

No. 1-11-1650

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. 02 CR 13745
)	
ERIC PERRY,)	Honorable
)	Vincent M. Gaughan,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

¶ 1 *Held:* The second-stage dismissal of defendant's postconviction petition is reversed and the cause is remanded for an evidentiary hearing on the claim that trial counsel was ineffective for failing to call alibi witnesses to testify at trial.

¶ 2 Defendant Eric Perry appeals the trial court's dismissal, on motion of the State, of his supplemental petition for postconviction relief. On appeal, defendant contends that his petition should not have been dismissed because it made a substantial showing that his trial attorney provided ineffective assistance where he failed to call alibi witnesses who had been subpoenaed by the defense and were present in court on the day of trial. For the reasons that follow, we reverse and remand for an evidentiary hearing.

¶ 3 Defendant's conviction arose from the 2002 shooting death of Donald Dunlap. Following a bench trial, defendant was convicted of first degree murder and sentenced to 49 years in prison. On direct appeal, we affirmed defendant's conviction, but determined that the evidence was insufficient to sustain the 25-year sentence enhancement for personally discharging the firearm that proximately caused Dunlap's death and, therefore, reduced defendant's sentence enhancement to 20 years, for an aggregate term of 44 years in prison. *People v. Perry*, No. 1-05-0480 (2007) (unpublished order under Supreme Court Rule 23). The underlying facts of the case are set forth at length in our order on direct appeal, but will be repeated here to some extent due to the nature of defendant's postconviction claims.

¶ 4 At trial, John Johnson testified that about 10 p.m. on April 29, 2002, he and the victim, Donald Dunlap, drove separate vans to pick up his friend, Erica Alexander, at her house. Both men double parked, and Johnson got out of his van to talk with Dunlap while they waited for Alexander to come outside. During their conversation, a blue Chevy Caprice, driven by defendant, came down the street. Johnson moved in front of Dunlap's van to let the car through. Defendant honked his horn and slowed down a little, but still hit both cars as he passed. According to Johnson, defendant then got out of his car, verbally accosted the men, and told them he was carrying a gun before returning to his car and driving away.

¶ 5 Johnson testified that, after he picked up Alexander, he stopped his van due to a mechanical problem. He recalled that, while he and Dunlap were outside his van during that stop, a maroon car pulled up, the trunk opened, and shots started coming out. As Johnson climbed through the inside of his van and hid under a couch located in the back, he heard more gunshots. He testified that he watched from the back passenger-side window as defendant walked past the van with a gun in his hand and fired a couple more shots at the ground. Although Johnson could see defendant from the waist up, he said that he could not see what

defendant was shooting at. He then watched as defendant walked back toward the maroon car, but did not see defendant get into the car before it sped off. Johnson later identified defendant as the shooter in photo and in-person lineups arranged by police.

¶ 6 For her part, Alexander testified that she heard a noise while Johnson's van was double parked but saw neither an automobile collision or an ensuing argument. She recalled that, after the van stopped while she was in it, she heard shots and dropped to the floor of the van, holding her head. She said that she did not see who fired the shots or what Johnson and Dunlap were doing at the time the shots were fired. She testified that it sounded like the shots were coming from more than one gun. When the shooting stopped, Alexander returned to her seat. She saw a maroon car driving away from the scene.

¶ 7 About an hour after the incident, Alexander spoke with the police and told them that she did not know who had been shooting at them. At trial, she denied that she did not tell the police defendant was the shooter because she was afraid defendant would kill her if she identified him.

¶ 8 Alexander testified that the next morning, the police escorted her to the police station, where she eventually identified defendant in a lineup. The police took a handwritten statement from Alexander in which she stated she saw defendant fire a gun at Dunlap and the van in which she was sitting, but that she did not initially identify defendant to the police because she was afraid he would kill her. Alexander signed the statement and a photograph of defendant, which was attached to the statement. Alexander also acknowledged that she testified before a grand jury about two weeks after the shooting. In her grand jury testimony, Alexander related that when the shooting stopped, she looked up and saw defendant holding a gun.

¶ 9 On cross-examination, Alexander maintained that she did not see who fired the shots or where they came from. Alexander testified that she identified defendant in the lineup because she was scared and confused. She stated that the handwritten statement was not completed until

4 a.m. on May 2, 2002, and that she signed it because of stress. Alexander explained that before she signed the statement, the police had locked her in a room, "hollered" and cursed at her, and threatened her that she would get half of defendant's time. Alexander further testified that she was tired and scared during the grand jury proceedings, that the police drove her there, and that she said "what [she] was told to say." Two detectives later testified to deny these claims of coercion.

