FOURTH DIVISION
January 29, 2015

No. 1-11-3424

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.	)	Nos. 01 MC2 8400
	)	02 CR 3364
	)	
JOHN TEBBENS,	)	Honorable
	)	Garritt E. Howard,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

O R D E R

¶ 1 *Held*: Second-stage dismissal of defendant's post-conviction petition affirmed where defendant failed to make a substantial showing of ineffective assistance of trial counsel.

¶ 2 Defendant John Tebbens appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et. seq. (West 2006)). He contends that he made a substantial

showing of a claim of ineffective assistance of trial counsel to warrant an evidentiary hearing.

¶ 3 The record shows that defendant was charged with reckless conduct, resisting a peace officer, and three counts of aggravated battery to a police officer in connection with an incident that occurred at approximately 10 a.m. on December 31, 2001, in Skokie, Illinois. He was subsequently convicted of one count of aggravated battery to a police officer, reckless conduct, and resisting a peace officer. On direct appeal this court reversed his conviction for aggravated battery to a police officer, and affirmed his remaining convictions. For purposes of this appeal, we include only the pertinent facts of this case. A full recitation of the facts can be found in the Rule 23 order relating to defendant's direct appeal (*People v. Tebbens*, No. 1-05-0583 (2006) (unpublished order under Supreme Court Rule 23)).

¶ 4 At defendant's jury trial, the State presented evidence that on the morning of December 31, 2001, defendant picked up his five-year-old daughter from the police station in Skokie pursuant to the terms of his court-ordered visitation. While doing so, defendant videotaped his daughter inside of the police station. While securing his daughter into his van, which was parked outside of the police station, defendant was approached by Officer Peter Chmiel, who questioned him about the purpose of the videotaping. Defendant stated that he had a reason for doing so, but did not state that reason, then drove away. However, at that time, Officer Chmiel was leaning into the open door of defendant's van, and his right shoulder and the van's door made contact as defendant drove away. Officer Chmiel broadcast a message over the police radio describing the incident and requested that officers stop defendant.

¶ 5 Shortly thereafter, Sergeant Fred Brehmer and Detective Tim Gramins responded to Officer Chmiel's message and approached defendant's van, which had been pulled over by other officers several blocks away from the police station. Sergeant Brehmer informed defendant that

he was under arrest for using his vehicle to strike an officer, and repeatedly asked him to exit his van, but defendant did not do so. Defendant denied striking an officer, and stated that he was going to call his lawyer, after which he rolled up his window. Defendant was holding a video camera at that time and appeared to be videotaping the incident.[1] Sergeant Brehmer saw defendant's hand move toward the gear shift, and, because he feared defendant was a flight risk, he broke the front, driver's side window of the van with a baton. He then reached into the van to shut off the ignition and remove the keys, however defendant grabbed Sergeant Brehmer's arm and did not let go until the sergeant hit him with a baton and another officer sprayed him with pepper spray. During the struggle that ensued, defendant grabbed Sergeant Brehmer's inner thigh near his groin and squeezed. Sergeant Brehmer was also struck in the shoulder by what he believed to be a video camera. Officers were subsequently able to handcuff defendant and transport him to the police station, as well as safely remove defendant's daughter from the scene.

¶ 6 Defendant testified that he had not hit Officer Chmiel with the van door, given that the officer had backed out of the van before he drove away. When he was pulled over shortly thereafter, he heard officers screaming at him to get out of the van, but did not do so because he was afraid the officers would beat him. Defendant described an incident that occurred at the police station in Skokie on December 20, 2001, during which he and his ex-wife argued over his court-ordered visitation and the police refused to enforce his visitation order. On that date, Sergeant Brehmer yelled at defendant that he would "beat the shit out of" him and lock him up the next time he saw him. Other officers, including one he believed to be Officer Chmiel, screamed similar threats. Defendant related this incident to his attorney, who advised him to

[1] A videotape of the incident, which included defendant's encounter with Officer Chmiel, as well as his subsequent encounter with the other officers, was played for the jury at various times throughout the State's, as well as defendant's, case-in-chief.

retreat if he had any trouble with the officers in the future. Defendant further testified that after he was sprayed with pepper spray on December 31, 2001, he promptly responded to the officers' instructions to put his hands behind his back, but the officers repeatedly struck him on the head and jabbed him in the back with what he assumed to be a baton. Defendant denied knowingly or intentionally striking any of the officers. A defense expert testified that it was not possible, as a matter of physics, that the van door could have struck Officer Chmiel.

