

2015 IL App (2d) 131087-U
No. 2-13-1087
Order filed January 14, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-2970
)	
VINCENT D. HOLMES,)	Honorable
)	Rosemary Collins,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice Schostok and Justice Hudson concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial counsel was not ineffective for failing to perfect impeachment of an occurrence witness or for failing to introduce evidence of prior attacks against defendant as probative of defendant's mental state at the time of the shooting; affirmed.
- ¶ 2 Defendant, Vincent D. Holmes, was found guilty of attempted murder for shooting the victim, Robert White, and the trial court sentenced defendant to 55 years' imprisonment. We affirmed defendant's conviction and sentence on direct appeal (*People v. Holmes*, 2012 IL App (2d) 100670-U) (*Holmes I*), and defendant filed a postconviction petition. The trial court dismissed the petition at the first stage and defendant appeals.

¶ 3 On appeal, defendant argues that the postconviction petition raises the gist of a constitutional claim by alleging that trial counsel was ineffective in two areas: (1) failing to perfect impeachment of an occurrence witness; and (2) failing to introduce evidence that defendant had been attacked three times between 2004 and 2007 as probative of defendant's mental state at the time of the shooting. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The facts of this case are adequately set forth in *Holmes I*, and will be briefly stated here. At trial, it was undisputed that defendant shot White three times, once in the chest, once in the abdomen, and once in the leg. Defendant raised the theory of self defense at trial, testifying that he had been in an altercation with White several weeks earlier and that defendant shot him because, when White rushed at him, he believed that White was reaching for a weapon.

¶ 6 White testified that he woke up around midnight and went downstairs to smoke a cigarette on the porch of a single-family residence. Several other people were hanging out on the porch, including children. White stated that defendant came up to the house, approached him, and the two had words concerning their prior altercation. White was standing in the doorway, holding the door partially open, when defendant drew a handgun and began shooting White. White ran up the stairs while defendant followed him, still firing the weapon. White told someone to call 9-1-1 before he collapsed.

¶ 7 Jacqueline Muriel testified that White had just come out of the house to ask for a cigarette when defendant came around the corner and confronted him. She stated that White did not approach defendant prior to the shooting.

¶ 8 Jamesha Irwin testified that she was sitting on the porch and White was standing outside near the door. Irwin saw defendant approach the house and speak to White for a few minutes.

Defendant then pulled a gun from under his shirt and started shooting. Irwin did not hear defendant or White arguing prior to the shooting. She did not recall seeing White go down the porch stairs toward defendant. On cross-examination, Irwin denied telling the police that White came out of the house and went to the bottom of the porch steps before his confrontation with defendant. She did acknowledge that she had been drinking that night, but she could not remember how much she drank. Irwin further stated that she did not know how many people had been there that evening or how long she had been there prior to the shooting. The jury rejected defendant's claim of self-defense, and this court affirmed.

¶ 9 Defendant filed a postconviction petition, alleging that his trial counsel was ineffective. He specifically claimed that counsel should have perfected his impeachment of Irwin with a police report indicating that Irwin had told the police that White was “standing *** near the bottom of the front porch steps” when defendant began to shoot him. Defendant also maintained that counsel should have introduced evidence that defendant had been attacked three times between 2004 and 2007 as probative of defendant's state of mind at the time of the shooting. Defendant did not allege that White had any involvement in the three attacks. The trial court dismissed the petition as frivolous and patently without merit. Defendant timely appeals.

¶ 10 II. ANALYSIS

¶ 11 A. Standard of Review

¶ 12 “The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a mechanism by which a criminal defendant can assert that his conviction and sentence were the result of a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both.” *People v. English*, 2013 IL 112890, ¶ 21. A defendant begins a

postconviction proceeding by filing a petition in the trial court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2010). Postconviction proceedings may consist of up to three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). During the first stage, a petition must present “the gist of a constitutional claim.” *People v. Harris*, 224 Ill. 2d 115, 124 (2007). If, taking the claims as true and liberally construed in the petitioner’s favor, the claims in the petition are frivolous or patently without merit, the petition will be dismissed. *People v. Kennebrew*, 2014 IL App (2d) 121169, ¶ 18. We review a first-stage summary dismissal of a postconviction petition *de novo*. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 13 When presenting an ineffective-assistance claim in a postconviction petition, the defendant must show that it is arguable that (1) trial counsel’s performance was deficient, which resulted in (2) prejudice to the outcome of defendant’s trial. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984)); *People v. Tate*, 2012 IL 112214, ¶¶ 18-20. We assess counsel’s performance using an objective standard of competence under prevailing professional norms. *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). To establish deficient performance, the defendant must overcome the strong presumption that counsel’s action or inaction was the result of sound trial strategy. *Id.* Counsel’s strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Id.* The prejudice prong of the *Strickland* test can be satisfied if the defendant can show that counsel’s deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004).

¶ 14 B. Ineffective Assistance of Trial Counsel

¶ 15 1. Failure to Impeach

¶ 16 Defendant first argues that the postconviction petition raised the gist of a constitutional claim by alleging that trial counsel was ineffective for failing to perfect impeachment of the occurrence witness, Jamesha Irwin.