¶ 10 The parties stipulated that a firearms expert concluded that two bullets recovered from Dunlap's body were fired from two different guns. The expert found that at least one other gun was fired at the scene and that it was impossible to rule out the possibility that more than three guns were fired.

¶ 11 The trial court found defendant guilty of first-degree murder. The court determined that Alexander's handwritten statement, as well as her statement before the grand jury, were "voluntary." In addition, the court found that during the commission of the offense, defendant personally discharged a firearm that proximately caused Dunlap's death. The court sentenced defendant to a total of 49 years in prison, 24 years on the first-degree murder count and an additional 25 years for personally discharging the firearm that caused Dunlap's death. On appeal, we affirmed defendant's conviction but reduced his sentence enhancement from 25 to 20 years, for an aggregate sentence of 44 years' imprisonment. *People v. Perry*, No. 1-05-0480 (2007) (unpublished order under Supreme Court Rule 23). Defendant's petition for leave to appeal to the supreme court was denied. Within six months of the denial, defendant filed a *pro se* postconviction petition. The trial court appointed counsel, who filed a Rule 651(c) certificate and a supplemental petition.

¶ 12 As relevant to the instant appeal, the supplemental petition included an argument that trial counsel provided ineffective assistance when he failed to present alibi witnesses who had been

subpoenaed by the defense. Defendant argued that the failure to call the alibi witnesses deprived him of the opportunity to rebut the allegations against him. He supported the argument with affidavits from Clarence Cooper and Shamika Benson.

¶ 13 In his affidavit, Clarence Cooper stated that he was one of three passengers in the car defendant was driving when he hit the two parked vans. According to Cooper, defendant stopped and admitted the accident was his fault, and the man standing next to the vans said, "It ain't nothing, I'm cool." The group drove off, went to a store, and then proceeded to a house on the 3900 block of Van Buren, where they hung out on a porch with a larger group, drinking and celebrating a friend's birthday. Around 11:30 p.m., Cooper, defendant, and two other friends decided to sit in a car and listen to the radio. Detectives arrived on the scene and took them to the police station. After several hours, Cooper and the others were released. However, shortly thereafter, Cooper, defendant, and two other men were pulled over on the highway and re-arrested. After Cooper participated in a lineup, the police tried to get him to sign a paper saying he saw defendant shoot someone. However, Cooper averred, "I know he didn't because we were together the whole day, even after we got picked up a second time." According to Cooper, he was released a couple of days later. He was subpoenaed, was present at defendant's trial, and told defendant's attorney that he wanted to testify on defendant's behalf, but was not called to testify.

¶ 14 Shamika Benson stated in her affidavit that at the time of the shooting, defendant was at her house at 3928 W. Van Buren, "amongst a lot of people." Benson stated that she was subpoenaed and was present at defendant's trial, but that defendant's attorney did not let her testify on his behalf.

¶ 15 The State filed a motion to dismiss the petition, and the circuit court granted the motion. Defendant now timely appeals.

¶ 16 On appeal, defendant contends that his supplemental petition and attached affidavits made a substantial showing that trial counsel provided ineffective assistance by failing to call "multiple" alibi witnesses who had been subpoenaed by the defense, were present in court on the day of trial, and were willing to testify that at the time of the shooting, defendant was with them at Shamika Benson's house. Defendant argues that nothing in the record indicates any strategic basis for failing to introduce exculpatory alibi evidence, and that prior to an evidentiary hearing on the issue, it would be premature and speculative to conclude that counsel's decision was strategic. He asserts that he was prejudiced by counsel's failure, as the State's evidence was weak and testimony from witnesses that he was elsewhere at the time of the shooting "obviously would have been material to the defense." He further argues that Cooper's testimony would have undermined the State's evidence of motive, since Cooper related that the conversation following the sideswiping of the vans was congenial.

¶ 17 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)) provides a three-stage process by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Boclair*, 202 Ill. 2d 89, 99-100 (2002); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Here, defendant's petition was dismissed at the second stage of the post-conviction process, and he argues that it should have been advanced to the third stage. A defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Coleman*, 183 Ill. 2d at 381; *Franklin*, 167 Ill. 2d at 9. At second-stage proceedings, all factual allegations not positively rebutted by the record are considered to be true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). We review *de novo* a circuit court's decision to dismiss a petition at the second stage of post-conviction proceedings. *Coleman*, 183 Ill. 2d at 388, 389.

