

2014 IL App (2d) 120559-U  
No. 2-12-0559  
Order filed January 14, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Kane County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 03-CF-1351
	)	
JOVAN D. DANIELS,	)	Honorable
	)	David R. Akemann,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SPENCE delivered the judgment of the court.  
Justices Zenoff and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to interview or subpoena three witnesses: defendant did not allege or show that counsel knew that those witnesses might have offered exculpatory testimony, and in any event there was no reasonable probability that such testimony would have changed the outcome of the trial.

¶ 2 Defendant, Jovan D. Daniels, appeals from the second-stage dismissal of the claim in his postconviction petition that his trial counsel was ineffective for failing to interview or subpoena

three potentially exculpatory witnesses. Because defendant failed to make a substantial showing of the denial of a constitutional right as to that claim, we affirm.

¶ 3

#### I. BACKGROUND

¶ 4 Defendant, who was an inmate at the Kane County jail, was involved in an attack on correctional officers Yolanda Rodriguez and Manuel Olalde. He was indicted in the circuit court of Kane County on one count of aggravated arson (720 ILCS 5/20-1.1(a) (West 2002)), one count of aggravated battery against Rodriguez (720 ILCS 5/12-4(b)(6) (West 2002)), one count of aggravated battery against Olalde (720 ILCS 5/12-4(b)(6) (West 2002)), and one count of mob action (720 ILCS 5/25-1(a)(1) (West 2002)).

¶ 5 The evidence at his jury trial established that defendant, who was housed in cell B, was one of five inmates in cellblock 151 during the incident. Also housed in cellblock 151 were Frank Aquino in cell B, Jesse Martinez and Shermain Shamley in cell C, and Anthony Butler in cell D (cells A and E were unoccupied). Within cellblock 151 was a “catwalk,” approximately 3 ½ feet wide, that ran the length of the cellblock and allowed access to the five cells.

¶ 6 While Rodriguez was escorting a nurse in the cellblock, Butler grabbed Rodriguez by her hair. Although she escaped his grasp, the five inmates, who were in their cells, began pelting her with feces, urine, pencils, and bottles. During the barrage, the nurse escaped the cellblock, but Rodriguez was unable to do so and radioed for assistance.

¶ 7 Several officers responded, including Olalde. When he looked into the cellblock, Olalde observed “five sets of arms” throwing items at Rodriguez. He also saw defendant throwing objects at the other responding officers, some of whom had already entered the cellblock.

¶ 8 Olalde covered his head with a blanket, grabbed a second blanket, and entered the cellblock to rescue Rodriguez. As he made his way to Rodriguez at the far end of the cellblock,

Olalde was hit with feces and urine. At one point, Butler grabbed Olalde's radio microphone and tore Olalde's uniform shirt.

¶ 9 After Olalde reached Rodriguez, he placed a blanket over her head. Butler yelled, "They have got a blanket over that bitch, yank that shit from them, we are going to kill you, bitch." As Olalde and Rodriguez attempted to retreat along the catwalk toward the exit, defendant and Aquino tried to remove the blankets and to strike Olalde and Rodriguez. Olalde was struck on the head with a hard object. As the blanket was removed from his head, he was "spun around [and] looked directly into [cell B] and saw the inmates that were involved." According to Olalde, defendant had the blanket in his left hand and a "soap sock"<sup>1</sup> in his right hand.

¶ 10 Several days after the incident, Olalde encountered defendant in another part of the jail. Defendant asked to speak to Olalde. He told Olalde that he did not know that it was he who had exited the cellblock with the blanket over his head or that it was he whom defendant had struck.

¶ 11 One of the correctional officers who responded to the melee, Ben Frary, heard defendant yelling, among other things, that "we are going to fuck [the responding officers] up." He recognized defendant's voice, having heard him speak more than 30 times.

