2011 IL App (2d) 090989-U
No. 2—09—0989
Order filed July 18, 2011

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Boone County.
Respondent-Appellee,	)	
v.	)	No. 05—CF—295
TANZIE S. LEEKS,	)	Honorable Fernando L. Engelsma,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

Held: The trial court properly dismissed petitioner's post-conviction petition: petitioner failed to make a substantial showing of imprisonment in violation of the state or federal constitution due to ineffective assistance of trial counsel; counsel's performance did not fall below an objective standard of reasonableness; and petitioner was not prejudiced because his witness's testimony would not provide exculpatory evidence or corroborate a defense, and it is not reasonably probable that the end result of the proceeding would have differed had she testified.

¶ 1 Petitioner, Tanzie S. Leeks, was convicted of robbery after a bench trial in 2006 and sentenced to a ten-year prison term. 720 ILCS 5/18—1(a) (West 2005). The direct appeal was dismissed in 2008 for lack of jurisdiction. *People v. Leeks*, No. 2—07—1240 (2008) (unpublished

order under Supreme Court Rule 23). In 2009, petitioner filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122—1 *et seq*. (West 2008)). The petition was dismissed by the trial court as being patently without merit. Petitioner now appeals the trial court's dismissal of his petition based on a claim of ineffective assistance of trial counsel. For the following reasons, we affirm.

¶ 2 I. BACKGROUND

¶ 3 Petitioner was arrested for robbery in October 2005. 720 ILCS 5/18—1(a) (West 2005). At a bench trial, both the victim, Ella Overton, and an eyewitness, Donald Fordsman, testified that petitioner hit her on the head repeatedly with his fists. Fordsman also testified that this continued until another male came and pulled petitioner off of the victim. Both Fordsman and the victim also testified that petitioner took a cell phone from the victim. These facts were corroborated by testimony from a police officer and paramedic who arrived on the scene after the attack and robbery. The defense did not call any witnesses before resting. At the close of trial, petitioner was convicted of robbery and sentenced to ten years imprisonment. 720 ILCS 5/18—1(a) (West 2005).Defense counsel filed a motion to reconsider sentence, which was denied. Counsel then informed the court that petitioner no longer wished him to remain on the case. Petitioner stated to the court that he believed counsel was bribed so he would be convicted of robbery. Petitioner had filed a complaint with the Illinois Attorney Registration and Discipline Commission, which did not pursue the matter further after an investigation. The court granted counsel's request to withdraw.

¶ 4 Petitioner filed an untimely notice of appeal, and petitioner's direct appeal was dismissed for lack of jurisdiction. *People v. Leeks*, No. 2—07—1240 (2008) (unpublished order under Supreme Court Rule 23). In 2009, petitioner filed a *pro se* post-conviction petition claiming his right to due

process under the federal constitution and the Fifth, Sixth, and Fourteenth Amendments to the Illinois Constitution was denied as a result of ineffective assistance of trial counsel. Petitioner claimed that counsel did not call two witnesses, Geneva Leeks, Randy Brown, and Jacqueline Johnson, whom he identified to testify for the defense.

¶ 5 However, to support the allegations in his petition, petitioner only attached the affidavit of Geneva Leeks. In the affidavit, Leeks stated that the victim claimed petitioner was the father of her child and that she was jealous of petitioner's new girlfriend. Leeks also stated that the victim told her previously that she wanted to have petitioner put in jail. Additionally, Leeks stated that the victim regretted calling the police because it was a misunderstanding and the only reason she appeared in court was because she was threatened by the police that her children would be taken away if she did not appear. However, in his post-conviction petition, petitioner himself admitted that the battery did occur after he went to confront the victim about a previous argument and another argument and physical altercation resulted. Finally, Leeks stated that petitioner did not take the cell phone.

