dire* that she was unsure whether she could decide defendant's cased based on the law and the facts.

The trial court summarily dismissed the petition. Defendant appeals.

ANALYSIS

Defendant contends the allegations in his post-conviction petition sufficiently stated the gist of a meritorious constitutional claim. Specifically, defendant contends his trial counsel was ineffective for failing to interview and call four alibi witnesses.

A defendant's petition may be dismissed at the first stage of post-conviction proceedings under the Act if the trial court determines the petition is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition is frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. Our supreme court clarified what constitutes a frivolous and patently without merit *pro se* post-conviction petition in *People v. Hodges*, 234 Ill. 2d 1 (2009). There, the supreme court

held that "a *pro se* petition seeking post-conviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 14.

We review summary dismissal of a post-conviction petition *de novo*. *Edwards*, 197 Ill. 2d at 247.

In order to establish ineffective assistance of counsel, a defendant must show: (1) his attorney's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's shortcomings, the outcome of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525 (1984); *People v. Martinez*, 348 Ill. App. 3d 521, 536 (2004). The burden falls on the defendant to establish both prongs of the *Strickland* test. *People v. Burks*, 343 Ill. App. 3d 765, 775 (2003).

To satisfy the first prong, a defendant must overcome the presumption that contested conduct which might be considered trial strategy is generally immune from claims of ineffective assistance of counsel. *People v. Hunter*, 376 Ill. App. 3d 639, 643 (2007); *Martinez*, 348 Ill. App. 3d at 537; *Burks*, 343 Ill. App. 3d at 775. If, however, the defendant fails to establish

prejudice as a result of the attorney's actions, the reviewing court need not consider whether his attorney's representation fell below an objective standard of reasonableness. *Burks*, 343 Ill. App. 3d at 775.

In assessing a claim, the court must give deference to trial counsel's conduct within the context of the trial and without the benefit of hindsight. *Strickland*, 466 U.S. at 689. Therefore, a defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998).

It is well settled that counsel's strategic choices made after a thorough investigation of the relevant law and facts relevant to the plausible options are virtually unchallengeable. *People v. Brown*, 336 Ill. App. 3d 711, 718 (2002); *People v. King*, 316 Ill. App. 3d 901 (2000). Moreover, a trial counsel's decision as to whether to present a particular witness is within the realm of strategic choices that are generally not challengeable on ineffectiveness grounds. *Brown*, 336 Ill. App. 3d at 718; *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). However, courts have recognized counsel's tactical decisions may be deemed ineffective when they result in counsel's apparent failure to present exculpatory evidence that he is aware of,

which includes the failure to call witnesses whose testimony would support an otherwise uncorroborated defense. *Brown*, 336 Ill. App. 3d at 718, citing *King*, 316 Ill. App. 3d at 913.

Initially, we note the trial court also based its summary dismissal of the defendant's petition on waiver. The State concedes the trial court erred in finding defendant waived his post-conviction ineffective assistance claims. Accordingly, we need not address the waiver issue in detail here.

In this case, defendant listed the names of four alibi witnesses--Loretta Wesley, Melissier Shields, Tiffany Wesley and Ira Hamilton--in his petition along with their affidavits stating that defendant was sleeping in his bedroom at Loretta Wesley's house with his son on the night of the murder while the witnesses all played cards in the house on the night of the murder. Two of the witnesses, Melissier Shields and Tiffany Wesley, also stated in their affidavits that defense counsel had never interviewed or contacted them prior to trial. Defendant alleged trial counsel's failure to call any of the four alibi witnesses, or properly investigate or interview Melissier Shields and Tiffany Wesley, constituted an unsound trial strategy that prejudiced the outcome of defendant's trial.

The State counters that the record below reflects the alibi witnesses were known to defense counsel prior to defendant's

trial, and, therefore, counsel's decision not to call the witnesses must be viewed as reasonable trial strategy. In support, the State notes the record indicates trial counsel disclosed during discovery that he could call Loretta Wesley as a witness to assert an alibi defense that defendant was present at her house at the time of the shooting. The State also notes all of the alleged alibi witnesses are related to defendant, which could have supported trial counsel's decision not to call them as alibi witnesses. Moreover, the State notes both Loretta Wesley and Ira Hamilton specifically stated in their affidavits that defense counsel had contacted them and interviewed them regarding defendant's alibi prior to defendant's trial.

In *Brown*, the defendant's *pro se* post-conviction petition was summarily dismissed by the trial court at the first stage of review. On appeal, the defendant contended his petition set forth the gist of a constitutional claim that he received ineffective assistance of trial counsel. Specifically, the defendant alleged his counsel was ineffective for failing to call alibi witnesses of whom he was aware, and for not allowing the defendant to testify. The defendant supported the claims with affidavits from two of the alibi witnesses. This court reversed the trial court's summary dismissal, noting:

"In light of the exculpatory nature of the

> statements in [the witnesses'] affidavits and defense counsel's failure to call them as witnesses, as well as the allegation that petitioner informed his attorney that he wanted to testify but was prevented from doing so, the amended petition, which was properly supported by affidavits, sufficiently raised the gist of a constitutional claim. We can think of no strategic reason why defense counsel would refuse to present this exculpatory evidence of which he was aware, or prevent petitioner from testifying in his own defense, especially in light of the fact that this case was one of an uncorroborated defense." *Brown*, 336 Ill. App. 3d at 720.