¶ 7 Kelly Yates, defendant's girlfriend, testified regarding the incident that occurred at the Skokie police station on December 20, 2001, and substantially confirmed defendant's description of events. In particular, she corroborated his account that officers, including Sergeant Brehmer, threatened defendant and shouted obscenities at him at that time.

¶ 8 In rebuttal, Officer Chmiel testified that he had never seen defendant before December 31, 2001, and Sergeant Brehmer testified that although he had seen defendant at the Skokie police station on December 20, 2001, he had never threatened defendant, nor had any officer threatened defendant in his presence.

¶ 9 During closing arguments, defendant counsel argued, *inter alia*, that defendant acted as he did out of necessity. The jury received an instruction on the requisite elements for the defense of necessity.

¶ 10 The jury found defendant not guilty of aggravated battery to Officer Chmiel and Detective Gramins, and guilty of aggravated battery to Sergeant Brehmer, reckless conduct and resisting a peace officer. He was sentenced to two years' probation, 30 hours of community service and a $1,000 fine for aggravated battery, and a concurrent sentence of two years' misdemeanor probation and 30 hours of community service for reckless conduct and resisting a police officer.

¶ 11 Defendant filed a direct appeal in which he argued that (1) the indictment charging him with aggravated battery was defective because it alleged two alternative acts in the same count; (2) the testimony of the treating physicians as to the contents of his report should have been stricken as hearsay; and (3) the prosecutor's cross-examination of him unfairly shifted the burden of proof, diminished his credibility, and distracted the jury, denying him his right to a fair trial. This court reversed defendant's conviction and sentence for aggravated battery, finding that the aggravated battery counts in the indictment were void due to a lack of specificity, and affirmed his remaining convictions. *Tebbens*, No. 1-05-0583, Order at 12-17.

¶ 12 Defendant subsequently filed a *pro se* postconviction petition in which he raised numerous claims, including, in relevant part, that trial counsel provided ineffective assistance in failing to heed his request that counsel hire and call his former therapist, Dr. Eliezer Margolis, as an expert witness to provide testimony regarding his diagnosis of post traumatic stress disorder (PTSD) and its impact on the incident.

¶ 13 In an affidavit filed in support of that petition, Dr. Margolis detailed his professional relationship with defendant, which spanned from May 1999 through July 2003, as well as his assessment of defendant's mental state at the time of the incident. Dr. Margolis averred that defendant suffered from PTSD, which is a syndrome of disturbed psychological equilibrium, impaired functioning, and entrenched, unresolved adjustment following exposure to a highly stressful situation. Dr. Margolis averred that this condition "greatly influenced" defendant's behavior on the day of the incident, causing him to be hypervigilant, keenly alert to the possible presence of threat or danger, and to engage in constant scanning of his immediate environment. Dr. Margolis further averred that the incident served as a retraumatizing dynamic which, *inter alia*, entrenched further "the established patterns of maladaptive response." Dr. Margolis opined

that on the day of the incident, defendant's response was caused by a mind that perceived that unless he could arrange for their escape, a grievous and immediate harm would come to his young daughter from individuals who had recently threatened him.

¶ 14 Defendant's petition advanced to the second stage and postconviction counsel was appointed. The State filed a motion to dismiss defendant's postconviction petition. Defendant subsequently privately retained postconviction counsel, who filed a Rule 651(c) certificate, along with a supplemental petition. In that supplemental petition, counsel incorporated defendant's *pro se* postconviction claims, as well as added the claim that trial counsel was ineffective for violating attorney-client privilege by disclosing to the State documents that were prepared in anticipation of trial, thereby assisting the State in prosecuting defendant. The State filed a supplemental motion to dismiss which addressed this additional claim. The circuit court granted the State's motion to dismiss, finding that the petition was untimely, was barred by the doctrines of *res judicata* and waiver, and that defendant's claims lacked merit.

