

No. 1-12-3089

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 13507
	)	
MICHAEL MONTGOMERY,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.  
Justices Hall and Rochford concurred in the judgment.

**O R D E R**

¶ 1 **Held:** Second-stage dismissal of defendant's postconviction petition affirmed, where defendant failed to make a substantial showing of a constitutional violation.

¶ 2 Defendant Michael Montgomery appeals the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq.* (West 2002)). He contends that he made a substantial showing that trial counsel was ineffective for failing to investigate and present evidence to support a viable defense to the charge of first degree murder, and requests this court to remand his petition for an evidentiary hearing.

¶ 3 The record shows that defendant was indicted on four counts of first degree murder, 14

counts of aggravated criminal sexual assault, six counts of criminal sexual assault, and one count of unlawful restraint after Debbie Vinson's body was discovered in an alley on May 14, 1993.

Following a bench trial, the trial court found defendant guilty of first degree murder and aggravated criminal sexual assault, then sentenced him to an extended term of 70 years in prison for first degree murder, and a consecutive term of 30 years for aggravated criminal sexual assault. This court affirmed that judgment on direct appeal. *People v. Montgomery*, 302 Ill. App. 3d 1 (1998).

¶ 4 Defendant subsequently filed a *pro se* postconviction petition under the Act, alleging, *inter alia*, that trial counsel was ineffective for failing to have an independent medical expert evaluate the medical records of the deceased and present testimony that she suffered grand mal seizures to refute the State's expert that she died from strangulation. The trial court dismissed the petition at the first stage of proceedings, and on appeal, this court reversed the trial court's determination and remanded for second stage proceedings, finding that the record does not support the conclusion that defendant's claim of ineffective assistance of counsel was frivolous and patently without merit. *People v. Montgomery*, 327 Ill. App. 3d 180, 191 (2001).

¶ 5 On remand, counsel was appointed to represent defendant, who then submitted a supplemental petition to the circuit court, asserting, *inter alia*, that trial counsel was ineffective for failing to investigate and present evidence that Vinson died of a seizure rather than strangulation. In support of the petition, defendant attached an affidavit from Dr. William Gibbons, a clinical pathologist.<sup>1</sup> Dr. Gibbons averred that based on his review of the trial

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<sup>1</sup> We note that defendant presented Dr. Gibbons' affidavit to this court on appeal from the first-stage dismissal; however, we refused to consider the affidavit because it was not part of the

transcripts, the testimony of the State's expert witness, forensic pathologist Dr. Mitra Kalelkar, and the autopsy report on Vinson, he concluded to a reasonable degree of medical certainty that the cause of Vinson's death was a grand mal epileptic seizure, and not strangulation, as Dr. Kalelkar had testified.

¶ 6 The State moved to dismiss defendant's petition asserting that defendant had not met his burden to establish his claims of ineffective assistance of counsel. On September 18, 2012, the circuit court granted the State's motion and dismissed defendant's petition. In doing so, the court observed that trial counsel had conducted an extensive cross-examination of the forensic pathologist on the issue of seizure, and that the decision of whether or not to present another expert was trial strategy. The court also found that defendant could not show prejudice where the evidence of his guilt was overwhelming and defendant's own admission was consistent with Dr. Kalelkar's report.

¶ 7 On appeal, defendant has abandoned all issues raised in his petition, but for ineffective assistance of counsel. He solely contends that he made a substantial showing that trial counsel was ineffective for failing to investigate and present evidence to support a viable defense to the charge of first degree murder that Vinson died from a seizure rather than strangulation.

¶ 8 The Act provides a method by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the second stage of proceedings, as here, defendant bears the burden of making a substantial showing of a constitutional violation and all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true.

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record, and allowed defendant to offer the affidavit to the circuit court on remand. *Montgomery*, 327 Ill. App. 3d at 186.

*People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If defendant makes the requisite showing, the proceeding advances to a third stage evidentiary hearing, where defendant may present evidence in support of his petition. 725 ILCS 5/122-6 (West 2000); *Pendleton*, 223 Ill. 2d at 472-473. Our review of the second-stage dismissal is *de novo*. *Id.*

¶ 9 In this case, defendant alleged ineffective assistance of trial counsel. To establish that claim, defendant must show that 1) counsel's representation fell below an objective standard of reasonableness; and 2) there is a reasonable probability that but for counsel's deficient performance, the outcome of the proceeding would have been different. *Strickland v.*

*Washington*, 466 U.S. 668, 687 (1984); *People v. Hall*, 217 Ill. 2d 324, 334-35 (2005).

