

NOTICE
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2012 IL App (4th) 100837-U

Filed 5/11/12

NO. 4-10-0837

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
ARTHEAL R. HOLLINS,)	No. 07CF297
Defendant-Appellant.)	
)	Honorable
)	Heidi N. Ladd,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices Pope and Cook concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Defendant did not forfeit his claims under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2008)), because the bases for the alleged errors raised under the Act did not appear in the original appellate-court record.

(2) The trial court did not commit manifest error in denying defendant's postconviction petition upon finding trial counsel's decision not to call a potentially exculpatory witness was not objectively unreasonable.

¶ 2 In December 2010, a third-stage evidentiary hearing was held on the *pro se* petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-8 (West 2008)) filed by defendant, Artheal Hollins. Defendant argued he was denied the effective assistance of counsel when trial counsel failed to present the testimony of exculpatory witnesses. After the evidentiary hearing, the trial court found defendant forfeited this argument by not raising it on direct appeal and trial counsel used trial strategy in not calling defendant's witnesses.

¶ 3 Defendant appeals, arguing the trial court erroneously (1) determined he forfeited this argument, and (2) concluded trial counsel's decision not to call an exculpatory witness amounted to the ineffective assistance of counsel. We agree with defendant's first argument, but not his second, and affirm.

¶ 4 I. BACKGROUND

¶ 5 In February 2007, defendant was charged with unlawful possession with intent to deliver a controlled substance (720 ILCS 570/407(b)(1) (West 2006)). In June 2007, a jury trial was held on the charge.

¶ 6 Michelle Ortiz-Standifer, a University of Illinois police officer, testified she and other officers were working security for a dance at the Illini Union on February 25, 2007. Ortiz-Standifer and her fellow officers received a report individuals were smoking cannabis in the ballroom. Upon entering the room, Ortiz-Standifer could smell cannabis. The room was dark, but it was lit enough to see where people were located inside. Ortiz-Standifer noticed two individuals hunched over alone in the back of the room near a window. One was rolling a blunt, while the other, defendant, stood looking over his shoulder. No one else was standing near the two. Two other individuals were standing six feet away.

¶ 7 Ortiz-Standifer shined her flashlight on the two and identified herself as a police officer. Defendant seemed surprised. He turned around, took a step back, and "immediately took [his] right hand and brought it behind [his] back to [his] side." Ortiz-Standifer, concerned for her safety, asked defendant to show her his hand. When he did not comply, Ortiz-Standifer "took control of his hand and *** turned him around towards the wall in a searching-type position." Ortiz-Standifer then looked at the ground to see if defendant had thrown anything. Ortiz-

Standifer noticed a lit cigarette butt and a plastic bag approximately two inches from defendant's right shoe. The parties stipulated the tests showed the substance in the plastic bag contained 4.5 grams of cocaine.

¶ 8 Defendant was the only defense witness to testify. Defendant testified "about a hundred or so" people attended the dance. Defendant testified he was standing next to Martinez Gill when the police arrived. Defendant stated he was two or three feet from the people who were dancing when the police approached them. Defendant was standing around and talking with his friends. When the light struck him, defendant turned. He admitted throwing a cigarette on the floor because smoking was not allowed in the Illini Union. The officer asked defendant who owned the cocaine. Defendant stated it was not his. Defendant claimed the \$235 found in cash on him came from his mother, who gave him \$250 earlier that day. Defendant testified he was standing over Gill because he wanted to see what Gill was doing.

¶ 9 A jury found defendant guilty. He was sentenced to a prison term of 16 years. Defendant appealed his conviction, arguing the State failed to prove him guilty beyond a reasonable doubt. This court affirmed his conviction. See *People v. Hollins*, No. 4-07-0678 (Sept. 11, 2008) (unpublished order under Supreme Court Rule 23).