¶ 6 Petitioner also based his petition on four additional claims. The first is that the trial court abused its discretion in allowing the state to amend the indictment. Second, that trial court abused its discretion in allowing the pre-sentence report from another state, which was not in compliance with 730 ILCS 5/3-1. Also, that petitioner was denied effective assistance of counsel when counsel failed to present the pre-sentence report under 730 ILCS 5/3-1. Lastly, that the evidence was insufficient to convict petitioner beyond a reasonable doubt.

¶ 7 In October 2009, the trial court dismissed the petition as patently without merit. The trial court held that even if Leeks' proffered testimony was admissible, it would only be admissible as impeachment by prior inconsistent statement or for motive to fabricate, which failed to establish

ineffective assistance of counsel for failure to call the witness. The trial court further held that the remaining four claims failed to state a claim of a denial of a constitutional right.

¶ 8 II. ANALYSIS

¶ 9 Petitioner appeals the dismissal of his post-conviction petition, claiming that he received ineffective assistance of counsel when trial counsel did not call the witnesses identified by petitioner. Furthermore, petitioner claims that he was prejudiced because counsel's failure to call these witnesses resulted in his defense not being corroborated.

¶ 10 The dismissal of a post-conviction petition is warranted "only when the petitioner's allegations of fact - liberally construed in favor of the petitioner and in light of the trial record - fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *People v. Coleman*, 183 Ill.2d 366, 382 (1998). The standard of review for a trial court's decision to dismiss the petition without an evidentiary hearing is reviewed *de novo*. *Coleman*, 183 Ill.2d at 388-89.

¶ 11 Under *Strickland v. Washington*, the ineffective assistance of trial counsel is determined by a two-pronged test. *Strickland*, 466 U.S. 668 (1984). The defendant must show both that "counsel's representation fell below an objective standard of reasonableness" and that the defendant was prejudiced. *Strickland*, 466 U.S. at 687-688. The Illinois Supreme Court also held that a claim of ineffective assistance of counsel will not be summarily dismissed at the first stage of post-conviction proceedings if "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Since both prongs are required to be satisfied, courts may resolve ineffectiveness

claims by finding only a lack of prejudice because a lack of prejudice makes counsel's performance irrelevant. *Coleman*, 183 Ill.2d at 397-98.

¶ 12 A. Objective Standard of Reasonableness

¶ 13 As petitioner acknowledges in his post-conviction petition, the decision to present witnesses is strategic and not grounds for an attack of ineffective assistance of counsel. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). It becomes grounds for attack only if counsel fails to "present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *Tate*, 305 Ill. App. 3d at 612.

¶ 14 The first problem for petitioner is that there is no information in the record that defense counsel was aware of these witnesses. There is no mention of Leeks until the post-conviction petition. Unlike the witnesses' affidavits in *Tate*, the affidavit of Leeks does not indicate that counsel was provided with her information or aware of her potential testimony. *Tate*, 305 Ill. App. 3d at 610. Petitioner does not mention counsel's failure to call these witnesses as the reason he wanted counsel to withdraw. He only indicates his mistrust of his attorney, and claims that counsel had been bribed so petitioner would be convicted of robbery.

¶ 15 The second problem for petitioner is that, even if counsel was aware of Leeks, there is no indication that Leeks' testimony would support an otherwise uncorroborated defense. There is nothing in Leeks' affidavit that would impeach either Fordsman or the victim's testimony that the battery occurred or that the cell phone was taken. While the statements in Leeks' affidavit provide a motive for the victim to fabricate the attack, in his petition, petitioner himself admits that a battery occurred. Also, there is no indication from the affidavit that Leeks had any first-hand knowledge that the cell phone was not taken by petitioner. Additionally, petitioner argues that Fordsman's

testimony indicates that another male was on the scene. However, Fordsman testified only that an individual came to the victim's aid, not that petitioner was with another person at the time of the battery, and nothing in Leeks' affidavit indicates knowledge of whether there was another person present. Therefore, her testimony as a witness would not provide any exculpatory evidence or corroborate a defense that petitioner did not take the cell phone or that there might have been another person present who did take it.

