

NOTICE
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2011 IL App (4th) 100011-U

Filed 12/7/11

NO. 4-10-0011

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
ANTHONY GAY,)	No. 02CF22
Defendant-Appellant.)	
)	Honorable
)	Robert M. Travers,
)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Cook and Knecht concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Where defendant failed to demonstrate that he was deprived of his right to due process by the State engaging in tactical preindictment delay to circumvent his speedy-trial rights, the circuit court properly dismissed his postconviction petition.

¶ 2 (2) Where defendant failed to demonstrate that he was deprived of the effective assistance of appellate counsel when his attorney failed to raise on direct appeal the issue that the trial court improperly deprived defendant of his right to effectively examine a State's witness, the circuit court properly dismissed his postconviction petition.

¶ 3 I. BACKGROUND

¶ 4 In August 2000, while an inmate at Pontiac Correctional Center, defendant committed aggravated battery against a correctional officer by squirting a brown liquid substance through a toothpaste tube, causing the liquid to strike correctional officer Kevin Keller. This offense was just one of 21 similar offenses that defendant committed while in prison between July 2000 and March

2001. Defendant was not charged with the offense until February 2002, 18 months after the incident.

¶ 5 After an April 2002 jury trial, defendant was convicted. He had represented himself at trial. However, prior to sentencing, he requested the appointment of counsel. The trial court appointed the public defender. Within minutes, defendant changed his mind, so the court vacated the appointment. The court sentenced defendant, who appeared *pro se*, to seven years in prison to run consecutively to the sentence he was then serving and several other sentences. Defendant appealed, claiming the court erred by discharging counsel without proper admonishments and before ordering a fitness hearing. This court found no error. *People v. Gay*, No. 4-03-0754, slip order at 12 (Sept. 21, 2005) (unpublished order under supreme court rule 23).

¶ 6 While his direct appeal was pending, in August 2005, defendant filed a postconviction petition. The circuit court summarily dismissed the petition without prejudice, finding postconviction proceedings should not proceed in conjunction with defendant's direct appeal. Defendant appealed from the court's dismissal. This court reversed, finding that both proceedings may proceed simultaneously. *People v. Gay*, No. 4-05-0807, slip order at 3 (April 13, 2007) (unpublished order under supreme court rule 23).

¶ 7 On remand, the State filed a motion to dismiss, and defendant was granted leave to file an amended petition. In December 2008, defendant filed a *pro se* amended postconviction petition wherein he alleged the following: (1) the trial court denied his right to present a defense where the court improperly limited his examination of Lieutenant Cromie and refused to allow him to call Captain Dean Wenzelman and Richard Irvin as witnesses; (2) the court erred in allowing the State to show the jury a brown stained toothpaste tube without admitting it into evidence; (3) the State failed to prove him guilty beyond a reasonable doubt; (4) the State violated his due-process

rights through preindictment delay, and (5) his appellate counsel was ineffective for failing to raise these issues on direct appeal.

¶ 8 On October 13, 2009, the circuit court conducted a hearing on defendant's petition. Defendant, appearing *pro se*, argued that the State's request to file a motion to dismiss *instanter* should be denied as untimely. Defendant argued that, at the previous hearing, the court gave the State until September 8, 2009, to file a responsive pleading. The court agreed with defendant, denied the State's request to file the motion to dismiss *instanter*, and entered a general denial on the State's behalf. At this same hearing, both parties argued the merits of defendant's amended petition. The court took the matter under advisement.

¶ 9 On December 14, 2009, the circuit court entered a written order, finding that the allegations set forth in defendant's amended petition failed to make a substantial showing of a constitutional violation. The court held it was dismissing defendant's petition at the second stage of the postconviction proceedings. The court noted that (1) defendant had failed to lay a proper foundation in his attempt to impeach Lieutenant Cromie, and as such, he could not demonstrate that his constitutional rights had been violated; (2) there had been testimony admitted regarding the discovery and condition of the toothpaste tube, which effectively defeated any prejudicial effect of showing the same to the jury; (3) sufficiency of the evidence is not cognizable as a postconviction issue; (4) defendant's due-process claim related to the State's alleged improper preindictment delay has no basis in fact or law; and (5) he was unable to establish that appellate counsel's performance prejudiced him. The court held defendant's petition was "dismissed and the relief prayed for [wa]s denied." This appeal followed.

