FIRST DIVISION
November 2, 2015

No. 1-13-2827

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. 97 CR 8844
	)	
DAVID VIDA,	)	Honorable
	)	Paula M. Daleo,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Liu and Justice Harris concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Second-stage dismissal of defendant's postconviction petition affirmed.

¶ 2 Defendant, David Vida, 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 2010). He contends that

his petition should be remanded for further proceedings because he made a substantial showing that trial counsel provided ineffective assistance by failing to present testimony from two alibi witnesses.

¶ 3 Following a 1998 jury trial, defendant was found guilty of the 1997 murder of Scott Harast. The trial court subsequently sentenced him to an extended term of 100 years' imprisonment, finding that his actions were exceptionally brutal and heinous, and indicative of wanton cruelty. This court affirmed that judgment on direct appeal (*People v. Vida*, 323 Ill. App. 3d 554 (2001)), and subsequently reinstated that sentence after considering it in light of the supreme court's decision in *People v. Crespo*, 203 Ill. 2d 335 (2003) (*People v. Vida*, 339 Ill. App. 3d 115 (2003)).

¶ 4 On October 24, 2003, defendant filed the *pro se* postconviction petition at bar alleging, *inter alia*, that his trial counsel was ineffective for failing to call his parents, Charles and Cheryl Vida, as alibi witnesses. The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed that dismissal and this court reversed and remanded for second-stage proceedings finding that defendant's petition sufficiently raised the gist of a constitutional claim. *People v. Vida*, No. 1-04-1696 (2005) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, defendant's appointed counsel filed a supplemental petition for postconviction relief, and the State filed a motion to dismiss defendant's *pro se* and supplemental petitions contending that they were untimely, and the claims therein were forfeited, barred by *res judicata*, or otherwise meritless. Without reaching the merits, the circuit court dismissed defendant's petitions as untimely. Defendant appealed that dismissal and this court reversed and

remanded the cause for consideration of the petitions on the merits finding that defendant had timely commenced the postconviction proceeding. *People v. Vida*, No. 1-09-2323 (2011) (unpublished order under Supreme Court Rule 23).

¶ 6 On the second remand, the State relied on its previously filed motion to dismiss, and challenged the substance of defendant's claims. Following a hearing on that motion, the circuit court dismissed defendant's petitions in a written order. In assessing defendant's ineffective assistance of counsel claim for failing to call his parents as alibi witnesses, the court stated that the affidavits attached to his petition from his parents did not provide an alibi defense that was supported by the evidence in the case. The court further found that even if they did, counsel's performance could not be seen as deficient in light of defendant's court-reported statement in which he admitted his role in the murder.

¶ 7 In this appeal, defendant contends that he made a substantial showing that trial counsel provided ineffective assistance for failing to present alibi testimony from his parents. He maintains that it was objectively unreasonable for trial counsel to not call his parents to elicit their alibi testimony, and that this deficient performance affected the outcome of his trial. The State responds that trial counsel's decision not to elicit the alibi testimony was a matter of trial strategy, which should not be disturbed by the court on appeal, and, in any event, the allegations contained in the affidavits fail to rebut the evidence presented at trial.

¶ 8 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respects in which petitioner's

constitutional rights were violated," and section 122-3 provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or amended petition is waived" (725 ILCS 5/122-2 (West 2010); 725 ILCS 5/122-3 (West 2010)). *People v. Jones*, 213 Ill. 2d 498, 503-04 (2004).

¶ 9 At the second stage of proceedings, the circuit court may appoint counsel for an indigent defendant (*People v. Harper*, 2013 IL App (1st) 102181, ¶ 33), and all well-pleaded facts in the petition that are not positively rebutted by the record are taken as true. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). Counsel is given the opportunity to amend the petition, and if the State moves to dismiss it, the court may hold a dismissal hearing. *People v. Wheeler*, 392 Ill. App. 3d 303, 307-08 (2009). A full evidentiary hearing is warranted only if the allegations in the petition, considered in conjunction with the trial record and accompanying affidavits, make a substantial showing of a constitutional violation. *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005), citing *People v. Hobley*, 182 Ill. 2d 404, 427-28 (1998). We review the dismissal of a postconviction petition at the second stage of proceedings *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 10 We initially observe that defendant raised a number of issues in his petition, but on appeal, he focuses solely on his claim of ineffective assistance of counsel. In doing so, he has waived the other issues for review. *Pendleton*, 223 Ill. 2d at 476.

