SIXTH DIVISION
SEPTEMBER 30, 2015

No. 1-13-0983

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.	)	No. 01 CR 30587
	)	
LASHUN MEMBERS,	)	Honorable
	)	Jorge Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice HOFFMAN concurred in the judgment.

O R D E R

¶ 1 ***Held:*** The circuit court's second-stage dismissal of defendant's postconviction petition is affirmed where trial counsel did not render ineffective assistance and the State did not commit a *Brady* violation.

¶ 2 Defendant LaShun[1] Members appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his postconviction petition. He contends that the court

[1] Throughout the record, defendant's first name is spelled as "LaShun" and "LaShaun." We use "LaShun" as that spelling was used on his postconviction petition and notice of appeal.

erred in dismissing his petition because he made a substantial showing that he was denied the effective assistance of trial counsel and denied due process by the State's violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¶ 3 Following a 2007 jury trial, defendant was convicted of three counts of attempted first degree murder of a peace officer, six counts of attempted first degree murder, and two counts of aggravated battery with a firearm for shooting at police officers and others during a gang-related gunfight on the night of November 14, 2001. After merging some of the convictions, the trial court sentenced defendant to three terms of 26 years' imprisonment for attempted murder of a peace officer, and three terms of 20 years' imprisonment for attempted first degree murder, all to run concurrent. The court also sentenced defendant to terms of 10 and 8 years' imprisonment for the two aggravated battery convictions, to be served concurrently, but consecutive to the attempted murder terms, for an aggregate sentence of 36 years' imprisonment. On direct appeal, this court vacated one of the aggravated battery with a firearm convictions under the one-act, one-crime rule, and affirmed defendant's remaining convictions and sentences in all other respects. *People v. Members*, No. 1-07-2631 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 On August 24, 2011, defendant, through counsel, filed the instant petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). Therein, defendant alleged, *inter alia*, that his initial counsel, Raymond Prusek, rendered ineffective assistance when he advised him to fabricate an alibi when he turned himself in to the police. Defendant argued that he was prejudiced by Prusek's misconduct because, if he had truthfully

told police that he was with codefendants and had pleaded with codefendant Willie Wells not to start trouble, then he could have testified to those facts at trial and not been impeached, and may have even been exonerated.

¶ 5 Defendant further alleged that his trial counsel rendered ineffective assistance when he failed to investigate and present evidence showing that the street lights at the crime scene were not operational on the night of the shooting. Defendant acknowledged that Officer May testified that the street lights were working, but argued that counsel should have called Phillip Duncan as a witness, who would have testified that the neighborhood was experiencing a blackout which included the lights at the crime scene. Defendant claimed that he was prejudiced by counsel's failure to present this evidence because the fact that the lights were not working would have supported the defense argument that the police officers' identifications of him were unreliable.

¶ 6 Finally, defendant alleged that the State committed a *Brady* violation when it failed to disclose to the defense that police officer Sean Ryan, who identified him as one of the gunmen, was the subject of an ongoing FBI investigation. Defendant noted that prior to his trial in 2007, he had requested information regarding the reason for Officer Ryan's removal from street duty, and was told that he was under investigation for using steroids. However, Officer Ryan subsequently pled guilty to a federal charge for selling a stolen assault rifle to a known felon in December 2005. Defendant argued that he should have had access to this information to attack Officer Ryan's credibility at trial, and because he did not, he was entitled to a new trial.

¶ 7 Defendant attached to the petition his own affidavit averring that he was with codefendants in his vehicle on the night of the shooting when a gang member fired a gunshot at

his truck. After driving away from the area, codefendants armed themselves with guns and walked back toward the scene, and defendant repeatedly tried to stop them. While codefendants walked around the corner, defendant was attacked by a group of men. Defendant then heard gunshots, broke free from the men, and ran to a stranger's house where he asked the woman there to call his mother to pick him up, and was picked up by his aunt's boyfriend. Defendant stated that when he turned himself in, he gave police a statement drafted by his initial counsel that said he was exercising his right to remain silent. After the police officer crumpled the statement and said he "didn't want to hear it," counsel advised defendant to give the police an alibi, warning him that if he placed himself at the scene of the shooting, the police would fabricate their police reports. Defendant then told police that he was with his girlfriend at the time of the shooting. Defendant later learned that the counsel who escorted him to the police station was not licensed at that time.

¶ 8 Defendant further averred that he asked his trial counsel to investigate the lighting at the crime scene because city workers had to come to the scene to turn them on, and when the shooting was reported on the news, the police spokesperson said there was a blackout. Defendant gave trial counsel the name and address of a woman who lived on the block who had said that the lights were out, and told counsel to ask his mother how to contact additional people

¶ 9 Defendant also attached an affidavit from Phillip Duncan, who averred that on the night of the shooting, he picked up defendant at a home about two blocks from the crime scene. Duncan stated that he drove about a block from the intersection of Huron Street and Christiana Avenue, where the shooting occurred, and none of the street lights were on in the entire

neighborhood. He said that trial counsel interviewed him, but he did not recall being asked about the street lights on the night of the shooting. Duncan further stated that he was willing to testify at trial and at an evidentiary hearing.

