2012 IL App (1st) 093488-U

FIRST DIVISION
August 13, 2012

No. 1-09-3488

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. 97 CR 11882
	)	
TAIWAN GRIFFIN,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hall and Karnezis concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant failed to make a substantial showing of ineffective assistance of counsel, defendant's post-conviction petition was properly dismissed on motion of the State.

¶ 2 Defendant, Taiwan Griffin, appeals the trial court's dismissal, on motion of the State, of his petition for post-conviction relief. On appeal, defendant contends his petition should not have been dismissed because it made a substantial showing that he was denied his right to a fair trial and the effective assistance of counsel where trial counsel refused to allow him to testify.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from the 1997 armed robbery and the shooting death of Josef Eberhardt, a Chicago taxi driver. Following a bench trial, defendant was convicted of first degree murder and armed robbery, and was sentenced to consecutive prison terms of 60 years and 25 years, respectively. The underlying facts of the case are set forth in our order on direct appeal, but will be

repeated here as necessary.

¶ 5 In a statement that was admitted into evidence at trial, defendant acknowledged his involvement in the crimes. Defendant's statement indicated that on the day in question, he and codefendant agreed to rob a taxi driver. Defendant knew codefendant had a gun. They flagged down a taxi and directed the taxi driver to a location. The taxi driver did not want to drive them to the location, and made them get out of the taxi. Defendant and codefendant walked a few blocks, then flagged down a second taxi. Again, they directed the taxi driver to a specific location. Once there, codefendant fatally shot the taxi driver in the back of the head. Defendant then climbed into the front seat and took money from the taxi driver's pockets. Defendant gave the money to codefendant, and both men fled the scene.

¶ 6 Police investigation of the area of the shooting revealed blood stains on several nearby gates and fences. A single, bloody fingerprint was found on one of the gates. Blood samples taken from the gates, fences, and the inside of the taxi, were submitted for DNA testing. Samples from inside the taxi and from one of the fences that were tested were consistent with the victim's DNA profile. However, the blood sample taken from the gate with the fingerprint was insufficient for DNA testing.

¶ 7 The gate with the bloody fingerprint was taken from its hinges and sent for analysis. A forensic scientist recovered an impression of the fingerprint and entered it into a computerized database, which generated a list of candidates as a possible match to the print. After further examination, the forensic scientist determined that the print was a match for defendant.

¶ 8 Two days after the shooting, another taxi driver, William Mohill, approached the police. He reported that on the day of the shooting, two men had hailed his taxi. One of the men directed Mr. Mohill to an intersection, but Mr. Mohill told him he could not take them there because the two streets actually ran parallel to each other. The two men were silent for a while and, eventually, Mr. Mohill told them they would have to find another taxi. As one man started to get out of the taxi, the

other man came up with an intersecting street, but Mr. Mohill refused to drive the men, and they got out of the taxi.

¶ 9 The next day, Mr. Mohill heard on the radio that a taxi driver had been shot near the intersection where he had refused to drive the two men. After speaking with a dispatcher, he went to the police with his story. Several days later, Mr. Mohill went back to the police station, where he was shown a photo array that included defendant's picture. Mr. Mohill identified defendant as one of the men who had been in his taxi the night of the shooting.

¶ 10 Defendant did not testify at trial, and defense counsel rested without calling any witnesses.

¶ 11 The trial court convicted defendant of first degree murder and armed robbery and, subsequently, sentenced him to respective consecutive prison terms of 60 and 25 years.

¶ 12 On direct appeal, defendant contended that his sentence was excessive and unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). We affirmed defendant's conviction and sentence. *People v. Griffin*, No. 1-00-2442 (2001) (unpublished order under Supreme Court Rule 23).