¶ 10

II. ANALYSIS

¶ 11 We review a circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Dismissal is warranted at the second stage where the defendant's claims, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Id.* At that stage, the defendant's factual allegations not rebutted by the trial record are taken as true. *Id.*

¶ 12 A. Preindictment Delay

¶ 13 Defendant claims he made a substantial showing that the State violated his due-process rights by engaging in preindictment delay to obtain a tactical advantage. We disagree.

¶ 14 Defendant committed the aggravated battery in this case on August 27, 2000. In July 2001, when four Livingston County indictments were pending against him, but before he was charged in this case, according to an affidavit attached to defendant's postconviction petition, defendant met with the State's Attorney to discuss a plea bargain. The State's Attorney informed defendant he had 19 additional charges that were ready to be filed against him. The prosecutor offered defendant a 12-year sentence in exchange for his guilty plea in the pending and uncharged offenses. In response to defendant's claim that the State would be unable to comply with defendant's speedy-trial rights if all 19 cases were filed, the prosecutor indicated he would file no more than four at a time. Defendant was indicted in this case on February 19, 2002, approximately 18 months after he committed the offense. Defendant claims the State's Attorney's comment about filing only a limited number of charges at a time demonstrated a tactical delay intended to circumvent defendant's right to due process.

¶ 15 A defendant who claims a preindictment delay violated his due-process rights must initially show he was actually and substantially prejudiced by the delay. *People v. Lawson*, 67 Ill.

2d 449, 459 (1977). Thereafter, the burden shifts to the State to establish "the reasonableness, if not the necessity of the delay." *Id.* Then the trial court must make the determination after weighing the competing interests and considering such things as the length of the delay and the seriousness of the crime. *Id.*

¶ 16 Because defendant's petition was dismissed at the second stage, without input from the State, the circuit court found that defendant had not met his initial burden of establishing prejudice. However, defendant claims there can be no other explanation for the State's delay in filing all of the charges that were, as of July 2001, ready to be filed. The tactical advantage, defendant claims, "is apparent in reviewing the provisions of the speedy[-]trial statutes." The State would have been unable to prosecute defendant in this case within the limitations of the speedy-trial statute based on the number of cases alone. As defendant points out, once a speedy-trial demand is filed by a defendant in custody facing multiple charges, the State has only 160 days from the resolution of the first case to try the remaining demand cases. See 725 ILCS 5/103-5(e) (West 2002). Defendant claims he has established his burden of demonstrating prejudice and it is the State's burden now to establish reasonableness or necessity for the delay. Thus, defendant argues, "[r]emand is necessary because the remainder of the *Lawson* analysis (reasonableness on the part of the State and balancing of interests) can only be undertaken at an evidentiary hearing." We disagree, finding remand unnecessary.

¶ 17 On February 19, 2002, the day defendant was charged in this case, seven other cases against him were pending. He filed his speedy-trial demand on February 28, 2002, and his jury trial was conducted on April 1, 2002. Any preindictment delay had no effect on the operation of defendant's speedy-trial rights. See *People v. Gay*, 2011 IL App (4th) 100009, ¶ 38, 2011

WL 5833973. Further, aside from speedy-trial concerns, defendant does not establish how the 18-month preindictment delay prejudiced him. We acknowledge that the delay benefitted the State. However, we also acknowledge that the State was entitled to have time to prosecute defendant for the plethora of offenses (21 to be exact) that defendant committed in the nine months between July 7, 2000, and March 27, 2001. The 18-month delay was reasonable given defendant's repeated criminal conduct. The delay cannot be designated as "tactical" so as to implicate due-process concerns.