¶ 10 In November 2009, defendant filed a *pro se* postconviction petition under the Act. Defendant alleged, in relevant part, trial counsel, Janie Miller-Jones, provided ineffective assistance of counsel when she failed to contact and interview Marcus Williams, who was present at the time of the alleged offense. Defendant maintained Williams "was willing to provide exculpatory testimony concerning who he had observe[d] drop a plastic [bag] filled with narcotics on the ballroom floor." Defendant further maintained Williams would testify he saw

Gill selling crack cocaine at the dance.

¶ 11 Also attached to the *pro se* petition was an affidavit dated October 28, 2009, signed by Williams. In the affidavit, Williams averred he was at the February 25, 2007, dance party at the Illini Union. According to Williams, at least 150 people were present. At some point, police officers entered and approached the area where Williams and approximately 10 others were standing. Defendant and Gill were standing in the same area; Gill was next to Williams. Williams heard one officer yell, asking why the lights were not yet on. Williams averred, before the lights were turned on, he saw Gill drop a plastic bag on the floor. Williams saw a female officer order defendant and Gill to face the wall and begin searching them. Later, Williams learned defendant had been charged with possessing the cocaine that was found in the bag he saw Gill drop to the floor. Williams was certain he saw Gill trying to sell the contents of that bag that evening at the Illini Union. Williams stated he had not been contacted by any attorney about the events of that evening.

¶ 12 In January 2010, the trial court appointed counsel to represent defendant on his postconviction petition. Counsel filed an amended petition, asserting the same ineffective-assistance-of-counsel claim. Defendant's affidavit was signed and attached to the petition. Defendant stated he recently learned his attorney did not contact or speak to Williams. Defendant also averred his counsel lied to him, stating she spoke to Williams, who stated he was not willing to testify "as to what had occurred."

¶ 13 Appointed counsel supplemented the amended postconviction petition with a March 2010 affidavit signed by Williams. In the March 2010 affidavit, Williams averred he was an inmate in the Illinois Department of Corrections (DOC). Williams averred he was at the Illini

Union at the same dance party as defendant. Williams averred he saw defendant being arrested for a plastic bag containing drugs found on the floor. Williams knew the drugs did not belong to defendant. He observed the drugs being thrown by someone in a group of approximately 10 people who were standing a few feet away from defendant. Williams averred he did not see who threw the drugs. Williams further averred he told an attorney in 2007 the drugs did not belong to defendant, but he did not know who owned the drugs.

¶ 14 In December 2010, after the State did not respond to the amended petition, an evidentiary hearing was held on defendant's postconviction petition. At the hearing, defendant, Williams, and Miller-Jones testified.

¶ 15 Defendant testified he was represented at trial by Miller-Jones. According to defendant, before trial, he told Miller-Jones that Williams might have seen who threw the drugs on the floor. He provided no further details. Williams was not called as a witness at trial.

¶ 16 Williams testified Miller-Jones called him while he was an inmate at the Champaign County jail in April 2007. Miller-Jones asked Williams if he was at the party. Williams responded he was. Williams testified he told Miller-Jones he saw someone else throw the drugs on the ground. When Miller-Jones asked if Williams could identify the individual by name, "she pretty much told [Williams] well if [he] ain't going to come to court and tell who did it by name [he] ain't going to be no good to him." Williams testified Miller-Jones asked if the drugs belonged to Martinez Gill. Williams said he told her, "it wasn't him that I seen thrown the drugs on the ground." When asked if Williams provided a description of the individual who threw the drugs, Williams testified to the following:

"I think—well, she really didn't ask for the description of

nobody else. She was pretty much saying if it wasn't—if I wasn't going to say Martinez Gill. I mean that's what she was stuck with. And I told her that I didn't know. It wasn't Martinez Gill, but I didn't know the person who did it. That's what she was pretty much stuck on was Martinez Gill. After that, after I said it wasn't him and I didn't know the person's name, pretty much that was it."

¶ 17 Williams testified the drugs on the floor were not defendant's. Williams testified he was standing with him. When the police entered the room, someone threw the drugs on the floor. When he saw the drugs hit the floor, Williams left. Williams testified a man threw the drugs.

¶ 18 On cross-examination, Williams testified he had known defendant since middle school. Williams was in custody at the DOC for driving on a revoked license.

