

No. 1-11-2917

**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. 85 C 5303
	)	
CLARENCE HAYES,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CONNORS delivered the judgment of the court.  
Justices Cunningham and Delort concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Dismissal of defendant's successive post-conviction petition affirmed over his contention that he made a substantial showing of ineffective assistance of trial counsel based on counsel's failure to call several potential alibi witnesses.
- ¶ 2 Defendant Clarence Hayes appeals from an order of the circuit court granting the State's motion to dismiss his successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). On appeal, defendant contends that he made a

substantial showing that trial counsel rendered ineffective assistance by failing to present an alibi defense. We affirm.

¶ 3 The record shows that defendant was charged with murder and armed robbery in connection with an incident at about 1:50 p.m. on March 17, 1985, in which six victims were robbed at gun point and one of them was shot to death near 110th Street and Michigan Avenue. At the time, defendant lived near 107th Street and Indiana Avenue, which was in close proximity to the scene of the crimes.

¶ 4 At the 1986 jury trial, six eyewitnesses identified defendant as the offender in question. During opening and closing arguments, as well as on cross-examination, defense counsel attempted to show that the eyewitness identifications were unreliable, asserting that defendant did not match the description of the offender, his fingerprints were not found at the scene, and the witnesses were under great stress, resulting in an inability to accurately observe the events. Following trial, defendant was found guilty of murder and six counts of armed robbery. The trial court sentenced defendant to death for the murder conviction and six concurrent 30-year prison terms for each armed robbery conviction. On appeal, defendant's murder and armed robbery convictions, and his sentences for armed robbery, were affirmed, but his death sentence was vacated, and the cause was remanded for a new sentencing hearing for murder. *People v. Hayes*, 139 Ill. 2d 89 (1990). On remand, defendant was sentenced to natural life imprisonment for murder.

¶ 5 In 1992, defendant filed a *pro se* post-conviction petition under the Act, asserting various claims of ineffective assistance of counsel, including that trial counsel was ineffective for failing to call several alibi witnesses, which the circuit court denied. On appeal, this court affirmed the circuit court's decision. *People v. Hayes*, No. 1-94-2701 (unpublished order under Supreme Court Rule 23) (1997). In 2000, defendant filed a successive *pro se* petition under the Act,

combined with an alternative petition to vacate the judgment and sentence pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)), contending that his sentence was unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The circuit court dismissed the petition, and we affirmed that judgment on appeal. *People v. Hayes*, No. 1-01-0905 (unpublished summary order under Supreme Court Rule 23) (2002). Defendant next filed a federal *habeas corpus* petition alleging, in part, that trial and appellate counsel were ineffective for failing to present and preserve his alibi defense. Defendant did not attach any affidavits to this petition. In denying defendant's petition, the federal district court found that his claims were procedurally defaulted. *Hayes v. Carter*, 2003 WL 21212598, at 5. The federal district court's opinion was affirmed on appeal. *Hayes v. Battaglia*, 403 F.3d 935 (2005).

¶ 6 On July 19, 2005, defendant filed a second successive *pro se* post-conviction petition, and, after advancing to the second stage of proceedings, appointed counsel filed an amended successive petition on behalf of defendant in October 2009. In the amended petition, defendant alleged, in pertinent part, that trial counsel was ineffective for failing to present alibi witnesses. Defendant specifically asserted that these alibi witnesses would have testified that he was at his residence on March 17, 1985, and not out committing the crimes of which he was convicted. Attached to the amended petition were affidavits from Donnell a/k/a Darnell Hayes, defendant's brother, Donna Hayes, defendant's sister, David Hayes, defendant's brother, and Kennedy Lagand Arnold, a family friend. According to defendant's petition, these witnesses were known to trial counsel, and, except for Arnold, they all testified before the grand jury.

¶ 7 Donnell attested that on the date of the incident, he was watching basketball in the basement, and that defendant was in the basement "at least some of the time." During his grand jury testimony, Donnell admitted that defendant was out of his sight for some of the time, but attested in his affidavit that he did not recall defendant leaving the house. Donna attested in her

affidavit that defendant was in the basement watching basketball and was home all day. However, she testified during the grand jury proceedings that defendant was watching basketball in David's bedroom and there were times when she did not see him. David testified during the grand jury proceedings that he watched basketball in his room with defendant, but attested in his affidavit that he watched basketball both in his bedroom and in the basement with defendant. According to David's affidavit, defendant never left the house between 12 p.m. and about 4:30 p.m., but admitted during his grand jury testimony that there were times when he did not see defendant. Arnold attested that he watched basketball with defendant in the basement, and defendant never left the house. Arnold further attested that after defendant was arrested, he learned that "Sean" committed the crimes in question. Finally, defendant attested that he was watching basketball at the time of the crimes.

¶ 8 On March 17, 2011, the State filed a motion to dismiss defendant's petition, asserting that his ineffective assistance of counsel claims were contradicted by the record, lacking in merit, and procedurally barred. In so arguing, the State relied on police reports generated during the investigation that resulted in defendant's arrest. Included in these reports were previous statements that defendant's alibi witnesses gave to police. Defendant filed a response to the State's motion to dismiss, as well as a motion to strike the police reports, which was denied.

¶ 9 On September 15, 2011, the circuit court granted the State's motion to dismiss, finding that his claim that counsel failed to call alibi witnesses was barred by *res judicata*, the affidavits from the potential witnesses did not provide defendant with an alibi where they did not show that defendant was at his residence the entire day, and he was not prejudiced by counsel's decision not to call these witnesses because the evidence against him was overwhelming. In rendering its decision, the court relied, in part, on the police reports referenced in the State's motion to dismiss.