¶ 15 On appeal, defendant challenges the propriety of that dismissal, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). We initially observe that defendant has concentrated solely on his claim of ineffective assistance of trial counsel based on counsel's failure to call Dr. Margolis at trial, thereby abandoning the remainder of the claims raised in his postconviction petition and forfeiting them for appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995). Additionally, because we review the judgment and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 16 At the second stage of postconviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473

(2006). A petition may be dismissed at this stage 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 making that determination, all well-pleaded facts in the petition and affidavits are taken as true; however, nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 17 To establish a claim of ineffective assistance of trial counsel warranting further proceedings under the Act, defendant must show that counsel's performance was deficient and that he suffered prejudice as a result, i.e., a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). 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 (1992).

¶ 18 Defendant's ineffectiveness claim is based on trial counsel's failure to call Dr. Margolis at trial. The State responds that defendant's claim is time barred, as well as waived because he did not raise it on direct appeal. However, because, as discussed below, we find that defendant failed to make a substantial showing of ineffective assistance of counsel, we need not address these additional arguments.

¶ 19 To satisfy the deficient performance prong of Strickland, defendant must overcome the strong presumption that the allegedly deficient action or inaction was the result of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Defense counsel's decision whether to call a particular witness at trial is a matter of trial strategy and is, in general, immune from claims of ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989).

¶ 20 Defendant maintains that Doctor Margolis' testimony would have been the best support for his defense of necessity. The elements of the affirmative defense of necessity are that (1) the

person raising the defense was without blame in occasioning or developing the situation, and (2) reasonably believed such conduct was necessary to avoid a greater public or private injury than that which might reasonably have resulted from his own conduct. *People v. Janik*, 127 Ill. 2d 390, 399 (1989). The necessity defense requires the jury to determine whether a defendant's actions were objectively reasonable under the circumstances presented, and defendant's reasonable belief has been held to encompass an objective factor. *People v. Kucavic*, 367 Ill. App. 3d 176, 180 (2006).

¶ 21 Initially we note that it is highly doubtful that Dr. Margolis' testimony would have been admitted, even if counsel had attempted to present it at trial, given that the essence of defendant's argument is not one of necessity, but rather, that at the time of the incident he had diminished capacity, which was caused by the symptoms of his PTSD. However, diminished capacity is not a valid defense under Illinois law, and thus Dr. Margolis' testimony regarding defendant's PTSD would not have been admissible on this basis. See *People v. Hulitt*, 361 Ill. App. 3d 634, 640-41 (2005) (finding that a psychologist's testimony regarding defendant's postpartum depression would not have been admissible to support defendant's contentions regarding her mental state at the time of the incident, given that diminished capacity is not a valid defense in Illinois).

¶ 22 Moreover, even if we were to conclude that expert testimony would be admissible on the issue of reasonableness in relation to a defense of necessity, defendant has not overcome the presumption that trial counsel's decision not to call Dr. Margolis was based on sound trial strategy. In his affidavit, Dr. Margolis averred that he would have testified regarding the details of defendant's PTSD diagnosis and its effect on his actions on the night of the incident. Dr. Margolis further averred that defendant's PTSD caused "disturbed psychological equilibrium, [and] impaired functioning," and that the incident at issue served as a retraumatizing dynamic

which entrenched further "the established patterns of maladaptive response." We fail to see how such testimony would have supported defendant's affirmative defense of necessity, given that the essence of that testimony would establish that defendant's beliefs and reactions were not those of a reasonable person, but rather, were "impaired" and "maladaptive" as a result of his PTSD. As noted above, defendant's reasonable belief in relation to the defense of necessity encompasses an objective factor (*Kucavik*, 367 Ill. App. 3d at 180), and here we find that trial counsel's decision not to call Dr. Margolis constituted sound trial strategy where such testimony would likely have hindered, rather than supported defendant's necessity defense.

¶ 23 For the foregoing reasons, we find that defendant failed to make a substantial showing of ineffective assistance of counsel, and, accordingly, affirm the order of the circuit court of Cook County.

¶ 24 Affirmed.