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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 03-CF-2226
)	
TIMOTHY D. ROBERTSON,)	Honorable
)	Theodore S. Potkonjak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices McLaren and Schostok concurred in the judgment.

ORDER

¶ 1 *Held:* Although the trial court erred in considering the State's evidentiary submissions, the trial court properly granted the State's motion to dismiss defendant's postconviction petition, which alleged that defense counsel was ineffective for failing to move to suppress defendant's statements and for failing to seek DNA testing: counsel had strategic reasons for both omissions, and in any event the evidence against defendant was strong enough that no prejudice resulted.

¶ 2 Defendant, Timothy D. Robertson, appeals from the second-stage dismissal of his postconviction petition, contending that the trial court improperly considered factual matters as to his claims of ineffective assistance of counsel and that he made a substantial showing of the denial

of a constitutional right sufficient to warrant a third-stage evidentiary hearing as to three of his ineffective-assistance-of-counsel claims. Because defendant did not make a substantial showing of ineffective assistance of counsel as to any of his claims, we affirm.

¶ 3

I. BACKGROUND

¶ 4 Defendant was indicted in the circuit court of Lake County. Count I of the indictment alleged first-degree murder in that defendant, without lawful justification, punched and kicked Johnny Tate, knowing that his acts created a strong probability of great bodily harm, and thereby caused Tate's death (720 ILCS 5/9-1(a)(2) (West 2002)). Count II alleged first-degree murder in that defendant, without lawful justification, and with intent to cause great bodily harm, punched and kicked Tate, and thereby caused his death (720 ILCS 5/9-1(a)(1) (West 2002)). Count III alleged first-degree murder in that defendant caused Tate's death while committing the forcible felony of robbery (720 ILCS 5/9-1(a)(3), 18-1(a) (West 2002)).

¶ 5 The following evidence is from defendant's jury trial. On June 19, 2003, Tate and Angela Roberts, who were on a date, drank Amaretto, purchased crack cocaine several times, and smoked the crack cocaine at various locations. Around 4 a.m. the following morning, the pair attempted to purchase crack cocaine from defendant and his companion. After Tate gave defendant money for the drugs, defendant, without giving Tate any drugs, exited the vehicle they were in and began to walk away. Tate followed him on foot and asked where the drugs were. Tate, who calmly asked defendant to return his money if he was not going to give him any drugs, stated he did not want to cause any trouble.

¶ 6 Defendant responded by punching Tate in the face. Tate tried fighting back but never landed a blow. Defendant punched and kicked Tate numerous times, including in the head. As Tate tried

to escape, defendant followed him and continued punching him in the chest and head. At one point, Tate was knocked down by a “pretty hard” blow to the head, and defendant “started kicking him when he was down.” According to Roberts, defendant stated that he wanted to “break some bones tonight” and also told Tate that he guessed Tate wanted to die. Defendant then dug through Tate’s pockets while Tate lay on the ground, taking a watch, cell phone, and wallet.

¶ 7 As a result of the beating, Tate had “severe head injuries” and “severe facial lacerations.” It appeared that his nose “might have been nearly ripped off.” Tate died a short time later as a result of blunt trauma to his head.

¶ 8 One of the witnesses called the police. Upon arriving, the police saw defendant standing over Tate. At that point, defendant fled on foot. After a chase, one of the officers tackled defendant. It took two officers to subdue him, because he physically resisted. Defendant did not complain of any injuries, either at the time of his arrest or afterward. The arresting officers did not observe any injuries to defendant.

¶ 9 While defendant was in the booking room of the police station, an evidence technician observed what he believed to be blood on defendant’s shoes, pants, and hand. The evidence technician collected defendant’s shoes, his blue jeans, and swabs of what “appeared to be blood” from defendant’s hand. The shoes, blue jeans, and swabs were admitted into evidence. To the evidence technician’s knowledge, the blood evidence was never analyzed in a laboratory.

¶ 10 The evidence technician did not observe any injuries, including scratches, bruises, or cuts, on defendant’s body. Nor did defendant complain to him about any injuries.

¶ 11 At the police station, defendant initially told the detectives that he and Tate had argued over a sports bet and that Tate had slapped him and ripped his sweater. Defendant explained that he was

drunk and upset that Tate had hit him for no reason, and this was what prompted him to hit and kick Tate in the face and chest. Later, defendant provided a substantially similar statement, but admitted that the argument was about a drug deal.

¶ 12 The jury was instructed on self-defense and second-degree murder, but found defendant guilty of all three counts of first-degree murder. Defendant was sentenced to 34 years in prison on count II. On direct appeal, defendant challenged his sentence only, and this court affirmed. See *People v. Robertson*, No. 2-06-0619 (2008) (unpublished order under Supreme Court Rule 23).

