2012 IL App (1st) 102398-U

FIRST DIVISION
FILED: APRIL 23, 2012

No. 1-10-2398

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. 89 CR 27587
	)	
MICHAEL MEYERS,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court followed this court's mandate on remand, did not err in granting defense counsel's motion to withdraw, and did not err in granting the State's motion to dismiss defendant's post-conviction petition.

¶ 2 Defendant Michael Meyers appeals from the circuit court's orders granting post-conviction counsel's motion for leave to withdraw and the State's subsequent motion to dismiss defendant's post-conviction petition without an evidentiary hearing. On appeal, defendant contends that the trial court erred in granting these motions because an evidentiary hearing was expressly mandated by a prior decision of this court, and there were meritorious issues to be

litigated. We affirm.

¶ 3 Defendant and six codefendants (James Young, Kevin Young, James Bannister, Thomas Carter, Eric Smith, and Michael Johnson, who are not parties to this appeal) were charged with the November 9, 1989, murders of Dan Williams and Thomas Kaufman near the Stateway Gardens housing complex. Following a jury trial, defendant was convicted of two counts of first degree murder and sentenced to natural life imprisonment. His convictions and sentence were affirmed on direct appeal. *People v. Young, et al.*, 263 Ill. App. 3d 627 (1994).

¶ 4 The evidence presented at the consolidated jury trial established that the shootings originated from the ground and first-floor porches of the building at 3517-3519 South Federal Street in Chicago. The shooters chased Williams toward an Illinois Institute of Technology (IIT) building across the street, where Williams stumbled to the ground. Both Williams and Kaufman, a security guard for IIT, were killed by gunfire. The State presented evidence in support of its theory that Williams was mistakenly shot in retaliation for the sexual assault, by members of a rival gang, of A.W., who was the girlfriend of co-defendant Kevin Young. At trial, A.W. testified that before the shooting, she was in Lisa Colbert's apartment at 3547 South Federal Street with five offenders, including defendant. At about 10 p.m., the offenders, all of whom were armed with guns, left the apartment and returned about 20 minutes later.

¶ 5 At trial, Deanna Wilson testified that he witnessed all seven offenders, including defendant, fire guns at Williams and that the shooting continued for about 15 seconds. In particular, Wilson watched from a second-floor porch on the 3519 building and saw defendant standing below him in front of that building. Wilson saw defendant step out from under the building, retrieve a gun from his coat, and fire at Williams. Wilson also had identified the same men from photographs at the police station on the day after the murders.

¶ 6 In 1995, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 1994)). In 2000, counsel filed a supplemental petition, which alleged, in relevant part, that trial counsel was ineffective in failing to interview or call Sherrie Parker as an alibi witness and to impeach the testimony of A.W. Defendant attached an affidavit of Sherrie Parker and a copy of the subpoena issued by trial counsel to her prior to trial. In her affidavit, Parker attested that she had known defendant "for as long as" she could remember. At about 9:30 p.m. on the night of the shootings, defendant came to her apartment at 3549 South Federal Street in apartment 102 and stayed for about 30 minutes. Almost immediately after defendant left her apartment, she heard gunfire that lasted about 10 seconds. As soon as the shooting stopped, Parker went outside to find her daughters and saw Kevin Young running with a gun in his hand. Parker asserted that she did not see anyone else with a gun, and did not see defendant at the scene. She further stated that the distance from her building to the scene of the shooting was about 300 feet and that defendant could not have traveled from her apartment (3549 building) to that location (3517 building) before the shooting started. In addition, Parker's affidavit attested that she had been subpoenaed to testify by defendant's attorney, but she had never met defendant's attorney and never spoke with him or with anyone else from the public defender's office. Parker also stated that she went to court during the trial, but was never called to testify.

¶ 7 On September 23, 2002, the circuit court conducted an evidentiary hearing regarding Wilson's subsequent recantation, an issue that is not a part of this appeal. Following the hearing, the circuit court denied defendant's petition for post-conviction relief, finding that Wilson's recantation of his trial testimony was not credible. The court also dismissed, without a hearing, defendant's claim regarding defense counsel's failure to interview or call Sherrie Parker as a witness.