¶ 18 This court has previously addressed this issue in another of defendant's appeals. Thus, we adopt our analysis in *Gay*, 2011 IL App (4th) 100009 at ¶ 38, 2011 WL 5833973, to the extent that it applies to the facts of this case. In particular, we adopt the holding as follows: "Defendant thus cannot establish prejudice, and in turn, defendant failed to make a substantial showing that any preindictment delay in this case violated due process." *Gay*, 2011 IL App (4th) 100009 at ¶38. The State's delay in filing indictments in some cases while pursuing others cannot be considered "tactical," but reasonable, in that it allowed the State "to comply with the speedy-trial statute, to avoid spoiling the jury pool, and to await verdicts before deciding whether later claims needed to be prosecuted or the earlier penalties sufficed to serve the ends of justice." *Gay*, 2011 IL App (4th) 100009 at ¶41. The circuit court correctly found defendant failed to make a substantial showing that the preindictment delay caused a due-process violation.

¶ 19 B. Ineffective Assistance of Appellate Counsel

¶ 20 Defendant also argues he had sufficiently demonstrated that he received ineffective assistance of counsel when, on direct appeal, his attorney failed to argue that the trial court circumvented his right to examine witnesses when the court prevented defendant from effectively

impeaching Lieutenant Cromie. Defendant's theory was that he did not commit the battery against Keller. Instead, Keller and other officers framed defendant in order to cover up their negligent acts in disregarding prison policy. Defendant claimed that the officers were frustrated with defendant for blocking his "chuck hole" every day. They wanted to search his cell for whatever he used to block it. They needed him out of his cell, so they told him they would let him see correctional officer Tracey Nodine as he requested. They told him to "cuff up." They took him out of his cell, but did not allow him to see Nodine, so defendant "slipped his cuffs." In order to "cover their tracks," they wrote defendant a disciplinary ticket alleging he committed a battery against Keller. That way, their action of removing defendant from his cell without first notifying the shift commander, was justified. When considering the State's motion *in limine* to bar evidence relating to the incident in which defendant slipped his handcuffs, the court decided to let defendant present his theory of defense. However, the court warned that it would not allow defendant to call multiple cumulative witnesses to testify regarding this event.

¶ 21 During defendant's direct examination of Lieutenant Cromie, the trial court cut short defendant's questioning about him slipping his handcuffs and then refused his request to call other officers as witnesses to this event. The following exchange occurred after the prosecutor objected to defendant's questioning regarding the handcuffing incident on relevance grounds:

"THE COURT: Sustained. In my earlier ruling, this is not relevant, Mr. Gay. I allowed you to present some limited evidence on it. If you keep going into this, I'm going to cut you off. Anything more?"

THE DEFENDANT: Yes.

Q. Mr. Cromie, did you report this incident?

A. Yes, in fact; and I was referred to ERO for it.

* * *

Q. Who did you report it to?

A. Captain Wenzelman by telephone.

Q. Captain Wenzelman. Could you tell us who Captain Wenzelman is? What was his duties and assignments?

A. He was the shift commander on 3 to 11 at that time.

Q. Were you investigated about this incident?

A. I was referred to ERO for it.

Q. Were you investigated by the institution investigator Richard Irvine about this incident?

A. He's involved with the ERO investigation. That's a possibility.

Q. Would you be familiar with your signature from the interview with Richard Irvine?

A. Yeah. Of course I would.

THE COURT: I tell you, we're going beyond. That's it, Mr. Gay. You keep going on into this latter incident.

THE DEFENDANT: Your Honor--

THE COURT: Mr. Gay, I already ruled. Any other questions?

THE DEFENDANT: Yeah.

THE COURT: Okay. If you want to get back to the incident.

THE DEFENDANT: This is the incident.

THE COURT: Any cross-examination, Mr. Malin [Assistant State's Attorney]?