¶ 13 Defendant subsequently filed a *pro se* postconviction petition, claiming that his trial counsel was ineffective for failing to seek suppression of his statements to the police, that his trial counsel was ineffective for failing to have the bloody pants tested for DNA to show that defendant's blood was on the pants, and that his appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness regarding the bloody pants. The trial court found that the *pro se* petition stated a gist of a constitutional claim and appointed counsel.

¶ 14 Counsel filed a supplemental postconviction petition that adopted the claims in the *pro se* petition, plus added a claim of ineffective assistance of appellate counsel for not raising on direct appeal the issue of hearsay testimony at sentencing. The State moved to dismiss the postconviction petition, attaching a combined affidavit from defendant's two trial attorneys regarding their trial strategy, defendant's signed statement to the police, and a letter from appellate counsel to defendant explaining why she would not raise the issue of trial counsel's ineffectiveness as to the DNA testing of the bloody pants. The trial court granted the motion to dismiss, based, in part, on the evidentiary materials submitted by the State.

¶ 15 Defendant filed a notice of appeal, and later filed a *pro se* motion to reconsider the dismissal of his postconviction petition. This court granted defendant's motion to dismiss his appeal, and defendant, in turn, filed a supplemental motion to reconsider the dismissal of his postconviction petition. The trial court denied the supplemental motion to reconsider, and defendant filed a timely notice of appeal.

¶ 16

II. ANALYSIS

¶ 17 On appeal, defendant raises four issues. Specifically, he contends that the trial court erred in dismissing his postconviction petition when it improperly relied on factual matters at the second stage of the proceeding. He alternatively posits that he made a substantial showing of a constitutional violation as to his ineffective-assistance-of-counsel claims related to trial counsel's failure to seek suppression of his statements, trial counsel's failure to obtain DNA testing of his bloody jeans, and appellate counsel's failure to raise the ineffectiveness issue related to the DNA testing. He does not challenge the dismissal of his claim of ineffective assistance of appellate counsel regarding the hearsay testimony at sentencing. We consider each argument in turn.

¶ 18 We first address defendant's contention that the trial court improperly considered the evidence included with the motion to dismiss in dismissing his postconviction petition at the second stage. The State correctly concedes that the trial court improperly considered the evidence included with its motion to dismiss. See *People v. Moore*, 189 Ill. 2d 521, 533 (2000). That said, we may, without considering those evidentiary materials, review whether the trial court otherwise correctly dismissed the postconviction petition. See *Moore*, 189 Ill. 2d at 533; see also *People v. Davis*, 382 Ill. App. 3d 701, 706 (2008) (reviewing court may affirm the dismissal of a postconviction petition on any basis in the record).

¶ 19 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) establishes a three-stage process for adjudicating a postconviction petition. If the petition is not summarily dismissed at stage one, it advances to the second stage, where counsel may be appointed. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). After counsel has made any amendments to the petition, the State may move to dismiss the petition. *Pendleton*, 223 Ill. 2d at 472.

¶ 20 In considering a second-stage motion to dismiss, the court must determine whether the petition, and any accompanying documentation, made a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If no such showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. If a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage for an evidentiary hearing. *Edwards*, 197 Ill. 2d at 246.

¶ 21 In the context of a claim of ineffective assistance of counsel, an evidentiary hearing is required only if an allegation in the petition, supported by the trial record and any affidavits attached to the petition, makes a substantial showing of a violation of the right to effective counsel. *People v. Hopley*, 182 Ill. 2d 404, 450-51 (1998). A trial court may review the trial record in determining whether a claim of ineffective assistance of counsel should be dismissed at the second stage. *Moore*, 189 Ill. 2d at 533. Review of a dismissal of a postconviction petition at the second stage is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 22 To establish ineffective assistance of counsel, a defendant must prove that: (1) his counsel's performance was deficient; and (2) he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To succeed on any ineffective assistance claim, a defendant must overcome the strong presumption that the challenged conduct fell within the realm of sound trial

strategy. *Strickland*, 466 U.S. at 689. Issues of trial strategy are viewed, not in hindsight, but from the time of counsel's conduct, and with great deference for his decisions. *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002).

¶ 23 Although the failure to demonstrate either prong is fatal to an ineffectiveness claim (*People v. Palmer*, 162 Ill. 2d 465, 475-76 (1994)), the claim may be disposed of on the prejudice prong alone, without deciding whether counsel's performance was deficient (*Strickland*, 466 U.S. at 694). Sufficient prejudice will be found where there is 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 that is sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694.