¶ 10 On appeal, defendant contends that he made a substantial showing that trial counsel rendered ineffective assistance by failing to present an alibi defense. He specifically maintains that counsel was ineffective for failing to call the alibi witnesses who attested that they were watching television with defendant at the time of the crimes.

¶ 11 We initially note that the State maintains that defendant's claim is forfeited and barred by the doctrine of *res judicata* where it was not raised on direct appeal, and was subsequently litigated in his prior post-conviction petition and in his petition for *habeas corpus* relief. Defendant responds, and we agree, that where the affidavits defendant attached to his petition were never part of the record prior to the proceedings at bar, forfeiture and *res judicata* do not apply. See *People v. Orange*, 168 Ill. 2d 138, 167 (1995) (concluding that, because the record did not previously contain the evidence presented by the defendant in support of his post-conviction petition, his post-conviction claim of ineffective assistance was not barred by *res judicata*). We thus turn to the merits of this case.

¶ 12 We review the court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). At the second stage of proceedings on a successive post-conviction petition, the relevant inquiry is whether the petitioner has made a substantial showing of the alleged constitutional violation such that an evidentiary hearing is warranted. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 34. The constitutional violation alleged in the amended successive petition is ineffective assistance of trial counsel based on his alleged failure to call alibi witnesses.

¶ 13 A defendant who argues ineffective assistance of counsel must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Lacy*, 407 Ill. App. 3d 442, 456-57 (2011). The failure to satisfy either prong of the

*Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000), citing *Strickland*, 466 U.S. at 697.

¶ 14 In order to establish the performance prong of the *Strickland* test, a 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). Decisions regarding which witnesses to call and evidence to present are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶ 15 Here, the record establishes that trial counsel's decision not to call defendant's alibi witnesses was a matter of trial strategy. All of defendant's witnesses were either his family or friends, and it has long been recognized that it is a reasonable trial strategy for counsel to forego presenting the testimony of someone close to defendant because that testimony is likely to carry little weight with the trier of fact. *People v. Kubat*, 114 Ill. 2d 424, 433 (1986). Furthermore, defendant's witnesses would not have provided a convincing alibi where they could not definitively prove they were with defendant the entire time he claims he was home. In addition, the witnesses' affidavits contradicted their grand jury testimony, and were inconsistent regarding where in the residence defendant was watching basketball. As the circuit court found in dismissing the petition, the fact that defendant was not accounted for at all times is significant where he could have easily left the house and returned without anyone knowing, especially considering the close proximity of defendant's residence to the crime scene. Based on the inconsistencies, the bias, and the motives to lie, trial counsel made a reasonable decision not to call defendant's alleged alibi witnesses, and, instead, decided to attack the reliability of eyewitness testimony and identifications.

¶ 16 Notwithstanding, even if we were to assume that counsel's performance in this matter was deficient, we conclude that defendant failed to establish a reasonable probability that, but for counsel's decision not to call defendant's alibi witnesses, the result of the proceeding would have been different. *People v. Johnson*, 183 Ill. 2d 176, 192 (1988), citing *Strickland*, 466 U.S. at 694. As defendant acknowledges in his brief, our supreme court stated that the evidence presented against him was "overwhelming" where he was identified by "six credible eyewitnesses." *Hayes*, 139 Ill. 2d at 135. Defendant argues, however, that the supreme court only characterized the evidence against him as overwhelming because the alibi witnesses were not presented at trial. We disagree. Based on the affidavits attached to defendant's amended petition, the potential testimony on retrial from defendant's family and friends would be inconsistent and contradictory, and thus insufficient to overcome the strong evidence of his guilt.

¶ 17 In reaching this conclusion, we find defendant's contention that the circuit court erred in dismissing his petition at the second stage because it considered matters outside of the record insufficient to necessitate remand for further proceedings. Defendant specifically points out that the circuit court relied on police reports utilized by the State in its motion to dismiss to reach its decision. While we agree with defendant that the circuit court referenced police reports showing that the proposed witnesses gave inconsistent statements to officers, that reference does not require this court to remand defendant's case for an evidentiary hearing.

¶ 18 We find *People v. Moore*, 189 Ill. 2d 521 (2000), instructive in resolving defendant's contention that remand is required because the court relied on police reports that were outside of the record. In *Moore*, 189 Ill. 2d at 531-32, the State filed a motion to dismiss the defendant's post-conviction petition, and attached to that motion counter documentation that was considered by the circuit court in its decision to dismiss the petition. Our supreme court acknowledged that motions to dismiss are generally limited to the allegations in the defendant's petition and original

trial record, and held that the counter documentation should not have been considered by the circuit court. *Moore*, 189 Ill. 2d at 532-33. The supreme court, however, did not remand the defendant's cause for further proceedings, and simply noted that it would not consider the affidavits in reaching its decision. *Moore*, 189 Ill. 2d at 533. Similarly to *Moore*, we also disregarded any information relied on by the State that was outside of the record. Here, reviewing defendant's claim *de novo*, we found that the trial record, grand jury transcripts, and defendant's pleadings showed that defendant failed to make a substantial showing of a claim of ineffective assistance of counsel. We thus find no reason to remand defendant's cause for further proceedings based on the circuit court's reference to matters relied upon by the State that were outside of the record.

¶ 19 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 20 Affirmed.