

No. 1-09-0104

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 91 CR 21147
)	
TERRENCE BROOKS,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's post-conviction petition reversed and cause remanded for an evidentiary hearing on defendant's claim that trial counsel was ineffective in failing to call an alibi witness; defendant forfeited claims of a *Brady* violation and actual innocence.

¶ 2 Defendant Terrence Brooks appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that the circuit court erred in denying him an evidentiary hearing where he made a substantial showing that trial counsel rendered ineffective assistance, that the State withheld

exculpatory evidence in violation of *Brady v. Maryland*, and that he was actually innocent based on newly discovered evidence.

¶ 3 The record shows, in relevant part, that after a 1994 bench trial, defendant was found guilty of six counts of first degree murder and three counts of attempted first degree murder in connection with two gang-related, drive-by shootings in Chicago's Englewood neighborhood which resulted in the death of three members of the Gangster Disciples street gang. Defendant's convictions were based on the statements of four eyewitnesses, two of whom later recanted their identifications. Following a sentencing hearing, a jury found no mitigating factors sufficient to preclude the death penalty, and defendant was sentenced to death.¹ The supreme court affirmed that judgment on direct appeal (*People v. Brooks*, 187 Ill. 2d 91 (1999)); however, defendant's sentence was later commuted to a term of life imprisonment in a blanket commutation.

¶ 4 On October 2, 1998, defendant, through counsel, filed an amended petition for post-conviction relief,² and on September 20, 1999, a second amended post-conviction petition. As pertinent to this appeal, defendant alleged actual innocence based on the newly discovered evidence that Brenda Hall, an eyewitness for the State, recanted her trial testimony. In an affidavit, Hall averred, *inter alia*, that she "made a mistake" during her trial testimony, that she "never saw anyone shoot out of the vehicle," and that she only testified that she saw defendant because she "was tired of States [*sic*] Attorney Mike Smith Questioning me and telling me that I knew what happened." Hall also gave a videotaped statement to post-conviction counsel denying that she saw defendant shoot from the car.

¹ These facts are taken from the supreme court's opinion in *People v. Brooks*, 187 Ill. 2d 91 (1999).

² Defendant's initial post-conviction petition is not contained in the record on appeal. However, a procedural history of the case prepared by the State for the benefit of the circuit court indicates that the petition was filed in October 1997 while defendant's direct appeal was pending.

¶ 5 Defendant further alleged that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to inform him that several of its police officer witnesses were being investigated for their use of abusive tactics. In support of this claim, he attached voluminous documents ranging from memoranda of the Chicago police department's Office of Professional Standards, to court filings in unrelated cases, to a magazine article.

¶ 6 Defendant finally alleged that trial counsel was ineffective for failing to present an alibi corroborated by Curtis Branch. In his affidavit, Branch averred that he has known defendant since childhood, and that "the police and people in our neighborhood knew that [defendant] and I were together almost every day and night." On the night of the shooting, he, defendant, LaShonda Smith, and Pam Curtis went to the Ford City movie theater to see the last showing of a movie called "Body Parts," which ended sometime around midnight. Branch averred that "[a]s soon as [defendant] heard that he was wanted for a drive by shooting," they brought counsel the ticket stubs from the movie, and counsel took the stubs and said he would get back to them, but never discussed defendant's case with Branch again. As further support for his alibi, defendant attached a copy of movie listings for the Ford City movie theater, and a map showing the distance between the theater and the scene of one of the shootings.

¶ 7 On April 24, 2000, the State filed a motion to dismiss defendant's second amended post-conviction petition. In its 135 page motion, the State asserted, *inter alia*, that Hall's recantation was "highly suspect," and even if it was taken as true, there would still be ample evidence to convict defendant. The State also asserted that the investigations into its police officer witnesses were irrelevant because no similar misconduct was alleged in defendant's case, and that it was "readily apparent" that trial counsel made a strategic decision not to call Branch to testify where defendant's answer to discovery listed him as an alibi witness.

¶ 8 On August 23, 2001, argument was had on the State's motion, and the circuit court set the case for a ruling on September 21, 2001. There is no report of proceedings for that date, but the memorandum of orders indicates that a continuance was entered that day. In addition, the record contains an unsigned, undated order entered by the circuit court granting defendant an evidentiary hearing on the issue of Hall's recantation, and denying defendant relief on the rest of his claims.³ In that order, the court found, *inter alia*, that Hall's recantation had to be taken as true and explored further at an evidentiary hearing, but that defendant failed to show a *Brady* violation where he never alleged mistreatment that led to an involuntary statement, and none of the witnesses alleged physical abuse by police. The court also found that trial counsel's decision not to call a witness is a matter of trial strategy which is generally immune from claims of ineffective assistance.

