

No. 1-11-3527

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. 97 CR 4108
)	
CHARLES STEWART,)	The Honorable
)	Michael Brown,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Justices Hyman and Mason concurred in the judgment.

ORDER

- ¶ 1 *Held:* Second-stage dismissal of defendant's post-conviction petition affirmed where defendant failed to make a substantial showing of a violation of his right to effective assistance of counsel.
- ¶ 2 Defendant, Charles Stewart, appeals from an order of the circuit court of Cook County dismissing his petition for post-conviction relief under the Post-Conviction Hearing Act (Act)

(725 ILCS 5/122-1 *et seq.* (West 2010)) at the second stage of proceedings. He contends that he made a substantial showing of a constitutional violation of his right to the effective assistance of trial counsel based on counsel's failure to investigate or call a known alibi witness.

¶ 3 Following a jury trial in 2001, defendant was convicted of first degree murder, attempted first degree murder, and armed robbery in connection with an incident that occurred in the late afternoon of December 24, 1995, on the north side of Chicago. The evidence adduced at trial showed that defendant and another man entered a jewelry store, shot and killed an employee, then shot at the store owner and struck him repeatedly with a gun before fleeing with various items of jewelry. This court affirmed defendant's convictions on direct appeal (*People v. Stewart*, No. 1-01-3046 (2004) (unpublished order under Supreme Court Rule 23)), as well as the sentence imposed thereon, *i.e.*, natural life imprisonment for first degree murder, a consecutive 30-year term for attempted first degree murder, and a concurrent 30-year term for armed robbery.

¶ 4 On May 17, 2006, defendant filed a *pro se* petition for post-conviction relief alleging ineffective assistance of trial and appellate counsel. As pertinent to this appeal, defendant alleged that trial counsel was ineffective for failing to call Carol Smith as an alibi witness. In support of his petition, defendant attached the affidavit of Smith, who averred that on December 24, 1995, she lived at "365 North Oak" in Chicago, and defendant was the boyfriend of her now deceased daughter. On that date "during the hours of 5:00 p.m.[,]" she saw her daughter and defendant "in plain sight" from the window of her home. She further averred that she was asked to come to court for defendant, and called his counsel before the trial began, but counsel never returned her call, and defendant told her that his counsel was refusing to call her as a witness.

¶ 5 Defendant also attached his own signed, but unnotarized, "affidavit," stating that he had

requested his counsel to call Smith as an alibi witness, but that counsel refused, telling him that it would be best not to put on a defense at all "witness wise," because the jury would not believe anything he "had to say or offer." He also stated that counsel advised him that "it would be best not to insult the jury with trying to prove my innocense [sic], since the next step was the death penalty hearing."

¶ 6 On May 23, 2006, the circuit court dismissed defendant's petition as without merit. Defendant appealed, and this court reversed, finding that he had raised the gist of a constitutional claim that trial counsel was ineffective for failing to present Smith as an alibi witness. *People v. Stewart*, No. 1-06-1938 (2008) (unpublished order under Supreme Court Rule 23). The case was then remanded for second stage proceedings.

¶ 7 On remand, defendant was appointed counsel and granted leave to file a notarized affidavit to replace his original verification statement. On April 27, 2011, counsel filed a certificate of compliance with Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984) stating that he had consulted with defendant, and examined the report of proceedings, the post-conviction motion and sentencing. Counsel also stated that he had not prepared a supplemental petition because defendant's petition adequately set forth his constitutional claims.

¶ 8 On September 21, 2011, the State filed a motion to dismiss defendant's petition, alleging, in pertinent part, that defendant failed to make a substantial showing of ineffective assistance where the record showed that the decision not to call Smith was a matter of trial strategy. The State also claimed that the record contradicted the contents of Smith's affidavit where, in his answers to discovery, defendant claimed he was with Smith herself at the relevant time and did not allege that he was outside of Smith's home with her daughter. Moreover, even if counsel's performance was deficient in failing to call Smith, the State alleged that defendant could not

establish prejudice because the evidence against him was overwhelming.