¶ 8 On appeal, we affirmed the portion of the circuit's order rejecting Wilson's recantation. *People v. Meyers*, No. 1-06-0214, order at 12 (unpublished order under Supreme Court Rule 23). However, "[b]ased on the record presented," we concluded that the allegations in the supplemental post-conviction petition about Parker were sufficient to make a substantial showing that defendant was deprived of his constitutional right to effective assistance of counsel, and that the circuit court erred in dismissing the petition on this ground without an evidentiary hearing. *Id*. at 16. Accordingly, we "reverse[d] the dismissal of the petition on the issue of ineffective assistance of counsel, and remand[ed] the cause for further proceedings consistent with the mandates of the Act." *Id*. at 17.

¶ 9 On remand, post-conviction counsel filed a motion to withdraw because review of the original trial file kept by defense attorney George Nichols revealed that the purported alibi witness Sherrie Parker was in fact contacted and interviewed by trial counsel. Counsel explained that given this discovery of evidence establishing that trial counsel actually had interviewed Parker, he could not in good faith advance the claim that trial counsel was ineffective for not contacting Parker without violating *People v. Greer*, 212 Ill. 2d 192 (2004) or Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). On May 26, 2010, the circuit court granted defense counsel's motion to withdraw and requested that the State file a formal motion to dismiss defendant's post-conviction petition. Following a short hearing on July 7, 2010, the circuit court granted the State's motion to dismiss.

¶ 10 On appeal, defendant maintains that by failing to conduct an evidentiary hearing, the circuit court improperly acted outside the scope of this court's mandate. Defendant specifically maintains that the discovery of trial counsel's interview notes on Parker merely created a credibility issue regarding Parker's potential testimony and did not obviate the need for an evidentiary hearing. Defendant further asserts that even if the interview notes did establish that

trial counsel was not ineffective for failing to interview Parker, there was no ruling or hearing on whether trial counsel was ineffective for failing to *present* Parker's testimony.

¶ 11 It is well settled that when a reviewing court issues a mandate, the trial court is vested with jurisdiction to only take such action as conforms to that mandate. *People ex rel. Daley v. Schreier*, 92 Ill. 2d 271, 276 (1982). Any order issued by a trial court that is outside of the scope of the mandate is void for lack of jurisdiction and must be reversed and vacated. *People v. Bosley*, 233 Ill. App. 3d 132, 137 (1992).

¶ 12 When, as here, the reviewing court remands a cause to the trial court for proceedings consistent with its opinion, the trial court must look to the opinion for directions and will of necessity construe the language of the opinion when needed. *People v. Palmer*, 148 Ill. 2d 70, 81 (1992). Absent specific directions by the reviewing court, the trial court must determine what further proceedings are consistent with the opinion. *Bosley*, 233 Ill. App. 3d at 137.

¶ 13 Defendant contends that our order mandated that the trial court conduct an evidentiary hearing. In contrast, the State argues that our remand was not so specific, but rather was for further proceedings consistent with the Act. We agree with the State.

¶ 14 Our order specifically stated that:

> "Based on the record presented, we conclude that the allegations in the supplemental postconviction petition were sufficient to make a substantial showing that the defendant was deprived of his constitutional right to effective assistance of counsel and that the circuit court erred in dismissing the petition on this ground without an evidentiary hearing. Our resolution of this issue should in no way be interpreted as a comment on the credibility of Parker or a determination that the defendant suffered

> a constitutional deprivation, which are matters that the circuit court must decide after an evidentiary hearing. [Citation omitted.]
>
> For the reasons set forth above, we affirm the circuit court's denial of postconviction relief based on the issue of Wilson's recantation, reverse the dismissal of the petition on the issue of ineffective assistance of counsel, and remand the cause for further proceedings consistent with the mandates of the Act." *Meyers*, No. 1-06-0214, order at 16-17.