¶ 9 On September 30, 2004, after a delay during which defendant's motion for substitution of judge was pending, the State filed a motion to reconsider the granting of a third-stage evidentiary hearing in light of *People v. Deloney*, 341 Ill. App. 3d 621 (2003). The State asserted that, in *Deloney*, the appellate court found that Hall's recantation, which was attached as an exhibit by a co-defendant in that case, failed to sustain any constitutional issue and was properly dismissed at the first stage of proceedings.

¶ 10 After this motion was filed, another multi-year delay ensued while defendant attempted to intervene in the Area 2 special prosecutor's investigation. The State then filed another motion to reconsider conducting a third-stage evidentiary hearing, and a supplemental motion to dismiss the remaining actual innocence claim. At a hearing on December 12, 2008, the court heard

³ The record indicates that the order was entered on November 16, 2001.

argument on the State's motions and ultimately dismissed defendant's remaining claim, finding that there was "no basis for further proceedings at this level." This appeal follows.⁴

¶ 11 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Delton*, 227 Ill. 2d 247, 253 (2008). At the second-stage of proceedings, defendant has the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* the dismissal of a petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 12 Defendant maintains that he set forth a claim of ineffective assistance of trial counsel warranting further proceedings under the Act. To establish such a claim, defendant must first show that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Secondly, defendant must show that counsel's deficient performance resulted in prejudice to the defense, *i.e.*, a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. Both prongs of *Strickland* must be satisfied to succeed on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

⁴ We note that after the initial briefs were filed in this case, we allowed defendant to file a supplemental brief raising additional issues, and the State to file a supplemental response brief.

¶ 13 Defendant claims that he made a substantial showing that trial counsel was ineffective for failing to adequately investigate and present the exonerating alibi evidence that he was at the movies at the time of the shootings. He specifically claims that counsel's failure to investigate Curtis Branch and call him as a witness was objectively unreasonable, and that given the weakness of the evidence against him, there is a reasonable probability that Branch's testimony would have changed the outcome of the trial.

¶ 14 The State responds that defendant has forfeited this claim because it could have been raised on direct appeal. The State also responds that defendant failed to make a substantial showing of ineffective assistance of trial counsel where the decision not to call Branch was a matter of trial strategy.

¶ 15 We initially find that defendant has not forfeited his claim of ineffective assistance of trial counsel. As defendant correctly notes, the rules of procedural default are relaxed where the facts pertaining to a post-conviction claim do not appear in the trial record. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). Since defendant's claim that trial counsel did not call Branch as a witness to corroborate his alibi is based on information outside the trial record, *i.e.*, the affidavit of Branch, and thus could not have been considered on direct appeal, we are not precluded from addressing his claim here. *Taylor*, 237 Ill. 2d at 373.

¶ 16 Turning to the merits of defendant's claim, we observe that defendant submitted the affidavit of Curtis Branch to support his post-conviction petition, in which Branch averred that he and defendant were at the movies with two females on the night of the shooting in question. Branch further averred that when defendant heard that he was being sought in a drive-by shooting, they brought their ticket stubs to counsel, who took the stubs and said he would get back to them, but never discussed defendant's case with Branch again.

¶ 17 Although defendant claims that he has made a substantial showing that counsel failed to investigate Branch, we find that claim to be refuted by Branch's affidavit, itself, which shows that counsel was apprised of the testimony that Branch was able to offer regarding defendant's proposed alibi defense when Branch and defendant allegedly brought him the movie ticket stubs establishing defendant's whereabouts on the night of the shooting. In addition, the State indicated in its motion to dismiss defendant's post-conviction petition that counsel filed an answer to discovery listing Branch as an alibi witness, which supports the conclusion that counsel considered calling him to testify at trial. We note that defendant has failed to provide this court with the common law record from his trial; however, we may assume that counsel disclosed Branch as an alibi witness since it was defendant's burden, as the appellant, to present a sufficiently complete record in support of his claims of error, and any doubts that arise from the incompleteness of the record will be resolved against him. *People v. Lopez*, 229 Ill. 2d 322, 344 (2008).

¶ 18 Notwithstanding, we find that defendant is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to call Branch as an alibi witness. It is well-settled that the decision of counsel regarding which witnesses to call is a matter of trial strategy, and thus generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). However, counsel may be deemed ineffective for failing to present exculpatory evidence of which he is aware, including failing to call a witness whose testimony would support an otherwise uncorroborated defense. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 19 Here, the defense theory of the case was that the State did not have any physical evidence linking defendant to the shootings, and that the eyewitness identifications were unbelievable. To prove that theory, counsel moved to suppress the identification testimony of three witnesses,

cross-examined the eyewitnesses regarding their identifications, and presented a stipulated defense which sought to impeach their credibility. The proposed testimony of Branch, *i.e.*, that defendant was at the movies at the time of the shooting, is not inconsistent with this defense; to the contrary, it provides defendant an alibi for his whereabouts on the night of the shooting, and thereby corroborates the defense theory that he was misidentified.

