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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Du Page County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 02—CF—3602
)	
ALAJANDRO ORTIZ,)	Honorable
)	Perry R. Thompson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Bowman and Hutchinson concurred in the judgment.

ORDER

Held: (1) We reversed the trial court's second-stage dismissal of defendant's postconviction claim that trial counsel was ineffective for failing to call an occurrence witness, as the State's evidence against defendant was circumstantial and the witness would have testified that defendant was not involved in the offense; (2) we affirmed the trial court's second-stage dismissal of defendant's postconviction claim that trial counsel was ineffective for failing to call a fingerprint expert, as counsel's reasonable strategy did not require an expert.

¶ 1 Following a bench trial, defendant, Alajandro Ortiz, was convicted of unlawful possession of cocaine with the intent to deliver (720 ILCS 570/401(a)(2)(D) (West 2002)) and sentenced to 16 years' imprisonment. Defendant appealed, arguing, among other things, that he was not proved

guilty beyond a reasonable doubt. This court affirmed. *People v. Ortiz*, 355 Ill. App. 3d 1056 (2005). Soon thereafter, defendant petitioned *pro se* for postconviction relief, arguing, among other things, that his appellate counsel was ineffective for failing to argue that defendant's trial counsel was ineffective for failing to interview and subpoena an occurrence witness, Enrique Puente, who would have testified that defendant knew nothing about the cocaine hidden in Puente's waistband, which cocaine formed the basis of defendant's conviction. Attached to defendant's petition was an affidavit prepared by Puente attesting to defendant's innocence. The trial court dismissed the petition as frivolous and patently without merit, defendant appealed, and this court reversed and remanded the cause for stage-two proceedings. *People v. Ortiz*, No. 2—06—0255 (2008) (unpublished order under Supreme Court Rule 23). On remand, counsel was appointed and an amended petition was filed. In the amended petition, defendant renewed his claim that his trial counsel was ineffective for failing to call Puente and argued that his trial counsel was also ineffective for failing to call an unnamed fingerprint expert who would have contradicted the State's expert's testimony identifying defendant's fingerprints on the duct tape that sealed the two packages of cocaine seized. The trial court dismissed defendant's petition, and this timely appeal followed. We affirm in part, reverse in part, and remand this cause.¹

¶ 2 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122—1 *et seq.* (West 2008)) creates a three-stage process for the adjudication of postconviction petitions and permits a defendant to mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). If a petition survives first-stage review, it proceeds

¹Because the facts are well known to the parties and this court, we see no need to recite in detail what transpired at defendant's trial.

to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 3 Defendant’s petition was dismissed at stage two. An appeal from a second-stage dismissal is reviewed *de novo*.² *People v. Adams*, 373 Ill. App. 3d 991, 993 (2007). At the second stage, a defendant must make a “substantial showing” of a constitutional violation. *People v. Addison*, 371 Ill. App. 3d 941, 946 (2007).

¶ 4 In determining whether a defendant has made a substantial showing of a constitutional violation, “all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient.” *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). Moreover, allegations that the record positively rebuts cannot be considered. See *People v. Phyfiher*, 361 Ill. App. 3d 881, 883-84 (2005) (“[U]nder second-stage procedure, as provided by section 122—5, the circuit court is foreclosed from engaging in any fact-finding because all well-pleaded facts not rebutted by the record are to be taken as true at *** stage two of the post-conviction process.”). Additionally, a court may not consider the credibility of witnesses at the second stage. *People v. Knight*, 405 Ill. App. 3d 461, 471 (2010). Rather, “[t]he credibility of witnesses is a matter that can only be resolved by an evidentiary hearing.” *Id.*

¶ 5 Defendant alleged in his petition that his trial attorney was ineffective for failing to (1) interview and subpoena Puente and (2) call a fingerprint expert to counter the State’s fingerprint

²Because our review is *de novo*, we may affirm on any basis the record supports, regardless of what the trial court relied on in dismissing the petition. See *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

expert's testimony. In evaluating whether defendant made a substantial showing that he was denied the effective assistance of counsel in these ways, we are guided by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a defendant who alleges that his counsel was ineffective must establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Wendt*, 283 Ill. App. 3d 947, 951 (1996). However, if a defendant fails to show that he was prejudiced, the second prong of the test, a court need not consider whether the attorney's performance fell below an objective standard of reasonableness. *Id.*

¶ 6 With these principles in mind, we consider whether defendant's trial counsel was ineffective for failing to interview or subpoena Puente to testify that defendant knew nothing about the cocaine that the police seized or the sale of that cocaine. The State claims that counsel was not ineffective for failing to call Puente, because, in light of all the evidence supporting defendant's guilt, the outcome of defendant's trial would not have been different. Specifically, the State claims that "in light of the extensive evidence presented in the record, such as the Defendant's and co-Defendant [Juan] Moreno's presence at the crime scene, [citation], the guns in their vehicle, [citation], their surveillance of the proceedings [from] their vehicle, [citation], and the Defendant's fingerprints on both of the kilos of cocaine, [citation], the trial court correctly held that co-Defendant Puente's affidavit was meritless." In reply, defendant argues that "the 'facts' upon which the [trial] court relied [to dismiss defendant's petition] were subject to interpretation" and "did not directly contradict Puente's affidavit." We agree with defendant.

¶ 7 A review of the evidence presented at trial reveals that defendant's conviction was based on circumstantial evidence. Specifically, the evidence established that, on the evening of December 10,

2002, defendant's friend, Puente, possessed two kilograms of cocaine. That night, officers observed Puente driving in the area where the drug transaction was to take place, and following closely behind him was a car driven by Moreno. Defendant was seated in the front passenger seat of Moreno's car. Nothing directly established that, at any point, defendant knew that Puente was in possession of the cocaine.