This mandate is broader than defendant's suggestion that the only "further proceeding" consistent with the Act would be an evidentiary hearing. Neither the Act nor the law requires either counsel or the court to continue after the allegation at issue has been refuted or found to be without merit.

¶ 15 Here, on remand, post-conviction counsel's discovery of trial counsel's interview notes about Parker refuted the allegation to be considered on remand and rendered it without merit. Our previous Order was expressly limited by "the record presented." *Id*. at 16. Based on the record before us then, we reasoned as follows: "Parker's affidavit asserted that she had never spoken with the defendant's attorney, and the record does not indicate any explanation for counsel's failure to interview her prior to trial. In light of the assertions in Parker's affidavit, which we must accept as true, the defendant's trial counsel did not know the substance of her potential testimony or the nature of her relationship with the defendant and could not have made a strategic decision not to call Parker." *Id*. at 15-16. The subsequent discovery on remand of the interview notes established that trial counsel actually did interview Parker and, necessarily also discovered her potential testimony and relationship with defendant, making an evidentiary hearing unnecessary. In light of this discovery, post-conviction counsel correctly concluded that he could not in good faith advance any further the claim that trial counsel was ineffective for not

contacting Parker and properly filed a motion to withdraw under the authority of *Greer*.

¶ 16 Contrary to defendant's argument, the *Greer* decision did authorize post-conviction counsel's withdrawal at this stage of proceedings. Our supreme court has repeatedly held that post-conviction counsel must perform specific duties in his representation as provided by Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), such as meeting with defendant to ascertain his contentions of error and amending, if necessary, the *pro se* petition so as to adequately present those issues. *Greer*, 212 Ill. 2d at 204-05. These requirements, however, do not obligate counsel to advance frivolous or spurious claims. In fact, if counsel believes that his client's claims are frivolous or without merit, counsel has an ethical obligation to seek withdrawal as counsel. *Id*. at 209. The supreme court in *Greer* specifically stated, "How can counsel, ethically, 'present the petitioner's contentions' when counsel *knows* those contentions are frivolous? Obviously, the answer is counsel cannot." *Id*. at 206. Counsel's ethical duties thus apply throughout all of the stages of the post-conviction process, not just at the second stage.

¶ 17 Next, defendant contends that even if the interview notes show that trial counsel interviewed Parker, an evidentiary hearing was required to determine whether trial counsel was ineffective for failing to *present* Parker to testify. We disagree.

¶ 18 To prevail on a claim of ineffective assistance of counsel, defendant must establish that counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *People v. Strickland*, 466 U.S. 668, 687, 694 (1984); *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Furthermore, there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and the defendant must overcome the presumption that the challenged action "might be considered sound trial strategy." *Strickland*, 466 U.S. at 689. The benchmark for judging any claim of ineffectiveness is whether counsel's

conduct so undermined the adversarial process that the trial cannot be relied on as having produced a just result. *Id*. at 696.

¶ 19 Decisions regarding which witnesses and evidence to present at trial on a defendant's behalf are matters of trial strategy (*People v. West*, 187 Ill. 2d 418, 432 (1999)), and are generally immune from claims of ineffective assistance of counsel (*People v. Guest*, 166 Ill. 2d 381, 394 (1995)). See also *People v. McGee*, 373 Ill. App. 3d 824, 835 (2007), quoting *People v. Palmer*, 162 Ill. 2d 465, 476 (1994) (the decisions that counsel makes regarding matters of trial strategy are "'virtually unchallengeable'"). Even mistakes in trial strategy or tactics will not, of themselves, establish that counsel was ineffective. *Palmer*, 162 Ill. 2d at 476.

¶ 20 Our prior decision to remand for further proceedings rested on the uncontradicted statement by Parker in her affidavit that trial counsel had failed to interview her as a potential alibi witness and that she had never spoken with trial counsel. *Meyers*, order at 15. If true, these statements meant that trial counsel could not know the substance of her potential testimony or her relationship with defendant, and, in turn, could not have made a strategic decision not to call Parker. *Id*. at 16. As discovered on remand, however, trial counsel did interview Parker. In addition, trial counsel actually had subpoenaed Parker to testify at trial. Furthermore, Parker attested that she was at the trial and, thus, was available to testify. Under these circumstances, we now know that trial counsel made a decision not to present Parker as a witness based on trial strategy and not deficient performance.