¶ 16 Since Leeks' testimony as presented in her affidavit, would not have resulted in either exculpatory evidence or supported an otherwise uncorroborated defense, it is not grounds for attack for ineffective assistance of counsel. The decision not to present Leeks as a witness, if counsel was informed of her, was a strategic trial decision and not grounds for attack for ineffective assistance of counsel.

¶ 17 B. Prejudice to Petitioner

¶ 18 Even had petitioner shown that counsel's performance fell below an objective standard of reasonableness, he has failed to show that he was prejudiced when counsel did not call Leeks to testify. Assuming counsel was aware of Leeks, there was still no prejudice to petitioner because it is not reasonably probable that the outcome of the proceeding would have been different had defense counsel called Leeks to testify. Leeks' affidavit did not indicate first-hand knowledge of the incident, therefore, she could not effectively testify about the taking of the cell phone. Also, her statements about the confrontation that occurred conflict with petitioner's own statement in his *pro se* post-conviction petition. Since her testimony would not have been helpful, there was no prejudice to petitioner, and there was no ineffective assistance of counsel.

¶ 19 The question of the whether petitioner had taken the phone from the victim would not have been effectively addressed by this witness if called to testify. In the affidavit attached to the post-conviction petition, there is no indication that Leeks had any first-hand knowledge about either the attack or the cell phone. The only mention of the cell phone in the affidavit is the witness's conclusion that petitioner did not take it and that the cell phone was not the reason that he went to confront the victim.

¶ 20 The remaining information in the affidavit, statements the victim made to Leeks that give the victim motive to want petitioner jailed, also would not have resulted in a different outcome of the proceeding. Instead, Leeks' statements in the affidavit contradict petitioner's own statements in his post-conviction petition. Leeks states in her affidavit that the victim told her she called the police as soon as she saw petitioner because she was angry and jealous, which is directly in conflict with what petitioner states in his petition: that he confronted the victim about a previous incident, which resulted in an argument, followed by a physical altercation and his battery of the victim.

¶ 21 The injury to the victim and the taking of the cell phone were also corroborated by the eye-witness testimony of Fordsman, who had loaned the cell phone to the victim. The injuries were established by the testimony of the policeman and the paramedic as well as the photographs taken at the hospital. Petitioner was identified by both the victim and Fordsman. Although petitioner argues that Fordsman's testimony allows for the existence of a third man, any testimony by Leeks would do nothing to establish this third person's presence or to impeach Fordsman's testimony. Her statements, however, would be impeached by the evidence of the injuries and testimonies of the other witnesses, as well as petitioner's own statements in his petition that the battery did occur. Therefore, not calling Leeks was not prejudicial to petitioner, since it is not reasonably probable that

including the testimony of Leeks as a witness would have resulted in a different outcome in the proceeding.

¶ 22 Liberally construing the petition in favor of petitioner and in light of the trial court record, it has not been shown that the trial counsel's representation fell below an objective standard of reasonableness. There is no indication the testimony of the witness would have brought to light exculpatory evidence or corroborated a defense. Additionally, given the other evidence in this case, including petitioner's own statements in his petition contradicting his witness's statements in the affidavit, there was no prejudice to petitioner since it is not reasonably probable that the result of the proceeding would have been different had Leeks been called to testify. Therefore, since the defense counsel's performance did not fall below an objective standard of reasonableness, and petitioner was not prejudiced, there was no showing of ineffective assistance of counsel.

¶ 23 III. CONCLUSION

¶ 24 Even liberally construing the facts in petitioner's favor, the allegations fail to make a substantial showing of a constitutional violation due to ineffective assistance of trial counsel. Therefore, the trial court did not err in dismissing the post-conviction petition, and its dismissal is affirmed.

¶ 25 The judgment of the circuit court of Boone County is affirmed.

¶ 26 Affirmed.