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SECOND 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
Respondent-Appellee,)	Cook County
)	
v.)	No. 00 CR 21223
)	
ADAM NJIE,)	Honorable
)	James B. Linn,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Justices Connors and Harris concur.

ORDER

HELD: Circuit court properly dismissed defendant's postconviction petition at the second stage where defendant failed to establish a substantial showing of a violation of his constitutional rights based on appellate counsel's failure to raise the issue of trial counsel's ineffectiveness on appeal.

Defendant, Adam Njie's postconviction petition was dismissed at the second stage, without an evidentiary hearing. Petitioner appeals from the dismissal and argues

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that he made a substantial showing that appellate counsel was ineffective when he failed to raise trial counsel's ineffectiveness on appeal. For the following reasons, we affirm the judgment of the circuit court.

BACKGROUND

Defendant was convicted of the first degree murder of Enich Chainey (a/k/a Frank Nitty) and was sentenced to 26 years' imprisonment. On direct appeal, after considering defendant's *pro se* response, we granted appellate counsel's motion pursuant to *Anders v. California*, 386 U.S. 738 (1967), and affirmed defendant's conviction. In doing so, we summarized the facts of the case as follows:

“On August 2, 2000, Chainey saw defendant selling drugs in front of his building and confronted him about the fact. An argument ensued during which time defendant reached for something in his left pants pocket. Chainey pulled out a gun, instructed defendant to raise his hands, and fired one shot into the air. Defendant complied, but warned Chainey that he would return and then walked away.

Defendant returned about one-half hour later, pointed a gun over the front gate and fired several shots. Antwon Fipps heard the gunshots from inside the basement apartment and ran outside to investigate. Fipps saw two men running down the street. He recognized one of them as defendant. When Fipps returned to the apartment, he saw Chainey lying on the floor bleeding. Chainey told Fipps, “[Defendant] shot me.” *People v. Adam Njje*, No. 1-02-1518 (2003) (unpublished order pursuant to Supreme Court Rule 23).

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In addition, at trial, Jeffrey Wilson testified that on the night of the incident he and his twin brother Bennett, witnessed a dispute between Chainey and defendant. Later that night, while Jeffrey, Bennett, defendant and several other people were sitting on a porch, defendant pointed his gun at the people on the porch and fired six shots. Chainey pushed him over the bannister and he landed on his brother Bennett. He ran to the back basement door and was let in. Shortly after, three shots came into the basement and he saw Chainey lying near the door on the floor.

On cross-examination, Jeffrey Wilson denied that he testified before the Grand Jury. He testified that it had to be his twin brother Bennett who used his name and testified before the Grand Jury while representing himself to be Jeffrey.

On February 2, 2006, defendant filed a *pro se* petition for leave to file a late postconviction petition, in which he asserted that he was not culpably negligent for the late filing because he was in segregation. Among the issues raised in his petition was that he was denied effective assistance of both trial and appellate counsel. Counsel was appointed to represent defendant and filed an amended petition, which alleged among other things, that trial counsel was ineffective when he failed to move for a mistrial after Jeffrey Wilson, the State's witness, denied appearing before the Grand Jury and claimed that his twin brother must have testified before the Grand Jury using his name. Defendant also claimed that appellate counsel was ineffective where he failed to raise the issue of trial counsel's ineffectiveness on direct appeal. The State filed a motion to dismiss defendant's petition on June 25, 2009. Defendant filed a response on July 29, 2009. After some argument unrelated to this issue, the trial court

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granted the State's motion to dismiss on August 27, 2009.

Defendant now appeals from the second stage dismissal of his post conviction petition.

ANALYSIS

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)), allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2008); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Where defendant is not sentenced to death, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

At the first stage, the circuit court must determine whether the petition before it alleges the "gist of a constitutional claim." *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418 . Taking all well-pleaded facts as true, the court must determine whether the petition alleges a constitutional infirmity that, if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2008); *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). If the trial court determines that a petitioner has stated the "gist of a constitutional claim," the petition is advanced to the second stage and counsel is appointed, if necessary, in accordance with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2008).

At the second stage, the State is required to either answer the post-conviction petition or move to dismiss. 725 ILCS 5/122-5 (West 2004). As the State in this case moved for dismissal, the trial court was required to rule on the legal sufficiency of the

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allegations contained in the petition, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). As we review this case at the second stage, our inquiry is whether the allegations raised by petitioner in his petition, supported by records and other documents, demonstrate a substantial violation of petitioner's constitutional rights. *Edwards*, 197 Ill. 2d at 245-46. The standard of review we apply to the circuit court's dismissal of petitioner's petition is *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

Defendant argues that the trial court erred in dismissing his petition at the second stage where he established that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. Specifically, defendant faults counsel for not requesting a mistrial and for not moving to dismiss the indictment following Jeffrey Wilson's admission on cross-examination that he never testified before the Grand Jury in defendant's case but that his twin brother, Bennett Wilson, using Jeffrey's name, actually provided the testimony in the Grand Jury. Defendant urges that because he made a substantial showing of a violation of his right to effective assistance of appellate counsel, he is entitled to an evidentiary hearing.