¶ 21 Moreover, the fact that Parker's proposed testimony would have contradicted A.W.'s, by itself, is not sufficient to warrant an evidentiary hearing or to demonstrate prejudice against defendant. The shootings occurred at the 3517-3519 building. Referring to the night of the shooting at about 10 p.m., Parker attested in her affidavit that defendant was leaving her apartment in the 3549 building, and A.W. testified at trial that defendant was leaving Tolbert's

apartment in the 3547 building. Parker averred that defendant could not have made it to the 3517 building between the time he left her apartment and the shooting started, and Wilson testified that defendant was at the 3519 building at the time of the shootings. Parker stated the shootings lasted about 10 seconds, and Wilson testified that they lasted about 15 seconds. Parker claimed that when the shooting stopped, she went near the 3517 building and did not see defendant out there, and A.W. testified that defendant returned to Tolbert's apartment within 20 minutes of leaving.

¶ 22 In short, Parker's statements did not present an alibi for defendant. Both Parker and A.W. placed defendant exiting either the 3547 or 3549 building around 10 p.m. Parker maintained that defendant could not have reached the 3517 building before the shooting started but Wilson placed defendant at the 3519 building and the shooting actually occurred at both of the 3517-3519 buildings, so defendant did not have to reach the 3517 address. After the 10 to 15 seconds of shooting, Parker went to the 3517 building and did not see defendant outside, which comports with Wilson's testimony that defendant had been at the 3519 building and accords with A.W.'s testimony that defendant came into her apartment after the shooting. Any contradictions between Parker's statements and the testimony at trial does not show that the outcome of the trial would have been different to satisfy the prejudice prong of a *Strickland* analysis.

¶ 23 We further find that defendant was not denied due process when the circuit court dismissed his petition on July 7, 2010. Here, defendant had notice that his attorney was seeking to withdraw on the basis that the post-conviction petition lacked merit given the newly discovered interview notes, and defendant did not object to counsel's motion to withdraw. After the court granted the motion on May 26, 2010, the State not surprisingly moved to dismiss the petition on the same day. The circuit court, however, asked the State to file a formal motion to dismiss and informed defendant that he would have an opportunity to address the court after the

motion was filed. The State complied and filed a motion to dismiss, and the court held a subsequent hearing on that motion on July 7, 2010. At the hearing, defendant claimed that he had not received the State's motion to dismiss, but had knowledge that the motion would be filed and also knew that it would be based on the same arguments in his post-conviction counsel's motion to withdraw. Therefore, we find that defendant had the opportunity to respond to the State's motion to dismiss his petition. Moreover, in its ruling, the court noted that even without the State's written motion to dismiss, the court "could have dismissed [the petition] on the court's own motion on the last date, based upon the fact that there is no real issue then before the court, as far as the post-conviction is concerned."

¶ 24 In reaching this conclusion, we find *People v. Kitchen*, 189 Ill. 2d 424 (1999), and *People v. Bounds*, 182 Ill. 2d 1 (1998), relied on by defendant, distinguishable from the case at bar. In both *Kitchen* and *Bounds*, the defendants' procedural due process rights were violated when the court surprised the defense counsel by ruling on the substance of the petitions without prior notice. See *Kitchen*, 189 Ill. 2d at 434-35 (the defendant's due process rights were violated when the trial court ruled on the substance of the petition at a hearing that was scheduled to consider discovery matters); *Bounds*, 182 Ill. 2d at 5 (the defendant's due process rights were violated when the trial court ruled on the substance of the State's motion to dismiss at a hearing that was scheduled as a status call). Here, however, defendant had notice that the circuit court would be ruling on the merits of his petition.

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.