¶ 10 Defendant contends that trial counsel was ineffective for failing to present medical evidence to support the defense theory that Vinson suffered a seizure at the time of her death and was not strangled. In doing so, he argues that this case is similar to *People v. Domagala*, 2013 IL 113688, in which defendant, a caretaker, was seen pressing his forearm against the 84-year-old victim's throat, and caused the victim to be hospitalized. At the hospital, the victim was administered tests and fitted with a feeding tube, which he repeatedly pulled out of his throat. The resulting infection led to the victim's death more than two weeks after the incident with defendant, and, trial counsel failed to argue that the victim's death was caused by gross negligence of the medical staff rather than by defendant's actions. The supreme court found in that case that trial counsel's failure to investigate or raise a viable defense at trial that the victim's death was caused by an intervening act of the hospital staff rather than by defendant in the context of a murder charge constituted deficient performance, and that a reasonable attorney would have investigated and pursued such a defense. *Domagala*, 2013 IL 113688 at ¶¶ 39, 40. The supreme court also found that, if proven, such a defense would create a reasonable

probability of a different outcome at trial. *Id.* at ¶ 46. The court thus concluded that defendant set forth a substantial showing of a constitutional violation and was entitled to an evidentiary hearing on his petition. *Id.* at ¶¶ 46-47.

¶ 11 The State maintains that this case is factually distinguishable from *Domagala*, where there was evidence that the victim died of gross medical negligence, rather than by defendant's hands, while here, there was no evidence of an intervening act of gross medical negligence which led to the victim's injuries or death two weeks after she was strangled. Although there was evidence that the victim had a history of a seizure disorder, there was no suggestion that she died of anything but defendant's acts.

¶ 12 The State contends that *Domagala* is further distinguishable from the case at bar in that there is no affidavit from trial counsel here that he did not investigate this issue or that his decision not to call an expert was not trial strategy. In addition, the State points out that trial counsel presented stipulated evidence of the victim's seizure disorder, cross-examined Dr. Kalelkar about whether Vinson's death could have resulted from a seizure, and addressed defendant's admission that he choked the victim by suggesting that he may have acted in self-defense or over-reacted to Vinson having a seizure, thus refuting defendant's present claim that counsel failed to raise this as a viable defense.

¶ 13 The dismissal of a postconviction petition is warranted at the second stage of proceedings only when the allegations in the petition, liberally construed in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 382 (1998). That showing is "a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation[.]" which, if proven at an evidentiary hearing, would entitle defendant to relief. *Domagala*, 2013 IL 113688, ¶ 35. Here, we find that defendant has not

met his burden of showing a violation of his constitutional right to the effective assistance of counsel. *Hall*, 217 Ill. 2d at 334-35.

¶ 14 It is well settled that trial counsel has the professional duty to conduct reasonable investigations and independently investigate any possible defenses. *Strickland*, 466 U.S. at 691. In addition, "[l]ack of investigation is to be judged against a standard of reasonableness given all of the circumstances, 'applying a heavy measure of deference to counsel's judgments.'" *People v. Kokoraleis*, 159 Ill. 2d 325, 330 (1994) (quoting *Strickland*, 466 U.S. at 691).

¶ 15 In support of his allegation that counsel failed to investigate and present a viable defense that Vinson died of a seizure, rather than by strangulation, defendant presented the affidavit of Dr. Gibbons to that effect. However, unlike *Domagala*, where no evidence was introduced by counsel about medical malpractice as the cause of death, trial counsel in the case at bar did introduce evidence that Vinson suffered from a seizure disorder, cross-examined the State's forensic pathologist about the effect of the disorder on the cause of death, and argued that the disorder may have caused her death. Counsel also attempted to argue that defendant acted in self-defense or overreacted to Vinson having a seizure in order to explain defendant's statements which were consistent with the pathologist's testimony regarding the cause of death. Given these circumstances, and the facts known to counsel at the time of the trial, including the gruesome crime scene and defendant's own damaging admission, we conclude that defendant failed to show that counsel's performance fell below an objective standard of reasonableness to satisfy the first prong of the *Strickland* test. *Hall*, 217 Ill. 2d at 335.

¶ 16 We also find that defendant failed to show that but for counsel's substandard performance, the outcome of the proceeding would have been different. *Hall*, 217 Ill. 2d at 335. Defendant's own statement in this case that he choked Vinson corroborated Dr. Kalekar's

testimony regarding the injuries she sustained to her neck, and supported the State's theory that he strangled her. The case thus stands in stark contrast to *Domagala*, where defendant denied putting his forearm against the victim's neck, and there was evidence of an intervening act of medical negligence, which counsel admittedly failed to investigate or argue as a viable defense. In addition, counsel presented stipulated evidence that Vinson suffered from a seizure disorder. Accordingly, we conclude that the outcome of the proceeding would not have been different even if Dr. Gibbons' testimony was made available to the court, and affirm the second-stage dismissal of defendant's petition by the circuit court of Cook County.

¶ 17 Affirmed.