In determining whether a defendant has made a substantial showing that appellate counsel was ineffective, we turn to the two-part test articulated in *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). *People v. Haynes*, 192 Ill. 2d 437, 476 (2000). First, the defendant must show that appellate counsel's failure to raise the issue complained of was objectively unreasonable. *Haynes*, 192 Ill. 2d at 476. Second, the defendant must demonstrate

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that appellate counsel's decision not to raise the issue prejudiced defendant. *Haynes*, 192 Ill. 2d at 476. Appellate counsel is not, however, obligated to raise every issue on appeal. *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Moreover, appellate counsel is not incompetent for failing to raise issues, that, in his or her judgment, are without merit. *Easley*, 192 Ill. 2d at 329. In other words, if the underlying issue is without merit, defendant can suffer no prejudice from appellate counsel's failure to raise the issue. *Easley*, 192 Ill. 2d at 329.

Petitioner argues that appellate counsel's failure to raise the issue of trial counsel's ineffectiveness on direct appeal was objectively unreasonable and had appellate counsel raised this issue on direct appeal, there is a reasonable likelihood that the matter would have been remanded for a new trial. So, the threshold question that must be addressed is, can trial counsel be considered ineffective for failing to request a mistrial and for failing to move to dismiss the indictment based on Jeffrey Wilson's testimony?

A claim of Ineffective assistance of trial counsel is evaluated similarly to that of a claim of ineffective assistance of appellate counsel. With respect to trial counsel, under the first prong of the *Strickland* test, defendant must overcome a "strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance; that is, defendant must overcome the presumption that under the circumstances, the challenged action, 'might be considered sound trial strategy.' " *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694-95, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S. Ct. 158, 164, 100 L. Ed. 2d 83, 94 (1955).

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A defendant satisfies the second prong of *Strickland* if he can show that a reasonable probability exists that, had counsel not erred, the trier of fact would not have found him guilty beyond a reasonable doubt. *People v. Caballero*, 126 Ill. 2d 248, 260 (1989).

Where the defendant fails to prove prejudice, the reviewing court need not determine whether counsel's performance constituted less than reasonable assistance. *Strickland*, 466 U.S. at 697, 104 S .Ct. at 2069, 80 L. Ed.2d at 699; *People v. Flores*, 153 Ill.2d 264, 284 (1992).

Defendant argues that trial counsel should have moved for a mistrial and then moved to dismiss the indictment following Jeffrey Wilson's testimony because the disclosure indicated that the indictment in this case had been returned under circumstances in which the Grand Jury based its decision upon the testimony of a witness who knowingly lied under oath.

A mistrial should be granted where an error of such gravity has occurred that the defendant has been denied fundamental fairness such that continuation of the proceedings would defeat the ends of justice. *People v. Nelson*, 235 Ill.2d 368, 435 (2009). Decisions whether to seek a mistrial are matters of trial strategy. See *People v. Cordevant*, 297 Ill App. 3d 193, 200 (1998); *People v. Steward*, 295 Ill. App. 3d 735, 745 (1998).

In addition, a trial court may dismiss an indictment if a defendant can establish that he has suffered a prejudicial denial of due process. *People v. Oliver*, 368 Ill. App. 3d 690, 694 (2006). This denial of due process may be based on prosecutorial misconduct. *People v. Fassler*, 153 Ill. 2d 49, 58 (1992). With respect to this kind of

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challenge to an indictment,

“Prosecutorial misconduct must rise to the level of a deprivation of due process or a miscarriage of justice. [Citations.] The due process rights of a defendant may be violated if the prosecutor deliberately or intentionally misleads the grand jury, uses known perjured or false testimony, or presents other deceptive or inaccurate evidence. [Citations.] An indictment may also be dismissed where the prosecutor has applied undue pressure or coercion so that the indictment is, in effect, that of the prosecutor rather than the grand jury. [Citation.] To warrant dismissal of the indictment, defendant must therefore show that the prosecutors prevented the grand jury from returning a meaningful indictment by misleading or coercing it.” *People v. DiVincenzo*, 183 Ill. 2d 239,257-58 (1998).