¶ 19 The State called Miller-Jones. Miller-Jones testified, at the beginning of the case, defendant gave her three names of potential witnesses: Williams, Quantrell Ayers, and Terrance Jake. Miller-Jones attempted to contact Terrance Jake but was unsuccessful. She spoke to Williams and Ayers but was unable to speak with Jake.

¶ 20 Miller-Jones testified she made a tactical decision not to call Williams to testify for two reasons. First, Williams would not testify to the events defendant described. When she initially spoke with defendant, defendant told her Williams, Ayers, and Jake would say the cocaine belonged to Gill and Gill had told them so. When Miller-Jones spoke with Williams, she asked him about Gill. According to Miller-Jones, Williams told her the drugs did not belong to Gill, he would not say who had the cocaine, and he would not testify Gill told him the cocaine

was his. Miller-Jones believed Williams' stating the drugs did not belong to defendant while refusing to identify the owner would not help defendant's case.

¶ 21 Miller-Jones testified Ayers said the same thing. Miller-Jones did not believe Williams told her "someone" threw the drugs, because she did not write it in her notes.

¶ 22 In October 2010, the trial court denied defendant's petition. The court first concluded defendant's postconviction claims were forfeited because he failed to raise them on direct appeal. The court also found, even if the claims were not forfeited, the claims fail. The court concluded Williams lacked credibility. The court observed Williams "paused for noticeable periods of time before answering some questions [and] was evasive and markedly cavalier in attitude." In contrast, the court found Miller-Jones to be "clear, direct and professional," as well as "very credible." The court concluded the following:

"With respect to the issues concerning trial counsel's representation and the decision not to call Mr. Williams, that is a matter of trial strategy and falls squarely within the realm of trial counsel's discretion and professional judgment. Given the lack of helpful or credible information from Williams at the time he was initially interviewed, her decision was a sound and prudent tactical determination. And given the fact that Mr. Williams has now supplied four different versions of what happened, three of them under oath, no colorable argument can be made that any reasonable attorney should have called Mr. Williams as a witness or that his testimony would have assisted the petitioner in any way."

¶ 23 This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 A. Postconviction Proceedings

¶ 26 The Act sets forth a three-stage process by which a defendant in noncapital cases may obtain postconviction review of his claims that a substantial denial of his constitutional rights resulted upon his conviction. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 17, 958 N.E.2d 367, 372. First, the trial court examines the petition to ascertain whether it is frivolous or patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658-59, 936 N.E.2d 648, 652 (2010). The court shall dismiss any petition deemed frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). If a petition survives stage one, it advances to stage two, and counsel is appointed. *Andrews*, 403 Ill. App. 3d at 658, 936 N.E.2d at 653. Then, the State may answer the petition or move to dismiss it. 725 ILCS 5/122-5 (West 2008). If the State answers the petition or the trial court denies the State's motion to dismiss, the proceeding advances to a third stage, in which the defendant may present evidence to support his claim. *Andrews*, 403 Ill. App. 3d at 658-59, 936 N.E.2d at 653; 725 ILCS 5/122-5 (West 2008). This case arises from the denial of a postconviction petition following the third-stage evidentiary hearing.

¶ 27 B. Forfeiture

¶ 28 Defendant argues the trial court erroneously found he forfeited this argument by raising it on direct appeal. The State concedes the error. We agree. A postconviction claim under the Act shall not be deemed forfeited when the facts relating to that claim do not appear in the original appellate record. See *People v. Patterson*, 192 Ill. 2d 93, 129, 735 N.E.2d 616, 637 (2000). The facts necessary to review this claim were found in affidavits filed pursuant to the

provisions of the Act and from testimony at the third-stage evidentiary hearing. These facts do not appear in the original appellate record.