MR. MALIN: No, Your Honor.

THE COURT: Okay. Thank you very much. You can step down.

(Witness excused.)

THE COURT: The jury's not here to listen to the incident that happened sometime later. We're here to decide the toothpaste situation.

THE DEFENDANT: That's why they wrote the report.

THE COURT: Any further evidence?

THE DEFENDANT: Yeah. I'd like to call Richard Irvin.

THE COURT: Is it going to be about the same thing?

THE DEFENDANT: It's going to be about them being negligent for not writing reports.

THE COURT: I'm not going to allow that. I'm not going to allow that. It's completely contrary to my earlier ruling. I let you present some evidence on it, but the jury's heard enough."

¶ 22 Defendant claims the trial court effectively prevented him from presenting a defense and that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

Appellate counsel raised only an issue related to the court's decision to discharge the public defender without proper admonishments to defendant.

¶ 23 The two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), applies to claims of ineffective assistance of appellate counsel. *People v. Golden*, 229 Ill. 2d 277, 283 (2008). "A petitioner must show that appellate counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused prejudice, *i.e.*, there is a reasonable probability that, but for appellate counsel's errors, the appeal would have been successful." *Id.*

¶ 24 Appellate counsel is not required to argue every conceivable issue on appeal. Rather, he must exercise professional judgment to select from the many potential claims of error that might be asserted on appeal. See *People v. Tenner*, 175 Ill. 2d 372, 387-88 (1997). Therefore, we judge a claim that appellate counsel was ineffective for failing to argue a particular issue, not on the basis of what the defendant might have preferred, but under the standard set forth in *Strickland*. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). To succeed on this claim, petitioner must show that appellate counsel's failure to raise this issue was objectively unreasonable and that, absent this failure, his conviction or sentence would have been reversed on direct appeal. *People v. Richardson*, 189 Ill. 2d 401, 412 (2000); see also *People v. Madej*, 177 Ill. 2d 116, 159 (1997) (stating that counsel's decision as to what issues to raise on direct appeal will not be questioned unless "patently erroneous"). Thus, if the issue that the trial court precluded defendant's opportunity to effectively present a defense is completely without merit, appellate counsel's refusal to raise the issue, despite petitioner's request to the contrary, was reasonable. *Williams*, 209 Ill. 2d at 244.

¶ 25 A defendant has the right to impeach a witness with evidence that tends to establish

bias or motive. *People v. Gonzalez*, 104 Ill. 2d 332, 337 (1984). " 'Where the defendant's theory is that the prosecution's witnesses are unbelievable, it is error not to allow cross-examination as to the witnesses' bias, interest or motive to testify. [Citations.] The trial court has no discretionary power to deny the defendant the right to cross-examine the witness to show interest, bias, or motive.' " *People v. Prevo*, 302 Ill. App. 3d 1038, 1046 (1999), quoting *People v. Phillips*, 95 Ill. App. 3d 1013, 1020 (1981).

¶ 26 Based on these cases, defendant argues that the trial court's ruling violated his right to confront the witnesses against him, guaranteed by the United States and Illinois Constitutions (U.S. Const., amends. VI, XIV, § 1; Ill. Const. 1970, art. I, § 8). The purpose of the confrontation clause is to secure the defendant's opportunity for cross-examination. *People v. Ciavirelli*, 262 Ill. App. 3d 966, 976 (1994) (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986)).

¶ 27 In determining whether a defendant's constitutional rights were violated based upon a trial court's decision to limit his ability to cross-examine witnesses, a reviewing court must look "not to what defendant was prohibited from doing, but at what he was allowed to do." *Prevo*, 302 Ill. App. 3d at 1047. If error is found, even though it encroaches on a constitutional right, it does not require reversal where it is shown to be harmless beyond a reasonable doubt. *Ciavirelli*, 262 Ill. App. 3d at 978. The factors to be considered are " ' [1] the importance of the witness' testimony in the prosecution's case, [2] whether the testimony was cumulative, [3] the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, [4] the extent of cross-examination otherwise permitted, and, of course, [5] the overall strength of the prosecution's case.' " *Prevo*, 302 Ill. App. 3d at 1048, quoting *Ciavirelli*, 262 Ill. App. 3d at 978 (quoting *Van Arsdall*, 475 U.S. at 684).