¶ 9 After a hearing, the circuit court granted the State's motion to dismiss defendant's petition. In doing so, the court noted that Smith was listed in discovery materials as a possible alibi witness, her name was read to the jury at the time of jury selection, and defendant referenced a discussion between him and counsel regarding whether to call her as a witness in his petition. Under these circumstances, the court concluded that the decision not to call Smith was a matter of trial strategy and did not constitute ineffective assistance of counsel. Defendant now appeals that dismissal, contending that he should be granted an evidentiary hearing on his allegation of ineffective assistance of counsel.

¶ 10 At the second stage of proceedings, defendant has the burden of presenting a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed 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). In determining whether defendant has met his burden, all well-pleaded facts in the petition and affidavits are taken as true, but nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). We review *de novo* a circuit court's decision to dismiss a petition at the second stage of post-conviction proceedings. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 11 Claims of ineffective assistance of counsel are assessed under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Second, 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 one sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 12 In order to establish the performance prong of the *Strickland* test, 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).

¶ 13 Here, the record shows that Smith was known to counsel as indicated by defendant's answers to discovery, the fact that her name was read to the jury during jury selection, and defendant's reference in his petition to a discussion with counsel regarding whether to call her. In addition, Smith was the mother of defendant's girlfriend at the time, and counsel could properly consider that this close relationship could cause the jury to afford her testimony little weight. *People v. Lacy*, 407 Ill. App. 3d 442, 466-67 (2011). These circumstances thus support the conclusion that the decision not to call Smith was a strategic one, and was not objectively unreasonable. *Lacy*, 407 Ill. App. 3d at 467.

¶ 14 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 omission, the result of the proceeding would have been different. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998), citing *Strickland*, 466 U.S. at 694. The evidence that defendant committed the crimes for which he was convicted was overwhelming. Eddison Jarrin, the

jewelry store owner and attempted murder victim, testified that he had known defendant since he was 13 years old, and identified him in a photo array, line-up, and in court as the perpetrator of the crimes. Clara Ortiz was inside the store immediately before the crimes occurred and testified that defendant was one of two men who she saw inside the store at that time, and who remained there after she left. She also identified defendant in a line-up, and testified that she was "positive" of her identification.

¶ 15 Raymond Hicks testified that defendant, a friend of many years, came to his home the morning after the robbery with several bags of gold chains, rings and other jewelry. Defendant gave Hicks one of the chains and wished him a "Merry Christmas." Hicks turned the chain over to police, and it was later identified by Jarrin as being inside the store prior to the robbery. In addition, evidence was presented that defendant fled Illinois after the incident and was eventually located in a California prison using a different name.

¶ 16 In light of this overwhelming evidence, we cannot say that, but for counsel's failure to call Smith as a witness, there is a reasonable possibility that the result of the trial would have been different. *West*, 187 Ill. 2d at 434.

¶ 17 Defendant, however, contends that the evidence was not overwhelming, asserting that no physical evidence, including his fingerprints or hair, was found at the crime scene, and that there were various issues affecting the reliability of his identification as a perpetrator of the crimes. However, in response to defendant's claim on direct appeal that the admission of certain evidence was error, we found that we would nonetheless affirm based upon the "overwhelming evidence of defendant's guilt." *People v. Stewart*, No. 1-01-3046, order at 13 (2004) (unpublished order under Supreme Court Rule 23). We find no reason to find otherwise here given the strong identification evidence elicited at trial, the evidence of his flight, and testimony

of Hicks that defendant was in possession of items which had been taken from the store just hours after the incident.

¶ 18 We thus conclude that defendant failed to make a substantial showing of a constitutional violation under the Act, and we affirm the second-stage dismissal of his post-conviction petition by the circuit court of Cook County.

¶ 19 Affirmed.