¶ 29 C. Effectiveness of Counsel

¶ 30 On appeal, defendant argues the trial court erred by concluding Miller-Jones' decision not to call Williams, who would have corroborated his testimony at trial, did not amount to the ineffective assistance of counsel. Defendant, relying on *People v. Tate*, 305 Ill. App. 3d 607, 712 N.E.2d 826 (1999), and *People v. King*, 316 Ill. App. 3d 901, 738 N.E.2d 556 (2000), argues there is no strategic reason for not calling an alibi witness whose testimony would have bolstered an otherwise uncorroborated defense. Defendant further argues, because the case was close, Miller-Jones' failure to call Williams prejudiced him.

¶ 31 The defendant, at the third-stage of proceedings, has "the burden of making a substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). Because the third-stage involves an evidentiary hearing, in which credibility and fact-finding determinations are made, this court will not disturb a trial court's decision unless that decision is manifestly erroneous. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 32 Defendant has the burden of establishing his counsel's representation was ineffective. To prove an ineffective-assistance-of-counsel claim in third-stage proceedings under the Act, a defendant must make a substantial showing (1) counsel's performance fell below an objective standard of reasonableness and (2) defendant was prejudiced. See *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009) (providing the two prongs of the effectiveness-of-counsel test); *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008 (stating defendant has the

burden of making a substantial showing a constitutional violation occurred).

¶ 33 We must first consider whether the representation was objectively unreasonable "on a circumstance-specific basis, viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions." *People v. Fuller*, 205 Ill. 2d 308, 330-31, 793 N.E.2d 526, 541-42 (2002). As part of this prong, we must decide whether the challenged conduct was a matter of trial strategy. A mistaken strategy decision does not alone "render the representation incompetent"; strategy decisions "are virtually unchallengeable." *Fuller*, 205 Ill. 2d at 331, 793 N.E.2d at 542. "[A] defendant must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998). Generally, the decision whether to call a specific witness "is within the realm of strategic choices that are *** not subject to attack on the grounds of ineffective assistance of counsel." *King*, 316 Ill. App. 3d at 913, 738 N.E.2d at 566.

¶ 34 Defendant relies on two cases, *Tate* and *King*, for his argument Miller-Jones' decision not to call Williams, who he claims is an exonerating witness who would corroborate defendant's testimony, was not "trial strategy" sufficient to comply with the requirement counsel provide reasonable assistance. In *Tate*, the case went to the First District when the trial court dismissed the defendant's petition at the second-stage of postconviction proceedings. See *Tate*, 305 Ill. App. 3d at 610, 712 N.E.2d at 829. Affidavits of three witnesses were attached to the postconviction petition. They averred the defendant could not have committed the offenses for which he was convicted, because he was with the three at the time the alleged offenses were committed. *Tate*, 305 Ill. App. 3d at 608-10, 712 N.E.2d at 828-29. The *Tate* court observed

"counsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *Tate*, 305 Ill. App. 3d at 612, 712 N.E.2d at 829-30. Considering the affidavits as true, which a court must do in the second-stage of postconviction proceedings, the First District determined the evidence supported defendant's theory he was misidentified and there was no strategic reason for not calling the three to testify. *Tate*, 305 Ill. App. 3d at 612, 712 N.E.2d at 830.

¶ 35 In *King*, the First District concluded, upon appeal of third-stage dismissal of a postconviction petition, trial counsel was ineffective for not calling a witness who would have provided exculpatory evidence. *King*, 316 Ill. App. 3d at 905, 919, 738 N.E.2d at 560, 570. The defendant, a school-bus driver, was charged with sexually assaulting a 17-year-old passenger while driving her home from school. *King*, 316 Ill. App. 3d at 903-04, 738 N.E.2d at 559. In his postconviction petition, the defendant alleged, in part, defense counsel was ineffective for failing to call Dovie Matthews, an alibi witness, who would have testified she worked as a bus attendant on the defendant's bus the day of the alleged assault and would have testified the sexual assault did not occur. *King*, 316 Ill. App. 3d at 904, 738 N.E.2d at 559. According to Matthews' affidavit, she was the attendant on the bus that date. She averred "she was on the bus the entire time the students were riding home from school as her job required," she did not leave early, and the assault did not occur as the victim alleged. *King*, 316 Ill. App. 3d at 904, 738 N.E.2d at 560. Matthews further averred she went to defendant's trial and was available to testify, but was not called to do so. *King*, 316 Ill. App. 3d at 904-05, 738 N.E.2d at 560.

