

No. 1-11-0304

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. 96 CR 22798
)	
OTIS WILLIAMS,)	Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Gordon and Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's *pro se* postconviction petition reversed because defendant made a substantial showing of ineffective assistance of counsel where trial counsel failed to interview and call alibi witnesses. The circuit court's dismissal of defendant's section 2-1401 petition for relief from judgment affirmed where the petition failed to state a meritorious defense or claim.

¶ 2 Following a jury trial, defendant Otis Williams was convicted of first degree murder of Gregory Sharp and aggravated battery with a firearm of Felicia Robinson. He was sentenced to consecutive prison terms of 45 years and 10 years, respectively. On direct appeal, this court

vacated defendant's conviction and sentence for aggravated battery with a firearm and affirmed the first degree murder conviction and sentence. *People v. Williams*, 332 Ill. App. 3d 254 (2001).

¶ 3 Defendant filed his initial *pro se* petition for postconviction relief in January 2003 and it was summarily dismissed in September 2003, beyond the 90-day time limit during which the trial court must rule on a petition. See 725 ILCS 5/122-2.1(a) (West 2002). Defendant filed a notice of appeal on October 15, 2003. The State Appellate Defender was appointed to represent defendant, and filed a motion for summary remand, which this court granted on March 3, 2005. *People v. Williams*, No. 1-03-3233 (2005) (unpublished order under Supreme Court Rule 23). On December 2, 2009, defendant's appointed counsel filed an amended postconviction petition contending defendant was denied effective assistance of counsel for trial counsel's failure to interview and call alibi witnesses. The State moved to dismiss and while the State's motion was pending, defendant filed a petition for relief from judgment pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). The section 2-1401 petition contended that newly discovered evidence, an affidavit from Quan Ray alleging he had an alibi for the shooting of Gregory Sharp, established that the State's occurrence witnesses perjured themselves. The trial court dismissed both petitions following a combined hearing. Defendant timely appeals.

¶ 4 Defendant's first degree murder conviction arose from the November 28, 1994 gang-related shooting of Gregory Sharp while he and Felicia Robinson sat in Sharp's car at a stoplight on the exit ramp of the Eisenhower expressway.

¶ 5 Three members of the Gangster Disciples testified against defendant: Delano Finch, Ramone Finch (Delano's nephew), and Kelly Quarles. Delano had been indicted on about 50 counts in a drug conspiracy and faced a minimum sentence of life in prison. In exchange for his

testimony against defendant and many other gang members, Delano received a sentence of 15 years' imprisonment. Ramone received a reduced sentence of 8 years' imprisonment for armed robbery and home invasion in exchange for his testimony against defendant, for which the sentencing range was 6 to 30 years. Quarles denied that he was offered or promised a deal in exchange for his cooperation at the time that he gave a statement to law enforcement regarding various crimes, including the murder of Sharp. Rather, Quarles testified that his 60-month sentence was reduced to 17 months following a motion to reduce sentence during which Quarles' counsel informed the court of Quarles' cooperation. Quarles denied knowledge of an offer for a reduced sentence in exchange for testimony against defendant. Delano and Ramone were incarcerated at the time of their testimony.

¶ 6 Delano, Ramone, and Quarles all testified that defendant accompanied them along with numerous other Gangster Disciple members to kill another member, Gregory Sharp. One of the gang leaders, Darryl "Pops" Johnson, ordered the murder of Sharp. According to Delano, on November 28, 1994, Johnson called a gang meeting at a gas station where he ordered the murder. Delano and Ramone testified that defendant and Quan Ray were among the Gangster Disciples at the gas station.

¶ 7 According to Delano's testimony, defendant was a member of Delano's security detail at the time of the shooting. At Delano's instruction, defendant obtained Delano's .40 caliber handgun and along with the other Gangster Disciples, opened fire on Sharp and Robinson as they sat in a vehicle in traffic on the Kostner exit ramp of the expressway. Delano testified that after his fellow gang members observed Sharp sitting in traffic on the expressway exit ramp near the stoplight, defendant exited Delano's car with the handgun and shot at a Chevy that appeared to contain Sharp's security detail. When the security vehicle drove away, defendant began shooting at Sharp through the rear window of Sharp's vehicle. Defendant fired more than 15 shots into

Sharp's vehicle while gang members "K-Dog" and "Heavy" also fired numerous shots into Sharp's vehicle. After the shooting, Delano instructed defendant to dispose of the weapon in a garbage can in an alley, and defendant did so. Delano did not come forward to tell the authorities about the murder until after he was indicted on separate charges related to his gang involvement.

¶ 8 Ramone testified that after meeting Delano at the gas station, he followed Delano onto the expressway. When he exited the expressway and while waiting in traffic on the ramp, Ramone heard gunshots and ducked down. He did not participate in the murder. Quarles was in the car with Ramone and was sleeping until he heard the gunshots. Ramone testified that when he lifted his head to see what was happening, he observed defendant near the trunk of Sharp's vehicle, shooting into the rear window of the car. Quan Ray, Heavy and K-Dog were also shooting at Sharp.