¶ 11 Claims of ineffective assistance of counsel are examined under the two-prong test set forth in *Strickland v. Washington*, 446 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, defendant must show that his counsel's performance "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defense.

People v. Hodges, 234 Ill. 2d 1, 17 (2009), citing *Strickland*, 466 U.S. at 687-88. A claim of ineffective assistance may be dismissed if defendant fails to make the requisite showing of either deficient performance or sufficient prejudice. *People v. Morgan*, 187 Ill. 2d 500, 530 (1999).

¶ 12 Here, defendant claims that counsel was ineffective for failing to call his parents as witnesses because they would have provided alibi testimony. Defendant does not contend that trial counsel failed to interview and investigate them as potential witnesses, but makes the narrower contention that counsel was ineffective for failing to elicit their alibi testimony at trial.

¶ 13 The record shows that defendant's mother, Cheryl Vida, did testify at trial on behalf of defendant, but neither counsel's questions, nor Cheryl's answers, alluded to the proposed alibi contained in her affidavit. In that writing, Cheryl averred that on the date of the murder, her husband and defendant came to visit her and her daughter in the hospital, arriving between 7:45 and 8 p.m., and departing between 8:30 and 9 p.m. She also claimed that this was the same story she told police when they canvassed the neighborhood following Harast's murder. Charles Vida averred that on February 24, 1997, he left the hospital with defendant after visiting Cheryl and his daughter between 8:30 and 9 p.m. He also stated that when he and defendant arrived home that night, he saw Harast waving at him from the passenger seat of a blue van. Defendant contends that these affidavits make a substantial showing that had counsel elicited this evidence at trial, the result of his trial would have been different.

¶ 14 Decisions concerning whether to call certain witnesses are matters of trial strategy, reserved to the sound discretion of counsel, and are generally immune from claims of ineffective assistance. *People v. Enis*, 194 Ill. 2d 361, 378 (2000); *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. Therefore, in challenging counsel's decision on these matters, defendant must

overcome the strong presumption that the challenged action might be considered sound trial strategy. *Strickland,* 466 U.S. at 689; *Coleman,* 183 Ill. 2d at 397. Defendant has failed to do so here.

¶ 15 At trial, Detective Lindenman testified that defendant initially denied killing Harast. However, he eventually explained to Detective Lindenman that he planned to lure Harast into a vacant house that he was "rehabbing" in order to "have it out" with him. He told Harast that he would pay him to vacuum the house, and the two men visited a liquor store before walking to the house in Brookfield, Illinois, where they began to argue about Harast's relationship with defendant's married sister. Defendant told Detective Lindenman that he struck Harast with his fist and a chair and that Harast did not fight back. After defendant continued to beat Harast, he collapsed, and defendant pushed him through a hole in the first floor where he fell onto the concrete floor in the basement.

¶ 16 Defendant also told Detective Lindenman that he went into the basement and discovered that Harast was not breathing. He then covered the basement windows with trash bags, and left the house to visit his mother in the hospital to tell her that he had killed Harast. Defendant returned to the house over the next few days to clean up evidence of the murder and dispose of Harast's body. After dismembering Harast's body, defendant placed it in a trash can and asked his mother to help him dispose of the body. She agreed, and they drove to a campsite in Wilmington, Illinois, where defendant dumped Harast's body over a cliff.