¶ 18 Claims of ineffective assistance of counsel are judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

¶ 19 We conclude that defendant is entitled to an evidentiary hearing on his claim that trial counsel was ineffective for failing to call Cooper and Benson as alibi witnesses. It is true that in general, an attorney's decision regarding which witnesses to call is a matter of trial strategy that is immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999). However, counsel may be deemed ineffective for failing to present exculpatory evidence of which he is aware, including failing to call a witness whose testimony would support an otherwise uncorroborated defense. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶ 20 Here, the defense's theory of the case was that defendant was misidentified as the person who shot Dunlap. Defense counsel argued that Johnson could not have seen who shot Dunlap from his vantage point under a couch in the back of his van, and that Johnson's testimony that defendant shot Dunlap at close range conflicted with the medical examiner's findings. In addition, counsel argued that Alexander's trial testimony that she did not see the shooter should have been believed over her recanted statement to the police and grand jury testimony. The proposed testimony of Cooper and Benson that defendant was with them and several other

people at the time of the shooting would have provided defendant an alibi and, therefore, would have corroborated the defense theory of misidentification.

¶ 21 The circumstances of the instant case are similar to those in *People v. Tate*, 305 Ill. App. 3d 607 (1999), and *People v. Cleveland*, 2012 IL App (1st) 101631.

¶ 22 In *Tate*, the defendant filed a post-conviction petition alleging ineffective assistance of trial counsel for failing to call three alibi witnesses whose affidavits placed defendant away from the scene of the shooting on the date and time in question. *Tate*, 305 Ill. App. 3d at 610. The circuit court granted the State's motion to dismiss the petition. *Tate*, 305 Ill. App. 3d at 608. On appeal, we remanded for an evidentiary hearing, finding that the affidavits supported the defense theory that the defendant was misidentified, and that there was no apparent strategic reason for not calling the alibi witnesses to testify. *Tate*, 305 Ill. App. 3d at 610, 612. We acknowledged that the defendant's attorney may have determined that the alibi witnesses would not testify truthfully or be persuasive due to their close relationship with the defendant, but we concluded that we could not say as a matter of law that was counsel's reasoning. *Tate*, 305 Ill. App. 3d at 612.

¶ 23 In *Cleveland*, the defendant's initial, amended, and supplemental petitions alleged that counsel was ineffective for failing to call alibi witnesses who were ready and willing to testify on his behalf, and included supporting affidavits executed by the potential witnesses. *Cleveland*, 2012 IL App (1st) 101631, ¶¶ 14, 16, 17, 24. The State filed a motion to dismiss, which was granted by the trial court. *Id.* at ¶¶ 28, 29. We reversed and remanded for an evidentiary hearing. *Id.* at ¶ 69. In doing so, we opined that it was "difficult to see how refusing to call several witnesses who could have provided an alibi for the defendant constituted reasonable trial strategy." *Id.* at ¶ 60. Because the record did not contain any evidence of a reasonable strategy that may have been employed by counsel in not calling the witnesses, we determined that the

defendant had made a substantial showing that his constitutional rights were violated and that he was entitled to a third-stage evidentiary hearing. *Id.* at ¶¶ 60-61.

¶ 24 Here, the averments made by Cooper and Benson in their affidavits -- which we must consider as true in this point of the proceedings -- support the defense theory that defendant was misidentified. As in *Tate* and *Cleveland*, the record in the instant case does not affirmatively disclose any strategic reason for not calling these alibi witnesses to testify at trial. Counsel's decision not to call Cooper or Benson may very well have been a professionally reasonable tactical decision and not incompetence, but the record does not reflect the nature of the decision one way or the other. See *Tate*, 305 Ill. App. 3d at 612. An evidentiary hearing will allow the circuit court to make an informed decision as to whether defendant received ineffective assistance of counsel. *Cleveland*, 2012 IL App (1st) 101631, ¶ 61; *Tate*, 305 Ill. App. 3d at 612. Accordingly, we reverse the dismissal of defendant's supplemental petition and remand for further post-conviction proceedings.

¶ 25 For the reasons explained above, we reverse the judgment of the circuit court of Cook County and remand for an evidentiary hearing.

¶ 26 Reversed and remanded.