2015 IL App (1st) 120371-U

SIXTH DIVISION
May 22, 2015

No. 1-12-0371

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	98 CR 19091
	)	
RODNEY THOMAS,	)	Honorable
	)	Maura Slattery Boyle,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices Bertina Lampkin and Mary K. Rochford concurred in the judgment.

ORDER

Held: Trial court properly dismissed petitioner's amended postconviction petition at the second stage of the postconviction proceedings where petitioner failed to establish that his trial counsel or appellate counsel on direct appeal provided ineffective assistance.

¶ 1 Petitioner, Rodney Thomas, appeals from a circuit court order dismissing his amended postconviction petition at the second-stage of the postconviction proceedings under the Illinois Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)). For the reasons that follow, we affirm.

¶ 2 This case arose out of the armed robbery of a jewelry store, Ted's Jewelers located at 5334 South Archer Avenue, in Chicago, Illinois, which ended in the shooting death of the store's owner Tadeusz Pawlikowski. Following a jury trial, petitioner was convicted of first-degree murder for the shooting death of Mr. Pawlikowski, two counts of armed robbery concerning Mr. Pawlikowski and his wife Anna Pawlikowski, and one count of unlawful restraint of Janino Labno, a jewelry store customer. Petitioner was sentenced to 60 years in prison for murder, with a consecutive sentence of 15 years for the armed robbery of Mr. Pawlikowski, and concurrent terms of 10 years for the armed robbery of Mrs. Pawlikowski and 5 years for the unlawful restraint.

¶ 3 On direct appeal, we vacated the armed robbery conviction concerning Anna Pawlikowski under the one-act, one-crime doctrine, but affirmed the judgment of the trial court in all other respects. *People v. Thomas,* No. 1-02-1727 (October 24, 2003) (unpublished order under Supreme Court Rule 23). Petitioner filed a *pro se* petition for postconviction relief alleging various challenges to his convictions. Petitioner's petition was later amended by counsel. The trial court dismissed the amended petition at the second-stage of the postconviction proceeding giving rise to the instant appeal.

¶ 4 The facts are set out at length in our decision on direct appeal and therefore we repeat only those facts relevant to the disposition of the issues raised in this postconviction appeal.

¶ 5 ANALYSIS

¶ 6 The Illinois Post-Conviction Hearing Act (Act) provides a procedure by which a criminal defendant can collaterally attack his conviction or sentence based upon a substantial denial of his federal or state constitutional rights. *People v. Tenner*, 175 Ill. 2d 372, 377-78 (1997); *People v. Haynes*, 192 Ill. 2d 437, 464 (2000). The Act provides defendants the opportunity to present claims based on matters outside the record. See *People v. Plummer*, 344 Ill. App. 3d 1016, 1020 (2003) ("Claims of ineffective assistance of counsel frequently implicate matters outside the record or require resolution of disputed facts").

¶ 7 A post-conviction proceeding not involving the death penalty is divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Petitioner's petition was dismissed at the second-stage of the postconviction process.

¶ 8 To survive dismissal at the second-stage, the petition and supporting documents must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). At this stage, all well-pled facts in the petition are taken as true unless positively rebutted by the record. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 9 On appeal, petitioner raises claims of ineffective assistance of trial and appellate counsel. Claims of ineffective assistance of appellate counsel are measured against the same standard as claims of ineffective assistance of trial counsel. *People v. Plummer*, 344 Ill. App. 3d 1016, 1019 (2003).

¶ 10 Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This requires

not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronic*, 466 U.S. 648, 655-56 (1984).

¶ 11 The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is comprised of two prongs: deficiency and prejudice. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. *Strickland*, 466 U.S. at 687; *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 12 A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need not determine whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 13 Petitioner first contends trial counsel was ineffective for failing to investigate and call his grandparents, Vertibe and Andrew Atherton as alibi witnesses. Petitioner claims that given the distance between the jewelry store and his grandparents' home in St. Louis, Missouri (approximately 297 miles), it would have been impossible for him to have been at the scene of

the crime at approximately 2:15 p.m., if as according to his grandparents' affidavits he arrived at their home shortly before 6 o'clock that evening.

¶ 14 Petitioner maintains it would take at least 4 hours and 33 minutes to drive from the jewelry store to his grandparents' home. Petitioner contends that given the distance, he could not have committed the offenses at 2:40 p.m., and still have been at his grandparents' house just prior to 6 p.m., a mere three hours and twenty minutes later. We disagree.

¶ 15 Petitioner's estimates are based on the assumption he would be driving at a then-legal speed limit of 65 miles per hour. However, a person could cover 297 miles in 3.5 hours if they drove an average speed of 89.1 miles per hour on an interstate highway. Maintaining such an average rate of speed would be risky, but not unattainable.

¶ 16 A defense counsel's decision on whether to call a particular witness is generally viewed as a matter of trial strategy which cannot support a claim of ineffective assistance of counsel. *People v. Flores*, 128 Ill. 2d 66, 85-86 (1989). According to the Atherton's affidavits they apprised defense trial counsel of the information contained in their affidavits. Thus, we cannot say that defense counsel failed to investigate the purported alibi. See *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992). Our review of the record suggests that defense counsel simply made a strategic decision not to call the Athertons as alibi witnesses.

¶ 17 Vertibe and Andrew Atherton were petitioner's grandparents, and as such, their credibility carried little weight. See *Dean*, 226 Ill. App. 3d at 468; *People v. Delony*, 341 Ill. App. 3d 621, 635 (2003) (rejecting claim that alleged failure to call proposed alibi witnesses constituted ineffective assistance where the witnesses were cousins of the defendant, and as such, their credibility may have carried little weight). Moreover, as we have shown, the grandparents'

statements in their respective affidavits did not rule out the possibility that petitioner could have driven to their home after committing the armed robbery and shooting.

