

No. 1-12-0921

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. 04 CR 6048
)	
JYWANZO LOYD,)	Honorable
)	Michael F. Sheehan, Jr.,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski 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 the effective assistance of trial counsel.

¶ 2 Defendant, Jywanzo Loyd, 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.

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¶ 3 Defendant is currently serving an aggregate term of 50 years' imprisonment that was imposed on his 2007 bench convictions of first degree murder and aggravated unlawful use of a weapon. This court affirmed that judgment on direct appeal. *People v. Loyd*, No. 1-07-3367 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 The record shows that defendant was convicted on evidence showing that about 8:45 p.m. on September 21, 2001, he and two other men approached a group of individuals standing on the corner of Lockwood and Potomac Avenues in Chicago. Defendant pulled out a gun and asked who was "selling two for five," meaning who was selling drugs at below market price. The victim and defendant exchanged words, and defendant fatally shot the victim in the chest.

¶ 5 On September 24, 2010, defendant filed a post-conviction petition through counsel, alleging ineffective assistance of trial counsel. Defendant alleged, *inter alia*, that trial counsel was ineffective for failing to "interview, investigate and call to the witness stand several witnesses *** including at least one alibi witness." He also asserted that counsel was ineffective for "ignoring and failing to assert [defendant]'s demand for a jury trial[,]" for "failing to communicate, consult or discuss any possible defenses with [defendant,]" and for "failing to discuss and advise [defendant] of his constitutional right to testify at trial in his own defense."

¶ 6 In support of his petition, defendant attached the affidavit of Juawice Jones who averred, that, "On or about September 21, 2001 (Jones is unsure of the exact date) at approximately 5:30 to 6:00 p.m.[,]" she and defendant went to a restaurant with another couple. After that, they went to a gourmet popcorn shop and walked along Navy Pier, then went to a motel on Madison Street, the name of which she could not remember, where they watched television and fell asleep for the night. Jones then stated:

"the next morning, [defendant]'s cell phone kept ringing and ringing. He finally woke up at 10:00 a.m. and answered it. Jones could hear a female's voice in a very loud tone saying over and

over, "Something has happened!" At that point, [defendant] got out of bed and walked to the bathroom with the phone and continued the conversation. [Defendant] came out of the bathroom and said, "We got to go, we got to go!" *** Jones repeatedly asked what was wrong, and do you want to talk about it? [Defendant] did not respond. *** Over a week later, [defendant] finally told Jones what had happened. He stated that one of his 'home boys' had gotten shot. This was the first time Jones heard of the shooting. [Defendant] said that he had gotten shot in the park close to [defendant]'s mother's house."

¶ 7 Defendant also attached the affidavit of his mother, who stated that she attended several meetings with his attorney to discuss the case. At one meeting, counsel told her that "there were two witnesses, one boy and one girl, who told the police that it was not [defendant] who was the shooter in the case." She did "not remember" counsel telling her the names of the witnesses.

¶ 8 In his own affidavit, defendant stated that "despite assuring [defendant] that he would, [counsel] failed to call the witnesses (whose affidavits are attached) *** [and] failed to interview any witnesses for the state or investigate, interview or prepare witnesses for the defense." He also stated that counsel showed him a document "that purported to be by a witness who claimed to have seen the shooting and said that I was not the shooter and was not present." Defendant asserted that neither the document, nor "this witness" was employed in his defense.

¶ 9 On December 15, 2010, the circuit court docketed defendant's petition for further consideration. 725 ILCS 5/122-2.1(b) (West 2010). The State filed a motion to dismiss the petition on June 2, 2011, and an amended motion on November 2, 2011, alleging that defendant failed to make a substantial showing of ineffective assistance of counsel because his petition was based on "nonfactual and nonspecific assertions amounting to mere conclusions[.]". The State

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noted that defendant claimed to have "witnesses" who would testify that he was not the shooter, but that he failed to provide the names of those witnesses or an affidavit as to what their testimony would be. The State observed that Jones' affidavit was suspect because she could not remember what date she was with defendant or the name of the motel where they had stayed. The State also asserted that defendant's claims regarding his rights to testify and to a jury trial were belied by the record which showed that he had been properly admonished of his rights before choosing to waive them.

¶ 10 In his response, defendant disputed the State's assertions, and claimed, in pertinent part, that the allegations in Jones' affidavit provided an arguable basis in fact and in law for his ineffective assistance of trial counsel claim.

¶ 11 The circuit court conducted a hearing on the State's motion and entered its ruling on February 23, 2012. The court found that defendant's claims regarding his right to testify and to a jury trial were clearly contradicted by the trial record, and that his affidavit was vague and conclusory, and belied common sense. The court observed that although defendant contended that counsel failed to interview or call certain witnesses, he failed to name them. In addition, defendant's allegation that his counsel showed him a document from a possible defense witness contradicted his allegation that counsel had failed to investigate those witnesses. The court also observed that in his own affidavit, defendant referred to the "attached affidavits" of witnesses, but that his affidavit was dated, respectively, 18 and 11 days before the attached affidavits of his mother and Jones were executed. The court found this "interesting" because it meant that the affidavits could not have been before defendant at the time he executed his affidavit and referred to them as "attached."

