

No. 1-09-2798

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 14519
	)	
MARCO SOLE,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE QUINN delivered the judgment of the court.  
Justices Connors and Harris concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Second stage dismissal of defendant's post-conviction petition affirmed where he failed to make a substantial showing of ineffective assistance of trial counsel.
- ¶ 2 Defendant Marco Sole appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that he made a substantial showing of ineffective assistance of trial counsel to warrant an evidentiary hearing.
- ¶ 3 The record shows that defendant was convicted of aggravated unlawful use of a weapon, specifically, a .44 caliber gun, on evidence showing that on May 21, 2002, police saw him

1-09-2798

standing outside the house at 12220 South State Street with codefendant Deonte Blair<sup>1</sup> holding a nickel-plated silver .44 caliber gun. When defendant and codefendant saw police, they ran inside the house, and were followed by the officers. Inside, they observed codefendant holding the nickel-plated silver .44 caliber gun, and defendant on the floor in another room within arms reach of a .22 caliber gun.

¶ 4 Defendant was sentenced to 14 years' imprisonment on his conviction, and this court affirmed that judgment on direct appeal. *People v. Sole*, 357 Ill. App. 3d 988 (2005). This court also affirmed the denial of defendant's request for a new sentencing hearing, after granting the State Appellate Defender leave to withdraw as counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967). *People v. Sole*, No. 1-04-3256 (2006) (unpublished order under Supreme Court Rule 23).

¶ 5 In September 2005, defendant filed a *pro se* post-conviction petition alleging, in relevant part, actual innocence and ineffective assistance of trial counsel. He specifically maintained that his trial counsel was ineffective for failing to investigate, interview and call Lula Rhynes, codefendant Blair and his mother-in-law Rosie Coleman who would have testified at trial that he did not possess a gun at the time in question. He also alleged that these witnesses supported his claim of actual innocence.

¶ 6 Defendant later supplemented his petition with affidavits. Rosie Coleman averred that she was competent to testify that defendant was on her porch at 12220 South State Street on the afternoon of May 21, 2002, drinking with several other people when police arrived, and that Blair ran into her house with a silver, shiny gun, which he attempted to place under her couch. Defendant also included the affidavit of Lula Rhynes who averred that she is competent to testify that during the afternoon of May 21, 2002, she was parked next door to 12220 South State Street

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<sup>1</sup>Codefendant pled guilty to unlawful possession of the .44 caliber gun, and is not a party to this appeal.

1-09-2798

talking to Joanne Coleman when police arrived, that there was no one in the street with a gun, and that defendant did not have a gun in his hand. In another affidavit, Rhynes averred that defendant's trial attorney told defendant on October 21, 2002, that her testimony was not needed since codefendant pled guilty to possession of the weapon. Defendant included his own affidavit averring that codefendant had the .44 caliber gun and that he did not have that gun at the time in question.

¶ 7 In October 2005, defendant filed a *pro se* supplemental post-conviction petition. In this petition, he incorporated his previous claims and additionally alleged a violation of the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I., §11).

¶ 8 In December 2005, counsel was appointed for defendant, and on March 27, 2009, counsel filed an affidavit from defendant's trial attorney, Michael Solock, who averred that he had represented defendant in his 2002 trial. Solock further stated that he listed four potential witnesses in discovery, but only called one witness, and could not recall why he did not call anyone else as it had been six years since defendant's trial. He further stated that if he was aware of any witnesses, other than the four he named in discovery, he would have tried to contact them, and if he did not, there must have been a reason. Solock further stated that he could not currently recall if there were other witnesses in court willing to testify on the day of the trial, although it is possible other potential witnesses were there, and it could be that he did not call them because he believed the witness he did call, Joanne Coleman, was a very credible witness with testimony that was sufficient to exonerate defendant. Solock further averred that it is possible that he did not believe anyone else would add anything to Joanne's testimony, that he generally feels one witness is sufficient, if credible, and that calling one witness reduces the possibility that other witnesses might provide conflicting testimony.

¶ 9 On March 27, 2009, defendant separately filed a *pro se* amended post-conviction petition. In this petition defendant, *inter alia*, reiterated the ineffective assistance of trial counsel claim

1-09-2798

that he alleged in his petition filed in September 2005. He also attached the previously filed affidavits of Rosie Coleman, and Rhynes. On that same March date, post-conviction counsel informed the court that all previous post-conviction petitions except for this amended *pro se* petition were withdrawn.

¶ 10 In April 2009, counsel filed a Supreme Court Rule 651(c) (eff. Dec. 1, 1984) certificate, and defendant filed a *pro se* supplemental petition for amended post-conviction relief. Defendant attached codefendant Blair's affidavit in support of this petition, in which codefendant averred that he was willing to testify on defendant's behalf, and that had he been called to testify, he would have stated that at 4:15 p.m. on May 21, 2002, he was showing his nickel-plated .44 caliber gun to a group of people on the front porch of 12220 South State Street when police arrived, and that defendant never possessed the weapon.

