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2012 IL App (3d) 100784-U

Order filed June 4, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-10-0784
)	Circuit No. 04-CF-1249
)	
TRACY A. ELLIS,)	Honorable
)	Richard C. Schoenstedt,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices O'Brien and Wright concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of the defendant's postconviction petition was proper where the evidence of the defendant's guilt was overwhelming. The victims provided consistent testimony throughout the defendant's trial, the defendant's DNA was collected from one of the victims, and the trial court found the defendant's testimony not to be credible.
- ¶ 2 After a bench trial, the defendant, Tracy A. Ellis, was convicted of aggravated kidnaping (720 ILCS 5/10-2(a)(6) (West 2002)), two counts of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2002)), and two counts of armed robbery (720 ILCS 5/18-2(a)(2)

(West 2002)). He was initially sentenced to 33 years' imprisonment for each of the two counts of aggravated criminal sexual assault, 6 years' imprisonment for aggravated kidnaping, and 6 years' imprisonment for each of the two counts of armed robbery. On direct appeal, the defendant's conviction was affirmed, but the case was remanded for resentencing. *People v. Ellis*, No. 3-06-0209 (2007) (unpublished order under Supreme Court Rule 23). The defendant was resentenced to 23 years' imprisonment for aggravated kidnaping, to be served consecutively to 23 years' imprisonment for one count of aggravated sexual assault. He was also sentenced to 23 years' imprisonment for the second count of aggravated criminal sexual assault, and 19 years for each of the two armed robbery counts, which were to be served concurrently. This court affirmed the defendant's sentence on his second appeal. *People v. Ellis*, No. 3-08-0351 (2009) (unpublished order under Supreme Court Rule 23).

¶ 3 The defendant now appeals from the dismissal of his postconviction petition, which was summarily dismissed at the first stage. On appeal, he argues that his petition stated the gist of a constitutional claim where he alleged that defense counsel was ineffective for failing to call an alibi witness during trial. We affirm.

¶ 4 **FACTS**

¶ 5 At trial, Matthew Ferry, one of the victims in this case, testified for the State. Ferry testified that on October 19, 2003, he arrived at Larsen's Corner bar at around 3 p.m., and he stayed there until it closed, which was around midnight. He stated that he had four or five vodka drinks, and he stopped drinking around 6 p.m., although he originally told police he stopped drinking at 10 p.m. Ferry also testified that he was dating the other victim, C.R., and that "[w]e had kind of started seeing each other."

¶ 6 After the bar closed, Ferry walked C.R. to her car and talked with her for several minutes. As they talked, they noticed a man heading toward them, and C.R. made a joke along the lines of "are you getting scared." The man, identified as the defendant, approached them, pointed a gun, and asked for their money. He then patted them down, and forced Ferry into the trunk of C.R.'s car, which was a Pontiac Sunfire. Ferry was able to call 911 with his cell phone from the trunk of the car, and the police had to remove Ferry from the trunk.

¶ 7 C.R. testified to similar events as Ferry, except that she denied they were dating at the time of the incident. After the defendant forced Ferry into the trunk, C.R. described how she begged for her life, and the defendant took her behind a dumpster and forced her to have oral and vaginal intercourse. After the incident, C.R. was taken to the hospital, and a sexual assault kit was collected. The semen collected from C.R. matched the deoxyribonucleic acid (DNA) profile of the defendant.

¶ 8 Jacqueline Tranchita testified for the defense. She stated that she was with the defendant during some weekend in October, but could not remember the date. The night she was with the defendant, they went to a bar called Cazadores in Joliet, and they stayed there from 10:30 to 12:30 p.m. On cross-examination, Tranchita was confronted by her affidavit, which stated that she and the defendant went to Cool Waters Bar, and arrived at approximately 10:05 p.m. and left at 1 or 1:30 a.m. Tranchita also admitted that she did not write the affidavit, and she only signed her name on it before sending it back to the defendant.

¶ 9 Andre Milton, the defendant's brother, testified that in October of 2003, he had seen the defendant in the company of a white female who drove a Pontiac Sunfire.

¶ 10 The defendant also chose to testify. He stated that he had consensual sex with C.R. three

or four times prior to being accused of sexual assault. He testified that he would call C.R. at either Larsen's Corner or her home, and she would meet him for sex.