¶ 24 Applying these principles, we address defendant's claim that his trial counsel was ineffective for failing to move to suppress his statements to the police following his arrest. We consider trial counsel's decision in that regard to be one of sound trial strategy. Although defendant may have incriminated himself to some degree when he made the statements, the statements also contained exculpatory matters related to his self-defense theory. Absent this evidence, he would have been hindered significantly in arguing that Tate was the instigator and aggressor and that the force he used was necessary to defend himself. It was eminently reasonable for trial counsel to forgo seeking suppression of the statements, considering that the statements, in significant part, supported his defense theory. Therefore, we cannot say that such a decision was outside the bounds of the strong presumption of trial strategy. Thus, defendant did not make, as to this claim, a substantial showing of ineffectiveness under the performance prong of *Strickland*.

¶ 25 Having said that, we also conclude that defendant made no substantial showing of prejudice under *Strickland* as to the ineffectiveness claim based on the failure to seek suppression of his statements. Had defendant's statements been barred from the trial, there was no reasonable probability that the outcome would have been different. This is so because there was strong evidence of defendant's guilt, irrespective of any incriminating aspects of his statements. Three witnesses, two of whom were unrelated to Tate, testified that defendant was the aggressor, that Tate was unable to defend himself, and that Tate did not injure defendant. Further, the injuries suffered by Tate demonstrated that defendant used an extensive amount of force in striking Tate in the chest and head. There was also evidence that showed that defendant relentlessly and violently continued to strike Tate while Tate was defenseless on the ground and trying to escape. In light of this overwhelming evidence of defendant's guilt, the absence of the statements to the police would have made no difference in the trial's outcome. Accordingly, defendant did not make a substantial showing of prejudice sufficient to satisfy that prong of *Strickland* and to warrant advancing this claim to the third stage.

¶ 26 We next address defendant's contention that his trial counsel was ineffective for failing to seek DNA testing of his bloody blue jeans. There was an obvious benefit in not having the jeans tested. Had the jeans been tested and had none of defendant's blood been found on them, then trial counsel could not have argued, as he did, that defendant's blood might have been on the jeans and that the State had not shown otherwise. Further, had the testing shown that none of defendant's blood was on the jeans, the door would have been wide open for the State to rely on that fact to bolster its case. Also, considering the lack of evidence that defendant was injured, aside from defendant's own self-serving assertion to that effect, it was certainly reasonable for trial counsel to

doubt whether DNA testing would show defendant's blood on the jeans. We find it to be sound strategy for trial counsel to have hedged his bet by forgoing any testing of the jeans and allowing himself to argue that the blood could have been defendant's.

¶ 27 On the other hand, there was little benefit to having the jeans tested. Even had the testing revealed the presence of defendant's blood, there was no evidence that Tate had sought to injure defendant. To the contrary, the evidence overwhelmingly showed that defendant was the aggressor. Therefore, even had the testing shown that defendant's blood was on the jeans, it would have had minimal exculpatory value. When the potential minimal benefit of having the jeans tested was balanced against the clear benefit of not having the jeans tested, the balance justified the decision not to have them tested. That decision was a classic exercise of sound trial strategy. Because defendant did not substantially show any deficient performance as to trial counsel's decision not to seek testing of the bloody jeans, the trial court did not err in dismissing the ineffectiveness claim at the second stage.

¶ 28 In terms of prejudice, even if the DNA testing had been done, and assuming that defendant's blood would have been found on the jeans, such evidence would have had no impact on the trial in light of the evidence against defendant. Absent any independent evidence of obvious or significant injury to defendant, the jury likely would have concluded that defendant's blood came from some minor injury he suffered during the attack on Tate or possibly during his arrest. The effect on the credibility of the State's witnesses would have been minimal at best, because evidence of defendant's blood on his jeans would not have conclusively established that he suffered an injury as a result of Tate's aggression. Indeed, even with such evidence before it, there was more than ample evidence for the jury to have found that, although defendant was injured, he was the aggressor

and used force in a manner that supported his guilt beyond a reasonable doubt. Therefore, we conclude that defendant did not make a substantial showing of prejudice sufficient to require advancing this claim to the third stage.

¶ 29 That leaves defendant's claim of ineffective assistance of appellate counsel. Because defendant did not make a substantial showing of the ineffectiveness of trial counsel as to the lack of DNA testing of the bloody jeans, he necessarily failed to do so as to the claim that appellate counsel was ineffective for failing to raise that issue on direct appeal. See *People v. Enis*, 194 Ill. 2d 361, 397 (2000) (because claim of ineffectiveness of trial counsel would not have succeeded on direct appeal, related claim of ineffectiveness of appellate counsel necessarily failed).

¶ 30

III. CONCLUSION

¶ 31 For the reasons stated, we affirm the decision of the circuit court of Lake County dismissing in its entirety defendant's postconviction petition.

¶ 32 Affirmed.