¶ 12 Defendant was acquitted of the aggravated arson charge, but was convicted of the other three offenses. He was sentenced to consecutive terms of five years' imprisonment for the aggravated battery offense against Rodriguez and three years' imprisonment for the aggravated battery offense against Olalde, and a concurrent term of two years in prison for the mob action

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<sup>1</sup> A soap sock is a "mace-like weapon." *Howard v. Maselko*, No. 11 C 9278, 2013 WL 1707955, \* 1 (N.D. Ill. April 19, 2013); see also *Tolliver v. Sheets*, 594 F. 3d 900, 910 n. 3 (6th Cir. 2010) (soap sock is an "admittedly deadly weapon"); *Trejo v. Gomez*, No. C-92-4556 EFL, 1995 WL 295832, \* 1 (N.D. Cal. May 10, 1995) (soap in a sock is "a common inmate weapon").

offense. He appealed to this court, challenging his mob action conviction and sentence only, and we affirmed. See *People v. Daniels*, No. 2-06-0371 (2008) (unpublished order under Supreme Court Rule 23).

¶ 13 Defendant filed a *pro se* postconviction petition, alleging, among other claims, that he was denied the effective assistance of trial counsel, because his attorney failed to interview or subpoena Butler, Martinez, and Aquino. Defendant alleged that those three witnesses would have testified that defendant was not involved in the incident. Although defendant alleged in his petition that trial counsel failed “to conduct even a minimal investigation into whether or not the [witnesses] would be willing to testify that [he] did not have any involvement in [the incident],” he did not allege that he informed trial counsel, or that trial counsel otherwise knew, that the three witnesses could, or would, provide exculpatory testimony.

¶ 14 Defendant included with his postconviction petition the notarized affidavits of Martinez and Butler and the nonnotarized statement of Aquino. Martinez stated in his affidavit that defendant “did not participate or had any involvement at all what so ever in [the] incident” and that he was willing to testify in that regard. Butler’s affidavit stated that its purpose was “to clear up the misunderstanding that [defendant] had any involvement in [the incident].” Butler further stated that defendant “tried to talk us out of are [*sic*] actions.” According to Butler, he was willing to testify to his assertions. Finally, Aquino stated that he was housed in cell B with defendant and that defendant “did not have any involvement in the incident that occurred in Cellblock 151.” The three statements were silent as to whether trial counsel knew about the witnesses’ potentially exculpatory testimony.

¶ 15 Defendant’s postconviction petition proceeded to the second stage, and he was appointed counsel. The trial court granted the State’s motion to dismiss the petition in its entirety. As to

the ineffective-assistance-of-counsel claim regarding the three potential witnesses, the trial court refused to consider Aquino's statement, because it was not notarized. The court also ruled that, because defendant did not allege, nor did the two remaining affidavits state, that trial counsel knew of Butler's and Martinez's potentially exculpatory testimony, trial counsel's failure to subpoena the witnesses was not objectively unreasonable. The court further ruled that, even if trial counsel's conduct was objectively unreasonable, defendant failed to demonstrate prejudice, because of Olalde's "clear testimony at trial" that defendant was involved in throwing substances and objects at Rodriguez and struck Olalde on the head with a soap sock. Defendant filed this timely appeal.

¶ 16

## II. ANALYSIS

¶ 17 On appeal, defendant contends that his postconviction counsel did not provide reasonable assistance, because he failed to obtain a notarized affidavit of Aquino. He further maintains that his postconviction petition should have been advanced to the third stage, because, based on the statements of the three witnesses, he made a substantial showing that trial counsel was ineffective for failing to interview or subpoena any of those witnesses.

¶ 18 A postconviction proceeding has three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the first stage, the trial court must, within the prescribed time, review the petition and decide whether it is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. If the petition is not dismissed at stage one, then it advances to the second stage, where counsel may be appointed (725 ILCS 5/122-4 (West 2010)) and the State is allowed to file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2010)). *Hodges*, 234 Ill. 2d at 10-11.