¶ 11 On the day of the incident, the defendant stated that he contacted C.R. at around 5:15 p.m., and she picked him up at 5:45 p.m. at Ranch Liquor store. They went to her friend's house to have sex, and arrived there around 6 p.m. She then dropped the defendant off around 6:30 p.m. He also testified that at the time of the incident he was at Cool Waters Bar.

¶ 12 In rebuttal, the State presented the testimony of Rebecca Lynn Kemp, who testified that C.R. arrived for her shift on October 19, 2003, right before 6 p.m. Kemp stated that she remembered the time because she was "very anal, and when it comes to me doing my job, I expect [other employees] to be there on time to take over for me."

¶ 13 After closing arguments, the trial court rendered a decision immediately from the bench. The trial court stated, "[t]here is really no doubt in this Court's mind that [the defendant] committed all of the offenses he's charged with. *** I don't think there was a detail that [the defendant] gave that wasn't clearly refuted by the State's evidence." The court continued, "I don't think a five year old child would believe the testimony I heard this week, so judgment of conviction on all counts."

¶ 14 On August 2, 2010, the defendant filed a *pro se* postconviction petition where he alleged, in part, that defense counsel was ineffective for failing to call an alibi witness to testify on his own behalf. In support of his petition, he attached the notarized affidavit of Corey M. Franklin, Sr., former disc jockey at Cool Waters Bar, who averred that the defendant was at Cool Waters Bar until closing time on the day of the offense.

¶ 15 The trial court summarily dismissed the petition on September 2, 2010. The defendant

appealed.

¶ 16

ANALYSIS

¶ 17 On appeal, the defendant argues that the trial court improperly dismissed his postconviction petition because he stated the gist of a constitutional claim. Specifically, he contends that defense counsel was ineffective for failing to call Franklin as an alibi witness because Franklin could have corroborated his defense. We review *de novo*. *People v. Edwards*, 197 Ill. 2d 239 (2001).

¶ 18 The Post-Conviction Hearing Act (the Act) provides a mechanism for criminal defendants to assert that their convictions were the result of a substantial denial of their constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage process for adjudicating postconviction petitions. At the first stage, a judge may summarily dismiss a petition if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is considered frivolous or patently without merit if the allegations in the petition, taken as true and liberally construed, fail to state the gist of a constitutional claim. *People v. Collins*, 202 Ill. 2d 59 (2002).

¶ 19 When a defendant's petition is based on ineffective assistance of counsel, he must establish both that: (1) his attorney's conduct fell below an objective standard of reasonableness; and (2) the defendant was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984). A court may resolve a claim of ineffective assistance of counsel by reaching only the prejudice prong of the *Strickland* test, because lack of prejudice makes the issue of counsel's alleged deficient performance irrelevant. *People v. Hall*, 194 Ill. 2d 305 (2000). Prejudice will be found when there is a reasonable

probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *People v. Garcia*, 405 Ill. App. 3d 608 (2010).

¶ 20 In this case, even taking every factual allegation in the defendant's petition as true, we hold that defendant was not prejudiced by counsel's alleged error because the evidence of guilt was overwhelming. *People v. Dobbey*, 2011 IL App (1st) 091518 (summary dismissal of postconviction petition was proper where evidence of guilt was overwhelming). The two victims gave largely consistent stories, and police found Ferry in the trunk of the car. In addition, the defendant's DNA was collected from the victim. We acknowledge that Ferry gave two different times that he had stopped drinking, and he and C.R. disagreed about whether they were dating at the time. However, these inconsistencies were on relatively minor points, and the essential details of the incident remained the same. *In re A.M.C.*, 148 Ill. App. 3d 775 (1986).

Additionally, while the defendant provided an explanation for how his DNA profile was collected from C.R., the trial court clearly found him not to be credible by stating that even a five-year-old child would not believe the testimony. Although counsel's alleged failure left the defendant's alibi uncorroborated, summary dismissal of the petition is appropriate where there is no reasonable probability that the result of the proceeding would have been different. *People v. Barcik*, 365 Ill. App. 3d 183 (2006) (although counsel allegedly failed to call a witness who could have corroborated an otherwise uncorroborated defense, summary dismissal was appropriate where defendant could not establish the prejudice prong of the *Strickland* test).

¶ 21

CONCLUSION

¶ 22 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.