¶ 9 Quarles testified that K-Dog stood on the driver's side of Sharp's vehicle while shooting and that defendant stood behind the door of the vehicle defendant rode in, and was shooting over the door towards Sharp's vehicle. There was also a "big dude" shooting from the passenger side of Sharp's vehicle. Quarles did not testify to observing Quan Ray at the gas station or at the scene of the shooting.

¶ 10 The jury found defendant guilty of the first degree murder of Sharp and aggravated battery with a firearm of Robinson. Defendant was sentenced to 45 years' imprisonment for first degree murder and 10 years' imprisonment for aggravated battery with a firearm, to run consecutively. The first degree murder conviction and sentence were affirmed on direct appeal, but the aggravated battery with a firearm conviction was vacated because the State failed to present evidence at trial to establish that Robinson was injured. *Williams*, 332 Ill. App. 3d at 261, 266-67 (2001).

¶ 11 Defendant filed his initial petition for postconviction relief in January 2003, asserting five claims, four of which were abandoned in a subsequent amended petition. The trial court summarily dismissed defendant's initial petition on September 17, 2003, nine months after it was filed. This court granted defendant's motion for summary remand due to the trial court's failure to enter an order on the petition within 90 days after it was filed and docketed. *Williams*, No. 1-03-3233.

¶ 12 An assistant public defender was appointed for the instant postconviction petition. In an amended petition, four of the claims asserted in defendant's initial petition were abandoned, and defendant solely contended therein that trial counsel was ineffective for failing to interview two alibi witnesses and for failing to call one alibi witness whom trial counsel interviewed. The petition included affidavits from three of defendant's sisters, all of whom averred that defendant was at a family birthday party supervising children during the time of Sharp's murder. Defendant's sister, Glynda Williams, averred in her affidavit that defense trial counsel informed her she would testify at trial and she waited outside of the courtroom door during the trial, but was never called to testify. Gail Alexander and Gabrielle Williams averred that they contacted trial counsel's office on various occasions but never received a return telephone call, and that had they been contacted, they would have testified as to defendant's alibi. Defendant alleged in his affidavit that he informed his trial counsel months before trial of Glynda Williams, Gail Alexander, and others, who were willing to testify as to defendant's alibi during the murder of Sharp.

¶ 13 The State filed a motion to dismiss, contending that trial counsel's decision not to call witnesses was a matter of trial strategy and that defendant was not prejudiced by trial counsel's decision. While the State's motion to dismiss was pending, defendant filed a petition pursuant to section 2-1401 of the Code of Civil Procedure (735 ILC 5/2-1401 (2010)) based on an affidavit

that defense counsel received from Quan Ray, who was placed at the scene by the State's occurrence witnesses and named as a shooter. Ray's affidavit averred that he had an alibi and did not participate in Sharp's murder. Defense counsel argued that if Ray's affidavit were believed, this new evidence would establish that the State's witnesses perjured themselves, warranting a new trial. The State moved to dismiss this petition as untimely and also contended that Ray's affidavit was insufficient to meet the requirements of section 2-1401. Following a hearing on the State's motions to dismiss, defendant's postconviction and section 2-1401 petitions were dismissed. Defendant filed a timely appeal.

¶ 14 Defendant first contends the trial court erred in dismissing his second-stage postconviction claim of ineffective assistance of counsel where he alleged counsel failed to interview and call alibi witnesses. At the second-stage of postconviction proceedings, defendant bears the burden of 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 contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The reviewing court takes "all well-pleaded facts that are not positively rebutted by the trial record" as true. *Pendleton*, 223 Ill. 2d at 473. A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14 (2007).

¶ 15 To establish a claim of ineffective assistance of trial counsel warranting further proceedings under the Act, a defendant must show first that "counsel's representation fell below an objective standard of reasonableness," and second that he suffered prejudice as a result, such that there is a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694

(1984). To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *Id.* at 687.

¶ 16 "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. Trial counsel has the right as a matter of trial strategy to decide what witnesses to call (*People v. Clendenin*, 238 Ill. 2d 302, 319 (2010)), and matters of trial strategy are generally immune from claims of ineffective assistance of counsel (*People v. Ward*, 187 Ill. 2d 249, 261-62 (1999)). An exception to this general rule is when counsel's trial strategy is so "unsound that counsel fails to conduct any meaningful adversarial testing." *Id.* at 262.

¶ 17 Taking defendant's well-pleaded facts in his petition as true (*Pendleton*, 224, Ill. 2d at 473), and as supported by the accompanying affidavits from defendant's sisters, defendant made a substantial showing that counsel's failure to call an alibi witness and to investigate two other alibi witnesses was objectively unreasonable. Three occurrence witnesses testified to seeing defendant repeatedly shoot at Sharp. However, if taken as true, defendant's alibi witnesses would rebut the testimony of the State's witnesses, thereby further questioning their credibility.