¶ 18 More importantly, petitioner has failed to show there is a reasonable probability the outcome of the trial would have been any different if the jury heard the alibi testimony. Petitioner's finger prints were found on a jewelry catalog and on a sliding glass panel door behind the jewelry display case in an area restricted to employees only. There were four eyewitnesses in the jewelry store who identified defendant. A fifth witness saw petitioner fleeing the scene carrying a case of rings and then driving away in a Chevrolet Tahoe truck with Missouri license plates. In addition, petitioner told officials he had never been to Chicago even though a video and witness testimony showed him apparently casing out a nearby jewelry store in the small strip mall the day before the crimes at issue in this case. Under these circumstances, we cannot say that counsel's supposed failure to call petitioner's grandparents as alibi witnesses was so unreasonable or prejudicial as to constitute ineffective assistance of trial counsel.

¶ 19 Petitioner finally contends appellate counsel was ineffective for failing to challenge the admissibility of the fingerprint evidence purportedly recovered from the sliding glass panel door behind the jewelry display case. Petitioner argues the State failed to lay a foundation for admission of this evidence either through its identification by a witness or by establishing a chain of custody and that appellate counsel was ineffective for failing to raise a claim of error regarding the admission of the evidence.

¶ 20 The admission of evidence is within the trial court's discretion and its ruling will not be overturned unless there is a clear showing of an abuse of that discretion. *People v. Tucker*, 317 Ill. App. 3d 233, 242 (2000). A trial court abuses its discretion when its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the court's view. *People v.*

Garcia, 2012 IL App (2d) 100656, ¶ 17. Here, we find no error in the trial court's admission of the fingerprint evidence taken from the sliding glass panel door.

¶ 21 A foundation for the admission of physical evidence may be laid either through witness identification or through the establishment of a chain of custody. *People v. Kabala*, 225 Ill. App. 3d 301, 305 (1992). "It is unnecessary to require both identification of the object and establishment of a chain of possession." *People v. Hagen*, 63 Ill. App. 3d 944, 948 (1978).

¶ 22 At trial, the State presented testimony from Officer Thomas Reynolds, a Chicago Police evidence technician. Officer Reynolds and his partner, Officer Gurtowski, processed the crime scene including the taking of fingerprint lifts. Sixteen of the nineteen lifts were taken from the top of the jewelry display case and three were taken from the sliding glass panel door behind the jewelry display case. The fingerprint lifts at issue in this case which were taken from the sliding glass panel door were collected by Officer Gurtowski, not Officer Reynolds. Petitioner contends that absent testimony from Officer Gurtowski to identify those lifts, there was no foundation laid for their admission. We must disagree.

¶ 23 At the time Officer Reynolds was collecting lifts from the top of the counter, Officer Gurtowski was working behind the counter; they were collecting lifts simultaneously and were not far apart. Officer Reynolds testified that he observed Officer Gurtowski recover the fingerprint lifts from the sliding glass panel door. Officer Reynolds identified two sliding panels in a photograph of the display case as the location where he saw Officer Gurtowski recover the three fingerprint lifts. The officers sorted the lifts and placed them into two separate evidence envelopes based on the area where the lifts were recovered and they wrote notes on the outside of the envelopes. The lifts were kept in the evidence envelopes until the officers returned to the police station. At the station, Officer Gurtowski wrote out labels for all of the fingerprint lifts

and both officers' initials were on the labels. The officers submitted the lifts directly to the Illinois State Police Crime Lab in Chicago for examination.

¶ 24 Amy Collins, from the Illinois State Police forensic sciences command, testified as an expert in the field of forensic science and latent prints. Collins testified to her findings concerning the fingerprint evidence, including the finding that one of the fingerprint lifts recovered from the sliding glass panel door matched the petitioner's prints.

¶ 25 Our review of the State's chain of custody indicates it presented a sufficient chain of custody to justify admission of the fingerprint evidence. Without evidence of actual tampering, substitution, or contamination, any alleged deficiency in the chain of custody regarding the fingerprint evidence went to the weight of that evidence, not its admissibility. See, *e.g.*, *People v. Smith*, 2014 IL App (1st) 103436, ¶ 54.

¶ 26 We also find the State laid an adequate foundation for admission of the fingerprint evidence through Officer Reynold's visual identification. "To establish a foundation by identification, the witness need only identify an exhibit capable of visual identification and establish that it is in substantially the same condition as it was when prepared." *People v. Jones*, 119 Ill. App. 3d 615, 629 (1983). As previously discussed, Officer Reynolds was present in the jewelry store and observed Officer Gurtowski recover the fingerprint lifts from the sliding glass panel door. At the police station, the officers placed labels on all of the lifts they recovered from the crime scene which included both officers' initials. Officer Reynold's identified the three lifts from the sliding glass panel door and testified they were substantially in the same condition as the time of the offenses.

¶ 27 In light of our finding that the State laid an adequate foundation for admission of the fingerprint evidence at issue, petitioner cannot show that appellate counsel was ineffective for

failing to object to its admission. "Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence for counsel to refrain from raising issues that counsel believes are without merit." *People v. Stephens*, 2012 IL App (1st) 110296, ¶ 109. Unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise it on appeal. *Id*.

¶ 28 In sum, trial counsel was not ineffective for failing to investigate and call petitioner's grandparents as alibi witnesses. Appellate counsel also was not ineffective for failing to challenge the admissibility of the fingerprint evidence recovered from the sliding glass panel door.

¶ 29 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing petitioner's amended postconviction petition.

¶ 30 Affirmed.