¶ 8 Moreno followed Puente's car, which was moving very slowly, to a parking lot where Puente met an undercover police officer. When Puente exited the car to meet with the undercover police officer, Moreno and defendant looked back at Puente. Nothing directly indicated that, with defendant's "look back" at Puente, defendant was involved with or knew of the drug transaction. However, given the manner in which *Moreno* followed Puente, an officer conducting surveillance theorized that defendant and Moreno were involved in the sale of the cocaine in that they were providing Puente with countersurveillance. Other than the way *Moreno* followed Puente, this officer could point to no evidence that specifically suggested that *defendant* was knowingly involved in the drug transaction.

¶ 9 Once Puente made the sale to the undercover police officer, Puente was arrested, and officers stopped Moreno's car. During a search of Moreno's car, officers found weapons concealed in the dashboard vents. Nothing directly indicated that defendant was aware of these weapons.

¶ 10 A further investigation revealed that defendant's fingerprints were found on the duct tape that sealed the packages of cocaine recovered from Puente. However, this did not directly establish that defendant knew about the cocaine. Specifically, according to the State's own expert, defendant's fingerprints could have been placed on the duct tape at some point before the tape was used to seal the packages of cocaine.

¶ 11 Puente's affidavit indicates that defendant knew nothing about the drug transaction.

Specifically, the relevant portion of Puente's affidavit reveals the following:

“4. [Puente] states that on or around December 10, 2002, he was in possession of two kilos of Cocaine.

5. [Puente] states that he placed and had hidden the 2 kilos of Cocaine in his waistband.

6. [Puente] states that on or around December 10, 2002, he met with two of his friends, [defendant] and JUAN MORENO, in the City of Addison, Illinois, in the County of Dupage [*sic*].

7. [Puente] states that he met with [defendant] and JUAN MORENO, in separate motor vehicles, on December 10, 2002.

8. [Puente] states that on December 10, 2002, he was driving a Nissan Maxima.

9. [Puente] states that both [defendant], and JUAN MORENO, were in a separate vehicle, a Ford Lighting Truck, on December 10, 2002.

10. [Puente] states at no time prior to, during, and or after December 10, 2002, did he inform [defendant] or JUAN MORENO, that [Puente] had two kilos of Cocaine in [his] waistband.

11. [Puente] states that [defendant] and JUAN MORENO, did not have any knowledge whatsoever that [he] had two kilos of Cocaine in [his] waistband and in [his] vehicle, on the day of December 10, 2002.

12. [Puente] states that at no time did [defendant] or JUAN MORENO, have knowledge that [he] was in possession of two kilos of cocaine with the intent to deliver or consume by way of ingestion any portion of [sic] that substance.”

¶ 12 Given the evidence presented at trial, Puente’s affidavit, and the fact that this case comes to us following a dismissal at stage two of postconviction proceedings, we conclude that defendant has made a substantial showing that his right to the effective assistance of counsel was violated. See *Knight*, 405 Ill. App. 3d at 470-71. As detailed above, the evidence presented against defendant at trial was entirely circumstantial. Nothing directly linked defendant to being involved in the crime in any way. Moreover, nothing in the record rebuts defendant’s claim, which is supported by Puente’s affidavit, that defendant was not involved. Indeed, the evidence presented at trial is not inconsistent with Puente’s assertions. And, given that we cannot assess the credibility of Puente’s statements at the second stage of postconviction proceedings, we accept them as true.

¶ 13 Assuming that this court may, at the second stage, affirm the dismissal of some of the claims raised in a postconviction petition while reversing the dismissal of others (see *People v. Lara*, 317 Ill. App. 3d 905, 908 (2000)), we find it necessary to address the second issue defendant raises on appeal. That is, whether defendant made a substantial showing that counsel was ineffective for failing to obtain a fingerprint expert to refute the State’s fingerprint expert’s testimony.

¶ 14 If nothing else, defendant’s unsupported and conclusory claim fails because even a cursory examination of the State’s expert’s testimony reveals that defense counsel’s strategy was to admit that defendant’s fingerprints were on the duct tape. Rather than contest that fact, defense counsel elicited the State’s expert’s admission indicating that, although defendant’s fingerprints were on the duct tape, those fingerprints could have been placed on the duct tape well before that tape was used

to seal the packages of cocaine the police seized. Pursuant to defense counsel's theory, defendant never knew about the cocaine even though his fingerprints were found on the duct tape. Given defense counsel's reasonable strategy, there was no need to challenge the State's expert's results. See *People v. Mendoza*, 402 Ill. App. 3d 808, 820-21 (2010) (second-stage dismissal of the defendant's postconviction claim that his trial counsel was ineffective for failing to call expert to testify that the victim fell into the bullet and that the defendant did not intend to fire the gun at the victim's torso was proper, because, among other things, the State would have called its own expert to rebut the defendant's expert, and, as a result, the defendant was "unable to overcome the strong presumption that trial counsel's performance was the product of reasonable trial strategy, not incompetence").

¶ 15 For these reasons, we affirm the second-stage dismissal of defendant's claim regarding counsel's failure to obtain a fingerprint expert, reverse the second-stage dismissal of defendant's claim concerning counsel's failure to call Puente to testify at trial, and remand this cause for further proceedings under the Act.

¶ 16 Affirmed in part and reversed in part; cause remanded.