¶ 36 There was no physical evidence of the offense and no other witness to the sexual

assault. See *King*, 316 Ill. App. 3d at 907-11, 738 N.E.2d at 561-64. However, at the evidentiary hearing, both parties stipulated another student passenger on the defendant's bus would testify he was usually dropped off after the victim, but on the date of the offense, he was dropped off before the victim. That student would also have testified Matthews was dropped off early that day, having "made a pact with everyone on the bus not to tell." *King*, 316 Ill. App. 3d at 909, 738 N.E.2d at 563.

¶ 37 In *King*, the defendant's trial counsel testified at the evidentiary hearing. Counsel remembered speaking to Matthews, but could not recall why he did not call Matthews to testify. Counsel called it "a matter of strategy." Counsel did admit, on cross-examination, he had presented no evidence to contradict the testimony Matthews exited the bus early that day, leaving the defendant and the victim alone. *King*, 316 Ill. App. 3d at 906, 738 N.E.2d at 561.

¶ 38 The First District determined "[a] defendant can overcome the strong presumption that defense counsel's choice of strategy was *sound* if counsel's decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." (Emphasis in original.) *King*, 316 Ill. App. 3d at 916, 738 N.E.2d at 568. The court found because trial counsel "failed to provide any explanation at the evidentiary hearing and because we cannot conceive of any sound trial strategy that would justify counsel's failure to call an available alibi witness who would have bolstered an otherwise uncorroborated defense, we find that [trial counsel's] failure to call Matthews as a witness was the result of incompetence." *King*, 316 Ill. App. 3d at 916, 738 N.E.2d at 568.

¶ 39 We do not find the trial court committed manifest error in deciding Miller-Jones' decision was trial strategy. Her representation did not fall below an objective standard of

reasonableness. Miller-Jones testified defendant identified Williams as a potential witness. Defendant told Miller-Jones Williams would testify a specific way. Miller-Jones spoke to Williams, who was incarcerated at the time. Williams did not say what defendant predicted. Instead, Williams told Miller-Jones he would not identify Gill, as defendant said he would, but would only say the drugs did not belong to defendant. Given the facts, we cannot say the strategic decision was unreasonable when Miller-Jones concluded Williams, who was incarcerated and a friend of defendant's, would testify to a different version of events provided by defendant and would only say defendant did not commit the offense. Miller-Jones concluded such testimony would not be helpful. While we view the facts at the time Miller-Jones made her decision, we recognize Williams' ever-changing testimony regarding the events of the evening. We find no error in the trial court's determination this tactical decision was not objectively unreasonable.

¶ 40 Defendant's cases are not helpful. *Tate* was a second-stage dismissal, where the facts were not contested and the attorney whose conduct was challenged had not testified. See *Tate*, 305 Ill. App. 3d at 610-12, 712 N.E.2d at 829-30. *King*, though a third-stage dismissal, involved different circumstances. The trial counsel could not give any reason for his decision, and the exculpatory witness's testimony had more substance than testimony stating "my friend did not do it."

¶ 41 We find defendant did not meet his burden of making a substantial showing he was prejudiced by the failure to call Williams to testify. To establish the second prong of the ineffective-assistance-of-counsel test, defendant must have shown a reasonable probability exists the outcome of the proceeding would have been different absent counsel's deficient performance.

People v. Moore, 189 Ill. 2d 521, 535, 727 N.E.2d 348, 355-56 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). The record shows there is no such probability. Williams had differing accounts of the evening. No one can predict what Williams would have said. Williams, who gave three different versions of whom the cocaine belonged to and whose testimony was found incredible, could not be believed. There is no reasonable probability the outcome of the trial would have been different had an "evasive and markedly cavalier" Williams been called to testify.

¶ 42

III. CONCLUSION

¶ 43 For the reasons stated, we affirm the trial court's judgment. We award the State its statutory assessment of \$50 as costs of this appeal.

¶ 44 Affirmed.