

2012 IL App (1st) 103635-U

SIXTH DIVISION  
NOVEMBER 30, 2012

Nos. 1-10-3635 and 1-11-1866  
(Consolidated)

**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. 98 CR 6661
	)	
EDWARD JONES,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HALL delivered the judgment of the court.  
Presiding Justice LAMPKIN and Justice GORDON concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Second-stage dismissal of post-conviction petition affirmed where defendant failed to make a substantial showing that trial counsel was ineffective in failing to investigate and call a witness.
- ¶ 2 Defendant Edward Jones 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 dismissing his petition where he made a substantial

1-10-3635 and 1-11-1866 cons.

showing that trial counsel was ineffective for failing to call a witness whose testimony would have rebutted that of the State's only eyewitness.

¶ 3 The record shows, in relevant part, that in 2000, defendant was convicted of first degree murder for the shooting death of Robert Davis. At his bench trial, the State established that about 9:30 p.m. on February 25, 1997, Davis was standing outside his house with an unknown female when defendant approached with a shotgun, exchanged some words, then shot and killed him. The incident was seen by a neighbor, Matthew Miller, who had been sitting in the window of his home across the street, watching for his daughter to return from the store. While testifying to the events that occurred that evening, Miller stated that there was a streetlight in front of the Davis residence.<sup>1</sup>

¶ 4 Prior to sentencing, defendant filed a *pro se* motion alleging that trial counsel was ineffective for failing to, *inter alia*, "obtain the necessary records from Commonwealth Edison, establishing that there was indeed a '**black-out**' in the area that the eyewitness claims to have witnessed what he allegedly witnessed." He was appointed different counsel to represent him, and at a hearing on the motion, the State called trial counsel and elicited the following testimony regarding the alleged blackout:

"Q. Was there any indication from the reports by those officers there was any problem with the lighting on that street whatsoever?"

A. Not only the officers, the other witnesses as well, all testified there was adequate street lighting, there was nothing to indicate there was a blackout whatsoever, and the only person that ever mentioned it to me was [defendant].

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<sup>1</sup>The above facts were taken from this court's order on direct appeal. *People v. Jones*, No. 1-01-3596 (2003) (unpublished order under Supreme Court Rule 23).

1-10-3635 and 1-11-1866 cons.

Q. When was the first time [defendant] mentioned to you something about a blackout?

A. It's hard to say exactly when because the trial was ongoing. It was commenced and continued bench trial over several weeks. It was during the course of the bench trial that he mentioned something about a blackout.

Q. You're saying the first time [defendant] ever mentioned anything to you about a blackout was after the trial actually started?

A. Yes.

Q. Or at least on the day the trial started or day thereafter?

A. It was contemporaneous with the trial starting, I believe."

On cross-examination, post-trial counsel also questioned trial counsel about the blackout in the following exchange:

"Q. And do you recall now which police reports reflect the quality of lighting that night?

A. No, I don't. I haven't looked at the file in months. I do remember there was an officer who lived across the street that was not on duty at the time of the shooting and came out and testified what he saw at the time. There was no indication from his statements in the police report there was any blackout.

Q. But there is no statement in the police reports about lighting, period?

A. I don't know for sure.

\* \* \*

Q. Did you make any independent investigation as to whether, in fact, there was a blackout?

1-10-3635 and 1-11-1866 cons.

A. I made some inquiries, but I just – general ones about how to find out if there was a black out.

Q. Were you able to confirm or refute that?

A. No, I was not able to, and frankly I didn't think it was beyond – it was really necessary based upon the readings of the discovery I made earlier that all of the other personnel, including the guy across the street, never mentioned anything about any lights being out, but it came up I had mentioned it about a blackout, but I didn't think it was that relevant at the time and I told him so, but it came in late during the case when he told me about the blackout. He never told me about it in the first, initial interview, but subsequent interview until I think the trial was about to start or had started."

The trial court ultimately denied defendant's *pro se* motion, then sentenced him to 30 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Jones*, No. 1-01-3596 (2003) (unpublished order under Supreme Court Rule 23).

¶ 5 On March 24, 2004, defendant filed a *pro se* petition for post-conviction relief alleging, as pertinent to this appeal, that trial counsel was ineffective for failing "to secure evidence of electrical blackout of all street lighting in the area the night Robert Davis was shot and killed." His petition was subsequently advanced to the second stage and counsel was appointed.