¶ 10 In addition, defendant attached an affidavit from his mother, Quiltine Campbell, who averred that on the night of the shooting, defendant called her from a woman's house and asked her to pick him up because he had been attacked by some men, and was afraid and in danger. He also asked her to call 911 and ask the police to pick him up. Campbell called 911 and Duncan, defendant's uncle. She stated that she knew people who lived near the shooting, including Nicole and Phillip Duncan, and they told her that the street lights were out when the shooting occurred. Campbell stated that she shared this information with trial counsel, and that she was willing to testify at an evidentiary hearing.

¶ 11 Defendant also attached to his petition a printout from a Chicago news website which reported that on January 13, 2010, former police officer Sean Ryan pleaded guilty to federal charges for selling a stolen assault rifle to a convicted felon in December 2005. In addition, defendant attached printouts showing that Prusak was suspended by the Illinois Attorney Registration and Disciplinary Commission effective December 9, 2008.

¶ 12 The State moved to dismiss defendant's petition, arguing that his two claims of ineffective assistance of counsel were waived because they were apparent on the face of the record and he failed to raise them on direct appeal. As evidence, the State pointed out that the attorney who accompanied defendant when he turned himself in was John Miraglia, not Prusak, and thus, the record contradicted defendant's allegation. In addition, the record showed that

defendant gave his alibi to police before speaking with Miraglia, which resulted in a more detailed alibi. As to the second allegation, the State noted that two witnesses, Officer Edward May and an evidence technician, testified about the lighting at the crime scene, and thus, counsel's failure to delve into the officers' ability to observe was discernible from the face of the record.

¶ 13 Alternatively, the State argued that defendant's claims lacked the required support and were conclusory. The State asserted that trial counsel interviewed Duncan and made a strategic, protected decision not to call him as a witness. It also argued that Campbell testified for the defense, and thus, was also interviewed by trial counsel, and further, that her affidavit contained inadmissible hearsay. The State asserted that defendant had not shown that Campbell or Duncan told counsel that the lights were out, and that any decisions by trial counsel regarding the course and conduct of the trial, including which witnesses to call and what evidence to present, were protected trial strategy, and therefore, immune from claims of ineffective assistance. In addition, the State argued that the evidence against defendant was overwhelming, that three witnesses identified him, and that he did not show that he was prejudiced by counsel's actions.

¶ 14 Finally, the State argued that defendant's claim that it committed a *Brady* violation was unsupported and conclusory. It asserted that defendant provided no documentation to show that Officer Ryan was under investigation by the FBI when the prosecution requested information regarding his status, or even at the time of trial. The newspaper article submitted by defendant did not indicate when the investigation of Officer Ryan began, and there was no evidence that the State had any knowledge of a pending FBI investigation of Officer Ryan. Thus, it could not

be held responsible for information that was not yet in existence. Moreover, newspaper articles are hearsay and cannot be used as evidence to support a postconviction petition. The State also pointed out that Ryan committed the offense in December 2005, four years after the shooting in this case, and was convicted in 2010, more than eight years after the shooting. Accordingly, Officer Ryan's conviction was not material or remotely relevant to this case.

¶ 15 In reply, defendant argued that he had not waived his allegations because they were not based on the trial record, but instead, on the affidavits attached to his petition. Defendant acknowledged that it was Miraglia, not Prusak, who accompanied him to the police station, but asserted that Miraglia was in contact with Prusak while en route to and at the station, and whichever attorney took him to the station rendered ineffective assistance by instructing him to lie to police. He maintained that he was prejudiced by counsel's action because, if he had told the truth, he would have been able to testify as a credible witness, but the false alibi prevented him from testifying.

¶ 16 Defendant reiterated his argument that the State committed a *Brady* violation, and pointed out that the parties knew Officer Ryan was under investigation by the FBI prior to trial, but did not know why. He clarified that he was not claiming that the State knowingly presented false information as the FBI investigation was confidential, but argued that he should now be allowed to subpoena relevant documents to determine the extent of the investigation at the time of his trial. He noted that Ryan committed the offense more than a year before he requested the information about the FBI investigation, and argued that the information could have provided valuable impeachment evidence.

¶ 17 Defendant subsequently filed a supplemental affidavit averring that Prusak gave Miraglia constant instruction over the telephone while they were en route to and at the police station. As defendant began giving police his alibi, Miraglia interrupted him. Defendant stated that he had planned to assert his right to remain silent, that he did not want to lie to police, but that he panicked and trusted his attorneys.