Similarly, in *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999), the defendant filed a post-conviction petition in which he raised several issues, including that trial counsel was ineffective for failing to call three alibi witnesses. He attached a signed affidavit from each of them in support of his claims. The circuit court granted the State's motion to dismiss the petition at the second stage of review. In reversing the

circuit court, this court concluded the defendant met his burden and should have been afforded an evidentiary hearing. *Tate*, 305 Ill. App. 3d at 612. The court noted defense counsel's strategy was to draw the jury's attention to various weaknesses in the State's case, which involved the identification of the defendant as the shooter. Considering the evidence as true, as the court noted it must at that point in the proceedings, the court held the evidence supported the defendant's theory that he was misidentified, and there was no apparent strategic reason for not calling them to testify. *Tate*, 305 Ill. App. 3d at 612.

Notwithstanding, the State contended counsel's decision not to call the defendant's alibi witnesses was strategic because the record showed counsel had interviewed defendant's mother and Hall, two of the alibi witnesses at issue. The court recognized that although counsel may have determined that the witnesses would not testify truthfully or would not be persuasive due to their close relationship with the defendant, it could not say as a matter of law that was counsel's reasoning. *Tate*, 305 Ill. App. 3d at 612. The record did not clearly reflect whether counsel made a professionally reasonable tactical decision not to call the witnesses or whether, as the defendant maintained, failed to call them as a result of incompetence. *Tate*, 305 Ill. App. 3d at 612.

In *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003), by contrast, the defendant contended he stated the gist of a constitutional claim that his counsel was ineffective for not calling two potential alibi witnesses to testify. Because the record revealed defense counsel had contacted the witnesses and even disclosed them to the State as potential witnesses, the court noted the defendant's claim was merely that counsel chose not to call them. *Deloney*, 341 Ill. App. 3d at 635. The court noted the record further revealed counsel's decision not to call the witnesses was strategic. First, the court noted the alibi witnesses were the defendant's cousins and, as such, their credibility may have carried little weight. *Deloney*, 341 Ill. App. 3d at 635. Second, defense counsel noted in his closing argument that the State's theory that the defendant was the shooter who rode in the back of the car was inconsistent with the defendant's in which he said he was driving the car. The court held that in as much as counsel was relying on the defendant's statement to discredit the State's theory, it would not have been strategic for him to further develop the contradictory alibi testimony. *Deloney*, 341 Ill. App. 3d at 635. Distinguishing *Tate*, the court noted the record in that case revealed no apparent strategic reason for not calling the alibi witnesses to testify. *Deloney*, 341 Ill. App. 3d at 345, citing *Tate*, 305 Ill.

App. 3d at 612. The court held that as discussed above, the record in *Deloney* revealed that defense counsel's decision not to call the defendant's cousins as witnesses was reasonable trial strategy. *Deloney*, 341 Ill. App. 3d at 345.

In this case, unlike *Tate* and *Brown*, we can think of several apparent strategic reasons for not calling the alibi witnesses to testify at defendant's trial. As the record and the witnesses' own affidavits reflect, defense counsel was clearly aware of Loretta Wesley's and Ira Hamilton's proposed alibi testimony prior to defendant's trial. Counsel even went as far as to disclose Wesley as a potential alibi witness to the prosecution during discovery. Counsel, however, ultimately chose not to call the witnesses or present the alibi defense at trial.

Counsel's strategic decision not to call the witnesses is supported in part by the fact that both Wesley and Hamilton are close relatives of the defendant, which counsel undoubtably recognized would undercut the credibility and weight of their testimony to the jury. See *Deloney*, 341 Ill. App. 3d at 345. Moreover, defendant's own conflicting statements to the police regarding whether he was present at the shooting, mixed with Officer Jankowski's unimpeached testimony that he saw defendant at the scene immediately after the shooting, indicate counsel easily could have determined presenting the contradictory alibi

testimony to the jury would be strategically riskier than focusing solely on the unreliability of the eyewitnesses' identification of defendant as the shooter. Although defendant also faults counsel for failing to interview the other two alibi witnesses counsel was aware of prior to defendant's trial, we note the record and the witnesses' own affidavits indicate that they were also close relatives of the defendant, and that their proposed testimony merely would have provided cumulative evidence supporting the alibi defense counsel had already decided not to present.

In light of the record before us, we find defendant has failed to set forth the gist of a constitutional claim that his counsel was ineffective for failing to call the alibi witnesses at defendant's trial. See *Deloney*, 341 Ill. App. 3d at 345.

Defendant also contends his counsel was ineffective for failing to use an available peremptory challenge to dismiss an allegedly biased juror.