¶ 6 On February 24, 2009, post-conviction counsel filed a supplemental petition for post-conviction relief alleging that trial counsel was ineffective for failing to call Chicago police officer David Lewis to testify that there was a power outage on the night of the shooting which rendered the streetlights inoperable. He claimed that Officer Lewis' testimony would have contradicted that of Miller who, "[b]y inference, [] denied that there was a black-out on the street which would have prevented him from keeping a watch on the street for his daughter."

1-10-3635 and 1-11-1866 cons.

¶ 7 In support of his petition, defendant attached, *inter alia*, two mostly typewritten affidavits from Officer Lewis containing multiple un-initialed alterations in ink.<sup>2</sup> Therein, Officer Lewis averred that he lives on the block where the shooting occurred, that it is his "belief" that on the night of the shooting there was an electrical power outage which prevented the street lights from being lit, and that he was not contacted by counsel prior to trial.

¶ 8 Defendant also attached a Chicago police department supplementary report prepared in connection with Davis' murder, which contains the summarized interviews of individuals who were at the scene of the shooting, including Officer Lewis. None of the witnesses' statements indicate that there was a blackout at the time of the shooting, and in a field titled "WEATHER AND LIGHTING," on the report, there is an entry that the area of the shooting was illuminated by "Street lighting from parkway."

¶ 9 The State subsequently moved to dismiss defendant's petition, asserting, *inter alia*, that defendant's claims were barred on the grounds of *res judicata* and waiver, and that the affidavits of Officer Lewis were inadequate. After a hearing, the circuit court granted the motion, finding that defendant failed to make a substantial showing of a constitutional violation, and noting that Officer Lewis' first affidavit did not meet the standard of well-pleaded facts due to the various alterations that had been made, that Officer Lewis never specifically averred that there was a power outage, and that his averments contradicted his previous statements to police. Defendant now appeals.

¶ 10 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

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<sup>2</sup>In one of the affidavits, the averments were typed out in a disjunctive form for the affiant to circle the proper verb; however, for some averments, neither verb was ever circled.

1-10-3635 and 1-11-1866 cons.

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).

¶ 11 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).

¶ 12 Defendant claims that he made a substantial showing that trial counsel was ineffective for failing to interview Officer Lewis<sup>3</sup> and call him to testify that there was a blackout on the night of the shooting. He claims that Officer Lewis' testimony would have contradicted Miller's testimony that he was able to see the shooter because of street lighting.

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<sup>3</sup>Since defendant's claim of ineffective assistance of counsel is based on matters outside the record, *i.e.*, the affidavit of Officer Lewis, it could not have been raised on appeal, and is therefore not waived in a post-conviction petition. *People v. Morris*, 335 Ill. App. 3d 70, 76 (2002), citing *People v. Owens*, 129 Ill. 2d 303 (1989).

1-10-3635 and 1-11-1866 cons.

¶ 13 The State responds that it was reasonable for counsel to forego further investigation of Officer Lewis in light of his statement to police, and to not call him as a witness at trial. The State also responds that defendant has not established prejudice because the evidence against him was overwhelming and cannot be overcome by a vague affidavit.

¶ 14 The record in this case shows that defendant submitted an affidavit from Officer Lewis in support of his post-conviction petition in which the officer averred that it is his "belief" that there was an electrical power outage on the night of the shooting which prevented the street lights from being lit. However, defendant also submitted a police report containing summarized interviews of individuals who were at the scene of the shooting, including Officer Lewis, in which no mention was made of a black-out being reported by any of the witnesses, and the area of the shooting was described as being illuminated by "Street lighting from parkway."

¶ 15 We recognize the obligation of defense counsel to explore all readily available sources of evidence that might benefit his client. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002).

Notwithstanding, counsel is only under a duty to make reasonable investigations, or a reasonable decision which makes particular investigations unnecessary, and his judgment on those matters is entitled to a heavy measure of deference. *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997). An attorney is not ineffective in forgoing additional investigation where circumstances known to him at the time of investigation do not reveal a sound basis for further inquiry in a particular area. *Pecoraro*, 175 Ill. 2d at 324.

¶ 16 Here, the record shows that counsel was never presented with a reason to investigate a blackout during his pretrial investigation. Counsel testified at the hearing on defendant's *pro se* motion for a new trial that "[n]ot only the officers, the other witnesses as well, all testified there was adequate street lighting, there was nothing to indicate there was a blackout whatsoever." His testimony finds support in the police report attached to defendant's petition which states that the

1-10-3635 and 1-11-1866 cons.

area in which the shooting took place was illuminated by "Street lighting from parkway," and indicates that neither Officer Lewis, nor any other witness, ever mentioned a blackout. In light of this substantial evidence that there was no blackout, and that the lighting was, in fact, adequate, we cannot say that counsel acted unreasonably in failing to interview Officer Lewis on this matter. *Pecoraro*, 175 Ill. 2d at 324.