¶ 12 The court dismissed the affidavit of defendant's mother's as "rank hearsay *** purportedly about a conversation with [counsel] who told her about two witnesses *** who did not see him at the shooting." The court noted that this averment also contradicted defendant's

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allegation that counsel had not investigated witnesses, thereby nullifying defendant's own assertions.

¶ 13 As to Jones' affidavit, the court found that her uncertainty as to the date she was with defendant "renders that affidavit and whatever positive notes it had for an alibi absolutely worthless. *** If she doesn't know what date that's on, that affidavit is not worth the paper it's written on." For these reasons, the court concluded that no evidentiary hearing was required and granted the State's motion to dismiss.

¶ 14 Defendant now appeals that dismissal, contending that he should be granted an evidentiary hearing on his allegation of ineffective assistance of counsel based on counsel's failure to present a known alibi witness at trial. Because defendant has concentrated his arguments solely on his claim that counsel failed to investigate and call Jones, we initially find that he has abandoned the remaining arguments set forth in his post-conviction petition, including those claims related to other unnamed "witnesses[.]" and forfeited them for appeal. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 15 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 therein, 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).

¶ 16 Claims of ineffective assistance of counsel are assessed under the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). Defendant must first demonstrate

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that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. Secondly, 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.

¶ 17 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).

¶ 18 Defendant argues that the court erred in determining that Jones' affidavit did not establish an alibi for the night of the shooting. He states "while Ms. Jones was candid in not remembering the exact date that she was with [defendant] in downtown Chicago, it is obvious from the rest of her affidavit that she was clear that it was the night [the victim] was killed as [defendant] relayed that to her after receiving the phone call in the hotel room." We disagree. In her affidavit, Jones stated that "[o]n or about September 21, 2001[,] adding that she was "unsure of the exact date[,] she and defendant spent an evening and night together in downtown Chicago. The next morning defendant received a phone call, and a week later, he told her that one of his "home boys" had been shot in the park close to his mother's home.

¶ 19 The trial evidence showed that the shooting occurred about 8:45 p.m. on September 21, 2001. Although defendant claims that Jones' affidavit provides an alibi for this time period, his claim is unsubstantiated by the record or supporting documents. *People v. Schladweiler*, 315 Ill. 553, 559 (1925). Because Jones could not remember the specific date she was with defendant, the only evidence tending to establish that they were downtown on the night the shooting

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occurred is the content of the phone call he reportedly received the next morning which would constitute inadmissible hearsay. *People v. Banks*, 237 Ill. 2d 154, 180 (2010) ("Hearsay is an out-of-court statement offered to establish the truth of the matter asserted."). Even if it were not, the timeline described in Jones' affidavit does not necessarily establish that the shooting occurred the previous evening, as defendant could have received a phone call about the shooting at any point after its occurrence. Jones did not allege that the caller informed defendant of when the shooting had occurred, nor did she give any other indication that she knew when the shooting happened in relation to their trip downtown. The record thus supports the trial court's conclusion that the affidavit was "worthless" and failed to further his claim of ineffective assistance of counsel.

¶ 20 We also observe that Jones was defendant's girlfriend at the time, and counsel could properly consider that this close relationship could cause the trier of fact to afford her testimony little weight. *People v. Lacy*, 407 Ill. App. 3d 442, 466-67 (2011). These circumstances support the conclusion that the decision not to call Jones was a strategic one, and that it was not objectively unreasonable. *Lacy*, 407 Ill. App. 3d at 467.

¶ 21 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. Although defendant contends that the evidence was "weak," asserting that the State's case was based on "information supplied by inconsistent and totally unbelievable convicted felons[.]" which could have been rectified if counsel had called "the witness in the attached affidavit[.]" the record shows otherwise.

Defendant was identified at trial by two eyewitnesses, and before trial by another. Although that witness recanted his earlier identification at trial, the trial court found that the witness had lied in his trial testimony, and, on direct appeal, this court deferred to the trial court's credibility

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determination and found that the facts cited by defendant did not undermine the multiple eyewitness identifications of defendant as the shooter. *People v. Loyd*, No. 1-07-3367, 8-9 (2010) (unpublished order under Supreme Court Rule 23). Insofar as defendant's underlying claim was decided on direct appeal, it is now barred by *res judicata*. *People v. Flores*, 153 Ill. 2d 264, 274 (1992). In sum, we conclude that defendant failed to show that, but for counsel's failure to call Jones as a witness, there is a reasonable possibility that the result of the trial would have been different (*West*, 187 Ill. 2d at 434), and his ineffective assistance of counsel claim fails.

¶ 22 Accordingly, we affirm the second-stage dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 23 Affirmed.