¶ 19 At the second stage, the trial court must decide whether the petition and any accompanying documents make a substantial showing of a constitutional violation. *People v.*

*Edwards*, 197 Ill. 2d 239, 246 (2001). If such a showing is not made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 246. If a substantial showing is set forth, the petition is advanced to the third stage, where an evidentiary hearing is held. *Edwards*, 197 Ill. 2d at 246. Our review of a second-stage dismissal is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 20 To succeed on a claim of ineffective assistance of trial counsel, a defendant must show both that his counsel's performance fell below an objective standard of reasonableness (*Strickland v. Washington*, 466 U.S. 668, 688 (1984)) and that there was 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). To satisfy the first part of the test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms. *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, trial strategy, or trial tactics will not support a claim of ineffective assistance of counsel. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 21 An attorney does not employ valid trial strategy, however, where he fails to conduct a reasonable investigation, fails to interview witnesses, or fails to subpoena witnesses. *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008). Attorneys are obligated to explore all readily available sources of evidence that might benefit their clients. *Irvine*, 379 Ill. App. 3d at 130. The failure to investigate and develop a defense, and the failure to present available witnesses to corroborate a defense, have been found to be ineffective assistance of counsel, because defense counsel has a legal and ethical obligation to explore and investigate a client's case. *Irvine*, 379 Ill. App. 3d at 130. Despite that general rule, an attorney is not required to "read the defendant's mind" about the existence of a potentially exculpatory witness and the potential nature of the witness's testimony. *Irvine*, 379 Ill. App. 3d at 130. Whether defense counsel's failure to investigate

amounts to ineffective assistance of counsel is determined by the value of the evidence that arguably should have been presented and the closeness of the presented evidence. *People v. English*, 334 Ill. App. 3d 156, 164 (2002); *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001) (citing *People v. House*, 141 Ill. 2d 323, 386 (1990)).

¶ 22 In our case, defendant relies primarily on the three statements of his fellow inmates,<sup>2</sup> contending that he made a substantial showing that his trial counsel was ineffective for failing to interview or subpoena those potentially exculpatory witnesses. The statements, however, were all silent as to whether trial counsel knew that the witnesses were willing to testify or that, if they were, they would have offered potentially exculpatory testimony. Additionally, defendant's postconviction petition did not allege that he advised trial counsel that any of the witnesses might offer potentially exculpatory testimony. Absent such knowledge, trial counsel could not be expected to read defendant's mind about such possible evidence. See *Irvine*, 379 Ill. App. 3d at 130. Thus, defendant did not make a substantial showing of trial counsel's ineffectiveness sufficient to advance the petition to the third stage.

¶ 23 Although defendant contends that his trial counsel should have explored the potential testimony of the three witnesses, because they were identified as part of discovery, such contention is meritless. Even though trial counsel generally should have been aware of the three witnesses, there is no indication in defendant's postconviction petition, or supporting materials, that trial counsel had any idea that any of the three witnesses could, or would, have offered

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<sup>2</sup> Because we consider the nonnotarized statement of Aquino, we need not decide whether postconviction counsel offered unreasonable assistance when he failed to obtain a notarized affidavit. Nonetheless, we note that there was no prejudice from his having failed to do so, as Aquino's statement essentially duplicated the other two.

exculpatory testimony. Defendant, who was in the best position to alert trial counsel to any such potential testimony, did not allege in his petition that he did so. Absent such knowledge on the part of trial counsel, it is not reasonable to expect him to have investigated whether any of those three individuals, all of whom were alleged perpetrators in the incident, might have exculpated defendant.

¶ 24 Further, in light of the evidence at trial, trial counsel was not ineffective for failing to investigate the possibility of such testimony. Although all three witnesses stated that defendant was not involved in the incident, the overwhelming evidence at trial clearly established that defendant threw bodily substances and other objects at Rodriguez and struck Olalde with a soap sock. Additionally, defendant essentially apologized to Olalde for striking him during the incident. Finally, Frary testified that he heard defendant, with whose voice he was quite familiar, yelling that they were going to “fuck up” the responding officers, one of whom was Olalde. Unlike in the cases relied on by defendant, such as *People v. Makiel*, 358 Ill. App. 3d 102 (2005), the evidence of guilt here did not present a close call.

¶ 25 Finally, even if trial counsel had a duty to investigate whether any of the three witnesses could, or would, have offered exculpatory testimony, his failure to do so was not prejudicial under *Strickland*. In light of the overwhelming evidence of defendant’s guilt, even had the three witnesses testified that defendant was not involved, it is not reasonably probable that the outcome of the proceeding would have been different.

¶ 26 III. CONCLUSION

¶ 27 For the reasons stated, we affirm the judgment of the circuit court of Kane County dismissing defendant’s postconviction petition at the second stage.

¶ 28 Affirmed.