¶ 17 We similarly find that counsel was not ineffective in failing to call Officer Lewis to testify. Decisions of trial strategy, including the choice of one theory of defense over another, are virtually unchallengeable because they are a matter of professional judgment to which a review of counsel's competency does not extend. *People v. Cunningham*, 376 Ill. App. 3d 298, 301-02 (2007). The decision of counsel regarding which witnesses to call is also a matter of trial strategy which is generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). The only exception to this rule is when counsel's chosen trial strategy is so unsound as to constitute a complete failure to conduct any meaningful adversarial testing. *West*, 187 Ill. 2d at 432-33. In making this determination, we must consider counsel's conduct from his perspective at trial and avoid using hindsight. *People v. Salcedo*, 2011 IL App (1st) 083148, ¶ 50.

¶ 18 Here, the record shows that counsel made a strategic decision not to raise a defense that there was a blackout which prevented the State's eyewitness from observing the shooting. This is evident from counsel's testimony at the hearing on defendant's *pro se* motion for a new trial that defendant first informed him about an alleged blackout either right at the beginning of trial or sometime shortly after his trial commenced, but that he was the only person to mention a blackout, and that all the other officers and witnesses had stated, to the contrary, that "there was adequate street lighting." The record also contains no indication that Officer Lewis mentioned a blackout prior to his affidavit, and thus there was no strategic reason for counsel to call him to

1-10-3635 and 1-11-1866 cons.

testify at the time of trial. We therefore have no basis on which to conclude that counsel's decision not to call Officer Lewis fell outside the wide range of professionally competent assistance. *Cunningham*, 376 Ill. App. 3d at 301, citing *Strickland*, 466 U.S. at 690.

¶ 19 Furthermore, defendant has not established that he was prejudiced by counsel's failure to interview or call Officer Lewis because even if Officer Lewis would have provided the proposed testimony, *i.e.*, that it was his "belief" that there was a blackout on the night of the shooting, such equivocal testimony would have clearly been impeached by the numerous other witnesses who indicated that "there was adequate street lighting" and the police report indicating the same. It is therefore not reasonably probable that the result of the proceedings would have been different had counsel interviewed and called Officer Lewis to testify (*Strickland*, 466 U.S. at 687, 694), and defendant's ineffective assistance of counsel claim must fail (*Flores*, 153 Ill. 2d at 283).

¶ 20 In reaching this conclusion, we have considered *People v. Makiel*, 358 Ill. App. 3d 102 (2005), cited by defendant, and find it distinguishable from the case at bar. In *Makiel*, 358 Ill. App. 3d at 109, this court found that the record reflected no strategic reason for counsel's failure to interview and call a witness. Here, on the other hand, the record shows that counsel did not interview and call Officer Lewis to testify regarding a blackout because all of the other witnesses stated that "there was adequate street lighting." These lighting conditions were corroborated by a police report, and also, we note, by the testimony of Miller, the eyewitness whom defendant now seeks to impeach. As this court noted in its order on direct appeal:

"Miller's testimony that defendant was standing three to four feet away from the victim when he fired his gun and the victim fell to the ground was corroborated by the stipulation that the victim was fatally shot from a distance of two to five feet. Miller could not

1-10-3635 and 1-11-1866 cons.

have known the distance of the fatal gunshot unless he witnessed the murder."

*Jones*, order at 10-11. We thus find defendant's reliance on *Makiel* misplaced.

¶ 21 In addition, we do not consider defendant's claim that the circuit court improperly dismissed his petition based on the crossed-out words in Officer Lewis' affidavit. Despite the appearance of the affidavits, Officer Lewis' averments concerning the alleged blackout were ambiguous in that he never specifically stated whether the streetlights were off on the night in question, and his statement that it was his "belief" there was a power outage that night contradicts the police reports which indicate otherwise. It is well-settled that this court may affirm the decision of the circuit court on any grounds supported by the record, regardless of that court's reasoning (*People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010)); and, here, our conclusion that defendant has failed to make a substantial showing of a constitutional violation is based on the substance of Officer Lewis' affidavits, not on the appearance thereof.

¶ 22 Lastly, defendant argues, in the alternative, that "if the affidavits are not found to meet the requirements of the Act based on the non-initialed changes," post-conviction counsel provided unreasonable assistance in failing to file an amended, unaltered affidavit from Officer Lewis. Since the prerequisite to this argument has not been met, we need not address it.

¶ 23 For the reasons stated, we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 24 Affirmed.