During *voir dire*, the trial court specifically questioned a juror, Keisha A., regarding whether she could be fair and impartial after she disclosed a relative had been murdered in a similar manner as the victim in this case. In response to the trial court's questioning, Keisha indicated she could decide the case based on the law and evidence. She also indicated nothing

else led her to believe she could not be a fair or impartial juror in defendant's case.

When defense counsel questioned Keisha regarding the prior incident, the following colloquy occurred:

> "[Defense Counsel]: If you were picked on this jury would you set that aside and decide this case on the facts and the law that apply to this case or would you still remember that?
>
> [Keisha A.]: It's hard to say. I would try to listen.
>
> [Defense Counsel]: Can you be sure that you will set that aside or not?
>
> [Keisha A.]: I can't be sure."

Outside the presence of the jury, defense counsel made a motion to strike Keisha A. for cause based on her statement that she could not be sure she could set aside the murder of her relative when deciding defendant's case. The trial court denied the request, noting she had indicated to the court that she could be fair and impartial notwithstanding her experience. The record reflects defense counsel did not use a peremptory challenge to strike Keisha A. She was eventually selected to serve on defendant's jury. The record also indicates defense counsel only

used one peremptory challenge during jury selection.

In his *pro se* post-conviction petition, defendant alleged defense counsel was ineffective for failing to use a peremptory challenge to excuse Keisha A. Defendant alleged he told counsel to use a peremptory challenge to strike the juror, which counsel agreed to do. However, defense counsel ultimately did not exercise a peremptory challenge against the juror. The trial court summarily dismissed the claim, finding the claim was frivolous and patently without merit because the decision to exercise a peremptory challenge is generally a matter of trial strategy.

Initially, the State contends defendant forfeited review of the issue because it was part of the trial record and was not specifically raised on direct appeal. See *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007) (issues that could have been raised on direct appeal are forfeited). Although the State recognizes defendant raised ineffective assistance of appellate counsel claims with regards to counsel's failure to raise ineffectiveness of trial counsel claims for not objecting to the State's motion to admit other crimes and the State's introduction of hearsay evidence, the State notes defendant never alleged appellate counsel was ineffective for failing to raise the peremptory challenge issue. The State contends defendant can not circumvent

forfeiture by arguing he alleged ineffective assistance of appellate counsel in his petition when that allegation was based on an entirely different reason. See *People v. Jones*, 213 Ill. 2d 498, 505 (2004) ("when [postconviction] appellate counsel discover errors not raised by their clients during the summary, first-stage postconviction proceedings, the proper course of action for counsel to take is to file a successive petition in which the newly found claim is properly alleged.")

Even if we were to find defendant did not forfeit his claim in this case, however, we find the trial court was correct in summarily dismissing the claim as frivolous and patently without merit.

"Defense counsel's conduct during *voir dire*, including the decision whether to exercise a peremptory challenge, involves matters of trial strategy that generally are immune from claims of ineffective assistance of counsel." *People v. Lopez*, 371 Ill. App. 3d 920, 931 (2007), citing *People v. Metcalfe,* 202 Ill. 2d 544, 562 (2002); *People v. Bowman*, 325 Ill. App. 3d 411, 428 (2001).

In this case, defendant has presented no evidence to rebut the presumption that his counsel's decisions were the result of an objectively-reasonable trial strategy. Accordingly, we find defendant has failed to show that defense counsel's decisions,

questionable as they might be, were not tactical and a matter of jury selection strategy. See *Lopez*, 371 Ill. App. 3d at 931; *Bowman*, 325 Ill. App. 3d at 428.

Moreover, defendant has failed to show he was actually prejudiced by counsel's decision not to exercise a peremptory challenge against Keisha A. *Strickland's* prejudice prong generally requires a defendant to establish "a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Bowman*, 325 Ill. App. 3d at 428. Our supreme court has noted it will not presume prejudice in a case such as this where defense counsel actively participated in the *voir dire* process as a whole, but allegedly failed to strike a biased juror. See *Metcalfe*, 202 Ill. 2d at 555.

The evidence presented in this case was more than sufficient to prove defendant guilty beyond a reasonable doubt, and we cannot say the result of defendant's trial would have been different had Keisha A. not served on the jury. Furthermore, while Keisha A. expressed she could not be sure she could set aside her past experiences when deciding defendant's case, she did not indicate a clear and strong bias against the defendant in her *voir dire* responses. She also specifically indicated to the trial court during *voir dire* questioning that she would judge

defendant based on the evidence and the law, and that she would not hesitate to find defendant not guilty if the State failed to prove its case beyond a reasonable doubt. Because defendant has failed to show how the result of the proceeding would have been different if defense counsel had exercised the peremptory challenge, we find the trial court was correct in summarily dismissing his claim. See *Lopez*, 371 Ill. App. 3d at 931; *Bowman*, 325 Ill. App. 3d at 428.

Accordingly, we find defendant's petition failed to state the gist of a meritorious ineffective assistance of trial counsel claim.

CONCLUSION

We affirm the circuit court's judgment

Affirmed.