¶ 17 Defendant later provided a court-reported statement in which he repeated the sequence of events as related by Detective Lindenman at trial. Defendant was given the opportunity to review the statement and make any corrections. The original version of the statement contains the

following clause: "We are here to take the statement of David Vida concerning the investigation of the homicide of Scott Harast which occurred on February 24, 1997, between the hours of 7:30 and 8:30 p.m. at 3517 Park in Brookfield, Illinois." The end of that time range, "8:30," is crossed out, and "7:45" is handwritten above it, with defendant's initials written in the margin. The corrected statement reads that the homicide occurred "between the hours of 7:30 and 7:45 p.m."

¶ 18 The State also presented evidence from other witnesses who repeatedly heard defendant say that he was going to kill Harast during the week before his murder. Harast's mother testified that she last saw her son between 7:15 and 7:30 p.m. on February 24, 1997, when he and defendant left together to go to the liquor store before going to work on the house in Brookfield. The medical examiner who performed the autopsy on Harast's body testified that it was his conclusion that Harast died of skull and brain injuries due to multiple blunt force traumas.

¶ 19 Defendant's mother, Cheryl, testified on defendant's behalf that she was admitted to LeGrange Memorial Hospital from February 23 to February 27, 1997, along with her daughter, defendant's sister. On cross-examination, she stated that she met with Detective Lindenman on March 8, 1997, but denied telling him that defendant told her that he had killed Harast. She also denied telling Detective Lindenman that defendant asked her to accompany him when he disposed of the body, or that she had agreed to do so.

¶ 20 In rebuttal, Detective Lindenman testified that he took a statement from Cheryl on March 8, 1997. In that statement, she related that on February 24, 1997, defendant told her that he killed Harast, and on February 27, 1997, she accompanied defendant to a campsite in Wilmington to dispose of Harast's body. Detective Lindenman also confirmed that Cheryl signed that statement.

¶ 21 Given this evidence, we find that defendant has failed to rebut the presumption that counsel's decision not to call his parents as alibi witnesses was not the product of sound trial strategy. *Strickland*, 466 U.S. at 689; *Coleman*, 183 Ill. 2d at 397. In considering the value of alibi evidence not presented, this court has found that the testimony of those related to defendant may carry little weight (See, e.g., *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003); *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992)), and that principle is borne out in this case by the infirmities inherent in Cheryl's account.

¶ 22 Moreover, as found by the circuit court, the affidavits did not provide an alibi defense that was supported by the record. The evidence adduced at trial shows that defendant placed the time of the murder between 7:30 and 7:45 p.m., after which he went to the hospital where he told his mother that he had killed Harast. Cheryl averred that defendant visited her at the hospital between 7:45 and 8 p.m., which corroborates defendant's court-reported statement and his statement to Detective Lindenman that he visited his mother at the hospital after killing Harast to tell her about the murder.

¶ 23 Charles' averment that he and defendant left the hospital between 8:30 and 9 p.m. fails to account for defendant's location at the time defendant indicated in his written statement that he committed the murder. In addition, his averment that he saw Harast later that night when he and defendant arrived home from the hospital, contradicts the correction defendant made to his court-reported statement and his statement to Detective Lindenman that he killed Harast between 7:30 and 7:45 p.m. that day.

¶ 24 In light of the foregoing, we find that defense counsel was not deficient for failing to present the proposed alibi testimony of defendant's parents (*Enis*, 194 Ill. 2d at 378; *Wilborn*,

2011 IL App (1st) 092802, ¶ 79), and that defendant has failed to rebut the presumption that counsel's decision not to elicit their testimony was the product of sound trial strategy (*Strickland*, 466 U.S. at 689; *Coleman*, 183 Ill. 2d at 397).

¶ 25 Accordingly, we conclude that defendant failed to make a substantial showing of ineffective assistance based on trial counsel's decision not to elicit the proposed alibi testimony from his parents (*People v. Jefferson*, 345 Ill. App. 3d 60, 75-76 (2003)), and thus affirm the second-stage dismissal of defendant's postconviction petition by the circuit court of Cook County.

¶ 26 Affirmed.