¶ 18 At the hearing on the State's motion to dismiss defendant's petition, the trial court found that, although defendant's allegations were not forfeited, he had not made a substantial showing that he was deprived of his constitutional rights. Following the reasoning in *People v. Cleveland*, 342 Ill. App. 3d 912 (2003), the court found that defendant's complicity with his attorney in presenting the false alibi to police foreclosed his claim of ineffective assistance of counsel. In addition, the court found that defendant failed to make the requisite showing of a *Brady* violation. Based on these findings, the circuit court granted the State's motion and dismissed defendant's postconviction petition.

¶ 19 On appeal, defendant first contends that the circuit court erred when it dismissed his postconviction petition because he made a substantial showing that he was deprived of effective assistance of counsel. Defendant argues that trial counsel rendered ineffective assistance when he failed to investigate and introduce evidence that the street lights were not working at the crime scene, which would have supported his argument that the police officers' identifications of him were unreliable. Defendant also contends that his initial attorney was ineffective when he advised him to fabricate an alibi when he turned himself in at the police station.

¶ 20 We review the circuit court's dismissal of a postconviction petition without an evidentiary hearing *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). A postconviction proceeding is not a substitute for a direct appeal, but instead, is a collateral attack upon the conviction that allows only limited review of constitutional claims that could not be raised on direct appeal. *People v. Harris*, 224 Ill. 2d 115, 124 (2007). To obtain postconviction relief, defendant must demonstrate that he suffered a substantial deprivation of a constitutional right in the proceeding that produced his conviction or sentence. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). During second-stage proceedings, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation, and if no such showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The burden of making a substantial showing is on defendant. *Pendleton*, 223 Ill. 2d at 473. At this stage, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Id*.

¶ 21 Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Graham*, 206 Ill. 2d 465, 476 (2003). To support a claim of ineffective assistance of trial counsel, defendant must demonstrate that (1) counsel's representation was deficient, and (2) as a result, he suffered prejudice that deprived him of a fair trial. *Strickland*, 466 U.S. at 687. To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the trial would have been different. *Graham*, 206 Ill. 2d at 476.

¶ 22 "In considering whether counsel's performance was deficient, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." ' " *People v. Patterson*, 217 Ill. 2d 407, 441 (2005), quoting *Strickland*, 466 U.S. at 689. In general, conduct related to trial strategy will not support a claim of ineffective assistance unless counsel failed to pursue any meaningful adversarial testing. *Patterson*, 217 Ill. 2d at 441. Decisions regarding which witnesses to call and what evidence to present at trial are considered matters of trial strategy, and as such, are generally immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002).

¶ 23 In this case, defendant's claim that the streetlights were not working at the time of the shooting was directly contradicted by the trial record. Chicago police officer Edward May testified that he arrived at the intersection of Huron Street and Christiana Avenue about 8 p.m. on November 14, 2001, with three other police officers who were involved in the shooting. The prosecutor specifically asked Officer May "[h]ow was the street lighting at that location?" He responded "[t]here's good artificial lighting. There's a streetlight on the corner, the building, lights coming off of the building if they're inhabited. There's an alley light behind me, an alley light in front of me. It's artificially lit." The prosecutor also asked police officer Sean Ryan, who was involved in the shooting, if the intersection had "typical Chicago street lighting," and he replied "[y]es." In addition, forensic investigator William Sullivan testified that he and his partner arrived at the crime scene about 8:40 p.m. at which time they collected numerous pieces

of evidence and took numerous photographs of the scene. While describing one of those photographs for the jury, the investigator testified that the photo showed an overall view of the corner of Huron Street and Christiana Avenue, and specifically pointed out "[y]ou have a street light, a mailbox, a stop sign."

¶ 24 The record also shows that several eyewitnesses who were involved in the shooting were shown photographs of the crime scene, and all of them testified that the photos accurately depicted the scene that night. There is no indication that the streetlights were not operational at the time of the shooting, and the affidavits submitted by defendant from Duncan and Campbell did not support his contrary allegation. Neither of these affiants claimed to be present at the intersection at the time of the shooting, and thus, had no personal knowledge of the lighting conditions during the offense. Accordingly, defendant failed to make a substantial showing of ineffective assistance based on trial counsel's failure to investigate and present evidence regarding the streetlights.

¶ 25 Defendant next contends that his initial attorney rendered ineffective assistance when he advised defendant to fabricate an alibi when he turned himself in to the police, and he was prejudiced by counsel's advice because it prevented him from testifying at trial. Defendant claims that if he truthfully testified that he was with codefendants, he would have been impeached with the alibi he gave police, and conversely, if he had testified in accordance with his alibi, he would have committed perjury and appeared incredible in light of the testimony of three witnesses who saw him in the vehicle with codefendants immediately before the shooting.