¶ 11 In July 2009, the State filed a motion to dismiss defendant's post-conviction petition alleging that trial counsel was not ineffective for failing to present additional witnesses whose testimony would have been cumulative to that of Joanne Coleman. The State further alleged that trial counsel was aware of Rhynes and his choice not to present the witnesses he was aware of was a strategic decision and did not amount to incompetent representation. The State also alleged that defendant failed to present a freestanding claim of actual innocence where he "bootstrapped" the claim to his ineffective assistance of trial counsel claim, and failed to establish actual innocence.

¶ 12 On September 25, 2009, post-conviction counsel filed a supplemental petition for post-conviction relief. Counsel noted that this petition "augment[ed] Mr. Sole's previously-filed amended *pro se* petition," and alleged that defendant was denied his rights to due process and equal protection where he received a grossly disparate sentence to that imposed on codefendant Blair, and that his trial and appellate counsel were ineffective for failing to raise the disparate sentencing argument.

1-09-2798

¶ 13 The court subsequently granted the State's motion to dismiss defendant's post-conviction petition. With regard to the ineffective assistance of trial counsel issue, the court found that counsel's decision on the witnesses was tactical as evidenced by counsel's affidavit. The court also noted that codefendant had nothing to lose by lying for defendant where he had already been sentenced, and that affected his credibility. This appeal follows.

¶ 14 Defendant claims that he made a substantial showing of ineffective assistance of trial counsel to warrant an evidentiary hearing. He cites as evidence counsel's failure to investigate, interview, and call his mother-in-law Rosie Coleman, codefendant Blair, and Rhynes, who, he claims, would have testified that he did not possess the gun at the time in question. We initially observe that defendant has raised no issues regarding the other allegations set forth in his petition, and has thus waived them for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 15 A defendant is not entitled to an evidentiary hearing unless the allegations set forth in his petition, as supported by the trial record or affidavits, make a substantial showing of a constitutional violation. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). In making that determination, all well-pleaded facts in the petition and affidavits are to be taken as true; however, nonfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the Act. *Rissley*, 206 Ill. 2d at 412. On appeal, we review *de novo* the circuit court's decision to dismiss defendant's post-conviction petition without an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 16 In determining whether defendant presented a substantial showing of ineffective assistance of trial counsel to warrant further proceedings under the Act, we are guided by the standard set forth in *Strickland*. *People v. Morris*, 335 Ill. App. 3d 70, 78 (2002), citing *Strickland v. Washington*, 466 U.S. 668(1984). Under that standard, defendant must establish that counsel's performance fell below an objective standard of reasonableness, and but for the deficient performance, there is a reasonable probability that the result of the proceedings would

1-09-2798

have been different. *Strickland*, 466 U.S. at 687, 694. For the reasons that follow, we find that defendant has not made such a case.

¶ 17 Defendant claims that trial counsel was ineffective for failing to present the testimony of codefendant Blair, Rhynes, and his mother-in-law Rosie Coleman who were present when the events leading to his arrest took place, and would testify that defendant never possessed the gun. We initially observe that their testimony would merely have been cumulative to the testimony of Joanne Coleman that she was present and defendant did not possess the gun. Thus, counsel cannot be deemed ineffective for failing to present such testimony. *People v. Phyfiher*, 361 Ill. App. 3d 881, 886-87 (2005).

¶ 18 Further, this cumulative testimony would not have overcome the testimony of the police officers, who were found credible by the court, that they observed defendant with the nickel-plated silver gun in his hand in front of the designated premises. Trial counsel stated that it was his trial strategy to only call one witness to prevent contradictory testimony, and that he would have had a reason for not calling anyone else. Because of defendant's familial relationship with Rosie Coleman, her credibility may have carried little weight (*People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003)), codefendant's would be tested by his conviction, and Rhynes offered nothing more than Joanne Coleman had presented. In addition, counsel was aware of these three potential witnesses, and chose not to call them, rather than failed to investigate them. *Deloney*, 341 Ill. App. 3d at 635. Defendant thus failed to show that he was prejudiced by counsel's decision not to call his mother-in-law, codefendant and Rhynes (*People v. Johnson*, 183 Ill. 2d 176, 192 (1998)), and, as a result, his claim of ineffective assistance fails (*People v. Pineda*, 373 Ill. App. 3d 113, 121 (2007)).

¶ 19 Contrary to defendant's contention, we do not find this case similar to *People v. Makiel*, 358 Ill. App. 3d 102 (2005), where this court reversed the dismissal of defendant's post-conviction petition and remanded for an evidentiary hearing. In that case, trial counsel failed to

1-09-2798

present the testimony of a witness, in particular, a codefendant who had been acquitted, and whose un rebutted affidavit impeached the testimony of the State's main witness, another codefendant, who testified against defendant in exchange for the State dismissing murder charges against him. *Makiel*, 358 Ill. App. 3d at 106-07. Here, unlike *Makiel*, defendant was identified as the offender by police officers, and not codefendant, and trial counsel presented the testimony of Joanne Coleman, who was present during the incident to support his contention that he did not possess the gun. Counsel also argued that codefendant Blair possessed the gun as evidenced by his plea of guilty to possession of the gun in question. Thus we find *Makiel* factually distinguishable from this case.

¶ 20 In sum, we find that defendant failed to make a substantial showing of ineffective assistance of trial counsel to warrant an evidentiary hearing, and we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 21 Affirmed.