In support of his argument, that defense counsel was ineffective for failing to request a mistrial and failing to move to dismiss the indictment, defendant cites *People v. Oliver*, 368 Ill. App. 3d 690 (2006). In *Oliver*, a grand jury witness, a police officer, committed perjury by testifying that he himself observed the events in question when, in fact, the police officer’s testimony was based on another police officer’s report and not his personal knowledge. *Oliver*, 368 Ill. App. 3d at 694. The court held that a prosecutor engaged in misconduct by withholding the hearsay nature of the police officer’s testimony and thereby violated the defendant’s due process rights.

“[I]f the only defect in [the witness’s] testimony were that its hearsay nature was concealed, we would be hard-pressed to determine that, had the grand jurors

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known that the testimony was hearsay, they would not have indicted defendant. However, as the trial court indicated, [the witness's] testimony was doubly deceptive. Not only was its hearsay nature concealed, but it also mischaracterized the observations of the actual eyewitness so as to establish probable cause where none existed. It is on this point that prejudice arises.” *Oliver*, 368 Ill. App. 3d at 697.

Defendant claims that, as in *Oliver*, not only did Bennett’s testimony conceal its hearsay nature, but necessarily mischaracterized the observations of the actual eyewitness. We disagree, finding defendant’s argument overcome by *People v. Holmes*, 397 Ill. App. 3d 737 (2010). *Holmes* recognized the holding in *Oliver*, but held that the prosecutor is under no obligation to disclose the hearsay nature of a witness’s testimony to the grand jury. *Holmes*, 397 Ill. App. 3d at 742. The only instance in which the failure to disclose the hearsay nature of a witness’s testimony would be problematic, is when it is so deceptive or inaccurate that it affected the grand jury’s deliberations. *Holmes*, 397 Ill. App. 3d at 742.

Here, the record in this case does not establish that the prosecutor engaged in misconduct by failing to disclose the hearsay nature of Jeffrey/Bennett’s testimony. As defendant admits, there was no indication that the State was even aware of the deception before the Grand Jury until Jeffrey testified on cross-examination. Furthermore, there is no concrete evidence to suggest that Jeffrey’s testimony on cross-examination was truthful. With respect to defendant’s argument about the

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mischaracterization of the actual evidence, we cannot speculate as to how Jeffrey's or Bennett's testimony before the Grand Jury would have compared with the evidence offered at trial. The record of the Grand Jury proceedings is incomplete.¹ For these reasons, defendant cannot establish that he suffered prejudice as a result of trial counsel's failure to request a mistrial and failure to move to dismiss the indictment, where neither motion would have been granted.

Even if Jeffrey/Bennett's testimony before the Grand Jury could be considered incompetent, the indictment need not be dismissed. In *People v. Hruza*, 312 Ill. App. 3d 319 (2000), defendant argued on appeal that a police officer perjured himself before the grand jury when he testified that the defendant failed all of the field sobriety tests he took when in fact the defendant had passed at least one. Defendant asserted that the police officer's perjured testimony must be disregarded and that the indictment must be dismissed because the officer was the only witness before the grand jury, and without his testimony there was no evidence to support the indictment. The *Hruza* court rejected defendant's argument without determining whether the officer's testimony before the grand jury amounted to perjury and found that although the officer's statement to the grand jury that defendant had failed all the field sobriety tests was

¹ The transcript provided to this court of Jeffrey/Bennett's testimony before the Grand Jury is incomplete. The first page is entitled "In re John Doe investigation." On the bottom of the page, Jeffrey Wilson is listed as a witness. The pages where the State would explain the purpose to the Grand Jury is missing, as are the next several pages of the transcript. There are several pages of testimony but it is unclear who is testifying. The defendant has the burden of providing a complete record on appeal and any doubts arising from an incomplete record will be construed against him. *People v. Toft*, 355 Ill. App. 3d 1102, 1105 (2005).

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incorrect, if that statement was disregarded, the additional evidence before the grand jury was sufficient to support the indictment. *Hruza*, 312 Ill. App. 3d at 323.

Here, Jeffrey/Bennett Wilson was not the only witness to testify before the grand jury. Although the entire record from the Grand Jury is not before this court, the record clearly indicates "P.O. Villardita" testified as a witness in securing the true bill.

As previously stated, if the underlying issue is without merit, petitioner can suffer no prejudice from appellate counsel's failure to raise the issue. *Easley*, 192 Ill. 2d at 329. Petitioner's claim that counsel was ineffective for failing to request a mistrial and motion to dismiss the indictment is without merit. Accordingly, we find that defendant has not made a substantial showing of a violation of his right to effective assistance of appellate counsel. Therefore, the trial court properly dismissed petitioner's postconviction petition without an evidentiary hearing and affirm the judgment of the trial court.

Affirmed.

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