¶ 26 As discussed by the circuit court, a substantially similar claim was raised in postconviction proceedings in *Cleveland* where the defendant alleged that his trial counsel rendered ineffective assistance when he advised Cleveland to falsely testify at trial. Cleveland claimed that he was prejudiced by his counsel's advice because his false testimony undermined his credibility with the jury. *Cleveland*, 342 Ill. App. 3d at 916. The appellate court found this claim "patently without merit as a matter of law," explaining:

> "[a]ll defendants must be presumed to know that if they choose to testify they must testify truthfully. Defendants are not entitled to rely on a lawyer's advice to testify falsely, and if they do so, there is no sound reason to treat them any differently from defendants who testify falsely entirely on their own initiative. If the allegations of defendant's postconviction petition are true, his complicity with his attorney in presenting false testimony forecloses a claim of ineffective assistance of counsel." *Id.*

¶ 27 We agree with the reasoning in *Cleveland* and apply it here. In this case, taking defendant's allegation as true, we find that his complicity with counsel's alleged advice to give police a false alibi forecloses his claim that counsel rendered ineffective assistance. Accordingly, his further allegation of ineffective assistance also fails and subjects his petition to dismissal.

¶ 28 Finally, defendant contends that the State committed a *Brady* violation when it failed to disclose that Officer Sean Ryan was under investigation by the FBI. Defendant acknowledges that prior to trial, the United States Attorney stated that no federal charges were pending against the officer at that time, and that the State claimed that it did not have any information about the investigation or federal charges. Defendant asserts, however, that because Ryan pled guilty to

committing the federal offense in December 2005, the "only logical conclusion" is that he was under investigation at the time of trial in 2007. He claims that Ryan was a key witness for the State, and if he had the investigation information, he could have impeached Ryan's testimony, and the outcome of his trial would have been different.

¶ 29 The State responds that no *Brady* violation occurred where it acted in good faith and exhausted all efforts to obtain information about Officer Ryan's status, then tendered all the information it had to the defense prior to trial. The State also argues that the news article relied upon by defendant is inadmissible hearsay, contains no information about the FBI investigation, and defendant's conclusion is based on speculation. The State further asserts that any investigation of Officer Ryan was not material to this case, and that the outcome would have been the same where other witnesses also identified defendant.

¶ 30 Pursuant to *Brady*, the State is required to disclose to the defense all evidence that is favorable to defendant and material to either his guilt or punishment. *Brady*, 373 U.S. at 87. To obtain relief under *Brady*, defendant must demonstrate that: (1) the withheld evidence was favorable to him because it was either impeaching or exculpatory; (2) the evidence was withheld by the State either willfully or inadvertently; and (3) he suffered prejudice as a result of the withholding. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 112. If the information was not available at the time of trial, it cannot be said that the State failed to disclose it in violation of *Brady*. *People v. Orange*, 195 Ill. 2d 437, 457 (2001); *People v. Haynes*, 192 Ill. 2d 437, 469 (2000).

¶ 31 Here, the trial record contains a letter addressed to the prosecutors dated November 22, 2006, from then United States Attorney Patrick Fitzgerald stating "[i]n response to your inquiry, please be advised that no federal charges are currently pending in the United States District Court for the Northern District of Illinois against either Chicago Police Officer Sean Ryan (Star # 11534) or Chicago Police Officer Jerome Turbyville (Star # 15952)." The record further shows that immediately before jury selection, the parties discussed Officer Ryan's employment status and the fact that he had been reassigned to an alternate response callback unit. The prosecutor stated that extensive efforts had been made to learn the reason for his reassignment and to discover if any other investigations were being conducted by the Chicago police or the FBI, and the only information obtained was that Officer Ryan admitted to using steroids. The prosecutor further stated that defense counsel was speculating about hypothetical investigations of which the State had no knowledge, and that the United States Attorney's Office had informed the State that such information was privileged and the office was not required to divulge any further information.

¶ 32 Defendant now claims that because Ryan pled guilty in 2010 to committing the federal offense in December 2005, the "only logical conclusion" is that he was under investigation at the time of trial in 2007. This allegation is speculative and conclusory. Moreover, the documentation he provided merely shows that Ryan pled guilty to the federal charge in January 2010, and contains no information about a federal investigation. On the other hand, the trial record shows that the State made extensive efforts to learn if any investigations were being conducted by the Chicago police or the FBI at that time, and received no information regarding any investigations.

We therefore conclude that the record contradicts defendant's allegation regarding available information about a federal investigation of Ryan at the time of trial, and thus, defendant failed to make a substantial showing of a *Brady* violation to warrant an evidentiary hearing.

¶ 33 Accordingly, we find that the circuit court properly granted the State's motion to dismiss defendant's petition, and affirm its order to that effect.

¶ 34 Affirmed.