¶ 13 In 2003, defendant filed a *pro se* post-conviction petition, raising numerous issues. The trial court summarily dismissed the petition as frivolous and patently without merit. Defendant filed a motion to reconsider, arguing that the dismissal was void because it was made more than 90 days after he filed the petition. After the State confirmed the timing of the dismissal, the trial court reversed its decision and docketed the petition for further proceedings. Counsel was appointed.

¶ 14 In 2006, defendant filed a *pro se* supplemental post-conviction petition. Among other things, defendant alleged in the petition that he received ineffective assistance of trial counsel where counsel refused his repeated requests to testify, and failed to advise him of his fundamental right to testify. According to defendant, counsel simply told him there was no need for him to testify, and would not offer any further explanation. Defendant asserted he was prejudiced by counsel's action because he "could have informed the court of the circumstances in regards to his alleged involvement," and

"could have testified to his version of the facts in this case." In support of his petition, defendant attached an affidavit that was not notarized, stating that prior to trial, he made repeated requests to testify to his attorney, that the attorney told him there was no need for him to testify but did not explain why, and that counsel never told him he had a fundamental right to testify on his own behalf. Post-conviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Apr. 26, 2012)) in 2008, and the State filed a motion to dismiss in 2009. Following argument, the trial court granted the State's motion to dismiss.

¶ 15 This appeal followed.

¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2008)) provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The instant case involves the second stage of the post-conviction process. At this stage, dismissal is warranted when the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Id*. at 382. A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition, only if the allegations in the petition supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Id*. at 381. At second-stage proceedings, all factual allegations not positively rebutted by the record, are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). Our review at the second stage is *de novo*. *Id*.

¶ 17 On appeal, defendant contends his petition should not have been dismissed because it made a substantial showing that he was denied his right to a fair trial and the effective assistance of counsel, where trial counsel refused to allow him to testify and did not inform him that the decision to testify was his to make. Defendant argues his claim is supported by the record in that trial counsel was silent at the close of the State's case, and the trial court did not admonish him regarding his right to testify. Defendant also argues that his claim is supported by the affidavit he attached to his

supplemental petition.

¶ 18 As an initial matter, we note the State's argument that dismissal was proper because defendant failed to have the affidavit that supported his supplemental petition notarized. The State did not make this argument in its motion to dismiss but, rather, is raising it for the first time on appeal. Recently, this court held that where the State fails to raise the issue of an affidavit's lack of notarization in a motion to dismiss, the issue is procedurally defaulted. *People v. Turner*, 2012 IL App (2d) 100819, ¶ 40. Accordingly, the State's argument is forfeited and we need not consider whether dismissal was proper on this basis.

¶ 19 Claims of ineffective assistance of counsel are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 669. Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 669. If a case may be disposed of on one prong of the *Strickland* test, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008).

¶ 20 In the instant case, we find defendant has failed to establish the prejudice prong of the *Strickland* test. First, defendant has not explained what his testimony would have been had he taken the stand at trial. The only hint defendant gives in this regard is his statement in his supplemental petition, that he "could have informed the court of the circumstances in regards to his alleged involvement," and "could have testified to his version of the facts in this case." Without any indication what these facts may have been, we cannot find defendant was prejudiced by not presenting them to the trial court.

¶ 21 Moreover, defendant is unable to establish prejudice under the *Strickland* test because

evidence of his guilt was overwhelming. Not only did defendant confess to the armed robbery and murder, but his bloody fingerprint was found near the scene, and Mr. Mohill identified him as one of the men who had been in his taxi earlier on the evening in question, looking to be driven to the intersection where the crime was committed. In these circumstances, we do not believe defendant's testimony would have created a reasonable probability that the outcome of the trial would have been different. See *People v. Madej*, 177 Ill. 2d 116, 147 (1997) (where evidence of the defendant's guilt was overwhelming, he could not show that he was prejudiced by the violation of his right to testify, and second-stage dismissal was proper).

¶ 22 Defendant has failed to make a substantial showing that his constitutional rights were violated. Accordingly, dismissal of his petition was proper.

¶ 23 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.