¶ 20 We find these circumstances analogous to those addressed by this court in *Tate*. In that case, defendant filed a post-conviction petition alleging that trial counsel was ineffective for failing to call three alibi witnesses whose affidavits placed defendant away from the scene of the shooting on the date and time in question. *Tate*, 305 Ill. App. 3d at 610. Although the circuit court dismissed the petition, this court remanded for an evidentiary hearing, finding that the affidavits supported the defense theory that defendant was misidentified, and that there was no apparent strategic reason for not calling the alibi witnesses to testify. *Tate*, 305 Ill. App. 3d at 610, 612. In reaching that conclusion, we acknowledged that counsel may have determined that the alibi witnesses would not testify truthfully or be persuasive due to their close relationship with defendant, but we could not say as a matter of law that was counsel's reasoning. *Tate*, 305 Ill. App. 3d at 612.

¶ 21 Here, likewise, the averment made by Branch supports the defense theory that defendant was misidentified, and the record does not affirmatively disclose any strategic reason for not calling Branch as an alibi witness at trial. This is not to say that trial counsel's decision not to call Branch was incompetence as opposed to a professionally reasonable tactical decision; rather, as in *Tate*, the record simply does not reflect the nature of the decision one way or the other. *Tate*, 305 Ill. App. 3d at 612. Under these circumstances, we believe that an evidentiary hearing will allow the circuit court to make a more informed decision as to whether defendant received

ineffective assistance of counsel (*Tate*, 305 Ill. App. 3d at 612); and we, therefore, remand this matter for further post-conviction proceedings on that issue.

¶ 22 Defendant next contends that the circuit court erred in dismissing his post-conviction petition where he set forth a claim that the State violated *Brady v. Maryland* by withholding exculpatory information about police officers' widespread and systematic physical abuse of suspects and witnesses. He claims that he has "alleged ample evidence of abuse and torture of witnesses and co-defendants by police in this case." The State responds that defendant failed to make a substantial showing of a constitutional violation, noting that defendant's claim that he has alleged "ample evidence" of abuse is not supported by any citation to the record.

¶ 23 In *Brady v. Maryland*, the Supreme Court held that the State violates defendant's right to due process when it fails to produce evidence favorable to the accused and material to guilt or punishment. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 112, citing *Brady v. Maryland*, 373 U.S. 83 (1963). To prove a denial of due process under *Brady*, defendant must show that the evidence is favorable because it is exculpatory or impeaching, that it was suppressed by the State, and that the accused was prejudiced because the evidence was material to guilt or punishment. *Cosmano*, 2011 IL App (1st) 101196, ¶ 112, citing *People v. Beaman*, 229 Ill. 2d 56, 73-74 (2008).

¶ 24 As noted by the State, defendant asserts that there is "ample evidence of abuse and torture of witnesses and co-defendants by police in this case," but has failed to cite to any such evidence in the record. His failure to do so violates Illinois Supreme Court Rule 341(h)(7) (eff. Jul. 1, 2008), which requires that appellant set forth his argument "with citation of the authorities and the pages of the record relied on." This court is not a depository in which defendant may dump the burden of argument and research, and given the voluminous exhibits attached to defendant's

petition, we find that defendant's failure to comply with the supreme court rules governing briefs results in the waiver of this issue on review. *People v. Davis*, 335 Ill. App. 3d 1, 20 (2002).

¶ 25 Moreover, we note that defendant has failed to allege that he gave a coerced statement, and has not identified any specific eyewitness who was abused or tortured. He now requests an evidentiary hearing "to determine the scope of the abuse/torture in the context of [his] guilt," but does not identify in his brief any specific abuse/torture related to his guilt. Bare assertions do not warrant a hearing (*Rissley*, 206 Ill. 2d at 412), and we thus reject defendant's conclusory claim on this matter.

¶ 26 Lastly, defendant contends that the circuit court erred in refusing to hold an evidentiary hearing to determine whether the recantation of Brenda Hall was evidence of his actual innocence. The State responds that defendant's argument does not merit consideration where he again makes bare contentions that fail to cite any authority. We agree.

¶ 27 Furthermore, we note that in *Deloney*, 341 Ill. App. 3d at 633, a co-defendant attached Hall's identical recantation to his post-conviction petition, and this court found that her affidavit failed to present the gist of a constitutional claim of actual innocence because, as is the case here, defendant offered no explanation as to why the facts in that affidavit were of such a character that they could not have been discovered when she testified at trial. Since defendant has failed to cite any record or legal support for his claim, we find the issue waived. *Davis*, 335 Ill. App. 3d at 20.

¶ 28 For the reasons stated, we reverse the second-stage dismissal of defendant's post-conviction petition and remand the cause for an evidentiary hearing on the sole issue of ineffective assistance of trial counsel.

¶ 29 Reversed and remanded.