¶ 18 The State argues that it was apparent from the record that it was trial strategy for defense counsel to decide not to call Glynda Williams to testify at trial because counsel was aware that Glynda was available to testify. However, where counsel fails to present exculpatory evidence, counsel's performance may be considered ineffective. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999) (while decision of whether to call a particular witness is generally a matter of trial strategy, "counsel may be deemed ineffective for failure to present exculpatory evidence," including "failure to call witnesses whose testimony would support an otherwise uncorroborated

defense."). We also reject the State's argument that counsel's decision to solely attack the credibility of the occurrence witnesses rather than also presenting an alibi defense is trial strategy not subject to constitutional challenge. The State's argument ignores the reality that pursuing both strategies would not have presented an inconsistent defense and could have been pursued at trial.

¶ 19 Moreover, the State argues that because defendant alleged in his affidavit that he informed his counsel of his alibi and corroborating witnesses, this is not a case of counsel "failing to fully investigate," and argues that it was counsel's strategy to forego further investigation. We disagree. "[S]trategic decisions may be made only after there has been a 'thorough investigation of law and facts relevant to plausible options.' " *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (quoting *Strickland*, 466 U.S. at 690). Asserting a defense of actual innocence via an alibi and utilizing alibi testimony to discredit the State's occurrence witnesses were plausible trial strategies and taking defendant and his alibi witnesses' affidavits as true, we find that defendant made a substantial showing that his trial counsel failed to thoroughly investigate these strategies.

¶ 20 Further, defendant made a substantial showing that he suffered prejudice. Trial counsel's theory at trial was that the State's occurrence witnesses were not credible. The affidavits of defendant's sisters would have provided alibi testimony corroborating defendant's theory at trial because it would have contradicted the trial testimony of Delano and Ramone Finch and Kelly Quarles. In the absence of any physical evidence linking defendant to the crime scene and if the alibi witnesses were found credible, there is a reasonable probability that the result of the trial would have been different had the jury heard the testimony of defendant's alibi witnesses.

¶ 21 The State argues, however, that the evidence against defendant was overwhelming. However, the totality of the State's evidence linking defendant to the crime scene was the

testimony of three occurrence witnesses who received significant consideration in exchange for their testimony in the form of reduced sentences. Defense counsel attacked the credibility of the State's witnesses at trial, and had defendant's alibi witnesses testified, the credibility of the State's witnesses would have been further tested. Because this case comes down to witness credibility, it was improper for the circuit court to dismiss defendant's second-stage postconviction petition without an evidentiary hearing. *People v. Domagala*, 2013 IL 113688, ¶ 35; *People v. Knight*, 405 Ill. App. 3d 461, 471 (2010). We find that the defendant made a substantial showing of a violation of his constitutional right to effective assistance of counsel where counsel failed to call an alibi witness and failed to investigate additional alibi witnesses.

¶ 22 Defendant further contends on appeal that the circuit court erred in dismissing his section 2-1401 petition for relief from judgment without holding an evidentiary hearing where the petition pleaded newly discovered evidence that questioned the credibility of the State's witnesses. Where, as defendant alleges here, the State unintentionally uses perjured testimony during trial, then a constitutional issue is not presented post-conviction, and a defendant may only seek relief via section 2-1401 of the Code of Civil Procedure, rather than via the Post-Conviction Hearing Act. See *People v. Brown*, 169 Ill. 2d 94, 106-08 (1995).

¶ 23 We review the circuit court's dismissal of defendant's section 2-1401 petition *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 14-16 (2007). The purpose of a petition for relief from judgment under section 2-1401 of the Code of Civil Procedure is to bring facts before the court which, had they been known at trial, would have prevented the contested judgment. *People v. Gray*, 247 Ill. App. 3d 133, 142 (1993). A section 2-1401 petition may be dismissed where it fails to prove by a preponderance of the evidence a meritorious claim or defense that would have precluded defendant's conviction. *Vincent*, 226 Ill. 2d at 7-8.

¶ 24 Defendant's petition is based on the affidavit of Quan Ray, who was placed at the scene by the State's occurrence witnesses and named as a shooter. Ray's affidavit averred that he had an alibi and did not participate in Sharp's murder. Defendant argues that the "relevance" of Ray's affidavit is that if Ray's affidavit were believed, this new evidence would establish that the State's witnesses perjured themselves. Although Ray's affidavit is relevant to question Delano, Ramone, and Quarles' testimony, it does not rise to the level of asserting a meritorious claim or defense. If found credible, Ray's affidavit would establish an alibi for his whereabouts during the shooting, but would not provide an alibi for defendant. Further, even if found credible, Ray's affidavit also would not prove the State's witnesses perjured themselves with regard to defendant's participation in the murder of Sharp. Ray's affidavit may also be interpreted as merely being sufficient to suggest that the witnesses were mistaken about Ray's involvement; it proves nothing about defendant's culpability.

¶ 25 Based on the foregoing, we reverse the judgment of the circuit court of Cook County dismissing defendant's second-stage postconviction petition and remand for an evidentiary hearing. We affirm the judgment dismissing defendant's section 2-1401 petition for relief from judgment.

¶ 26 Reversed in part; affirmed in part.