¶ 28 "Only if we are satisfied that the constitutional guaranty has been satisfied will we examine the trial court's exercise of discretion to restrict the scope of cross-examination. [Citation.] A trial court properly uses this discretion to preclude repetitive or unduly harassing testimony, or to exclude evidence of bias that is too remote or uncertain. [Citation.] Nonrelevant evidence that would only confuse or mislead the jury is also properly excluded. [Citation.]" *Prevo*, 302 Ill. App. 3d at 1048.

"On review, we are not required to isolate the particular limitation on cross-examination to determine whether reversible error has occurred. [Citation.] Rather, ' "the question in each case must finally be whether defendant's inability to make the inquiry created a substantial danger of prejudice by depriving him of the ability to test the truth of the witness's direct testimony." ' [Citations.] We look to the record in its entirety and the alternative means open to the defendant to impeach the witness. [Citation.] 'Thus, if a review of the entire record reveals that the fact-finder has been made aware of adequate factors concerning relevant areas of impeachment of a witness, no constitutional question arises merely because the defendant has been prohibited on cross-examination from pursuing other areas of inquiry.' [Citation.]" *People v. Klepper*, 234 Ill. 2d 337, 355-356 (2009) (quoting *People v. Harris*, 123 Ill. 2d 113, 145 (1988), quoting *United States v. Rogers*, 475 F.2d 821, 827 (7th Cir. 1973)).

¶ 29 Our review of the entire record reveals that the fact finder was aware of defendant's theory of the case. However, defendant did not present evidence supporting his theory. The jury heard evidence that defendant regularly blocked his "chuck hole," resulting in the correctional officers' conduct. Cromie denied that he had lured defendant out of his cell with a promise to see Nodine so that he could search defendant's cell for the item used to block the chuck hole. Rather, he insisted he removed defendant from his cell after defendant assaulted Keller. The witnesses all insisted they followed policy after the battery incident. The trial court cut off defendant only when he was trying to establish that Irvin had concluded that Cromie and Robertson were negligent for failing to report that defendant had slipped his handcuffs. Defendant slipped his handcuffs while the officers were searching his cell after the assault.

¶ 30 However, defendant did not ask any of the correctional officers any questions on cross-examination about the slipping-the-handcuffs incident. His questions on cross-examination were about the assault only. The court did not limit defendant's cross-examination at all. Based on testimony presented at the trial by the time Cromie was testifying for the defense, questions regarding whether the officers were written up for failing to report the subsequent handcuffing incident were irrelevant to the facts related to the assault. Further, during closing argument, defendant only challenged the officers' credibility about the details of the assault, not about the slipping-of-the-handcuffs incident.

¶ 31 Under these circumstances, the trial court acted within its wide latitude in limiting defendant's examination of Cromie. We share the postconviction court's sentiment when it observed that, even if defendant had been allowed to impeach Cromie, the impeachment evidence "would not have been substantive proof of the defendant's theory." Defendant had laid no evidentiary foundation

for the impeachment of Cromie. As such, defendant cannot reasonably demonstrate that he was prejudiced by appellate counsel's failure to raise the issue on direct appeal. Counsel's decision not to raise this issue on direct appeal was not objectively unreasonable and, absent counsel's failure to do so, defendant's conviction or sentence would not have been reversed on direct appeal.

¶ 32

III. CONCLUSION

¶ 33 For the foregoing reasons, we affirm the circuit court's judgment dismissing defendant's amended postconviction at the second stage of the proceedings for failing to make a substantial showing that his constitutional rights were violated. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 34

Affirmed.