¶ 17 At trial, the crucial factual issue was whether defendant or White was the aggressor. Irwin testified that she saw the victim when he came out the front door and that she did not recall seeing the victim go down the porch stairs toward defendant. On cross-examination, Irwin testified that she never told the police officers that the victim came out of the house and went down to the bottom of the porch steps. In his postconviction petition, defendant attached a police report, written by Officer Erik Semenchuk, indicating that Irwin told the police that the victim was standing near the bottom of the front porch steps when the shooting occurred. Defendant maintains that there is a reasonable likelihood that the outcome of the trial would have been different had defense counsel perfected this impeachment with the police report, as it would have provided support for his self-defense theory.

¶ 18 As an initial matter, the State argues that the attached police report was not an affidavit and the “bare inclusion of a document purporting to be a police report” is insufficient to satisfy the “affidavits, records, or other evidence” requirement of section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). We disagree.

¶ 19 The State ignores the language of the Act explicitly stating that “other evidence” is sufficient to support a petition. Moreover, the reason for the requirement of an affidavit is to enable the court to ascertain what the proposed witness would testify to. “ ‘In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary.’ ” *People v. Harris*, 224 Ill. 2d 115, 142 (2007) (quoting *People v. Enis*, 194 Ill.

2d 361, 380 (2000)). In this case, however, after examining the police report authored by Officer Semenchuk, any court considering the petition would have a basis for ascertaining what Officer Semenchuk would have testified to if he was called at trial because, if he did not testify consistently with his report, he would have been subject to impeachment.

¶ 20 Although an argument could be made that the statement in the police report is not actually impeaching, it is at least arguable that it is, and the failure to perfect the impeachment could be deficient. See, e.g., *People v. Vera*, 277 Ill. App. 3d 130, 140 (1995). Nevertheless, when assessing the importance of the failure to impeach for purposes of a *Strickland* claim, “[t]he value of the potentially impeaching material must be placed in perspective.” *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989); *People v. Salgado*, 263 Ill. App. 3d 238, 247 (1994).

¶ 21 Defendant argues as if impeachment of Irwin amounted to substantive evidence, but he does not analyze why. More importantly, however, if the impeachment had been perfected, it does not show in any way that White was the aggressor. Irwin’s statement did not corroborate defendant’s testimony that White rushed at him. In fact, Irwin’s testimony that White did not go toward defendant at all went unimpeached. Thus, perfecting this impeachment would not create a reasonable likelihood that the outcome of the trial could have been different. Accordingly, we do not find that counsel was ineffective for failing to perfect the impeachment of an occurrence witness.

¶ 22 2. State of Mind

¶ 23 Defendant next argues that his trial counsel was ineffective for failing to elicit testimony from defendant that defendant had been attacked three times between 2004 and 2007. Defendant maintains that these incidents were relevant to his state of mind at the time of the

shooting and therefore, should have been presented at trial. We reiterate that defendant does not suggest that White had anything to do with these earlier attacks on defendant.

¶ 24 In *People v. Sims*, 265 Ill. App. 3d 352 (1994), the First District Appellate court held that the trial court did not abuse its discretion in barring evidence of an unrelated attack which did not involve the victim and occurred five months before the shooting incident that was the subject of the trial as it was not relevant to the defendant's self-defense claim. In *People v. Wood*, 129 Ill. App. 3d 29 (1984), during the course of testifying, the defendant referred to a beating that he had suffered at an earlier time to show how he felt when the fight began and what he feared. The State objected to any description of this altercation, and made an offer of proof to show that it had occurred more than five years earlier when the defendant was beaten outside his house by two men, neither of whom was involved in any way with the victim. The trial court sustained the State's objection and therefore, the jury only heard the bare statement that the defendant had been beaten before. *Id.* at 32. The trial court's decision to bar the details of the prior incident was affirmed on appeal. The Fourth District Appellate Court held that such detailed testimony was irrelevant and only would have distracted the jury from the incident in question. *Id.* at 32-33.

¶ 25 In this case, the trial court allowed defendant to enter evidence of his reasonable belief that he needed to defend himself. During defendant's testimony at trial, the jury heard about the prior altercation between defendant and White at that same location. The trial court also allowed defendant to explain why he had the need to carry a weapon on the night of the incident. Evidence of the prior altercations may not have been admissible at trial as there was no clear connection between defendant and White, the present crime, and the prior events. Given that evidence was admitted to support defendant's theory of self defense, that the prior attacks may

not have been admissible, and, if admissible, may have been limited in detail, we conclude that counsel's decision was a matter of trial strategy.

¶ 26 Even if the testimony had been elicited concerning the prior attacks, it would not have altered the outcome of the trial. In light of the evidence presented at trial, it is difficult to see how testimony about prior attacks, which had nothing to do with the victim, would have changed the outcome of the trial. While it may be arguable that these prior incidents could have influenced defendant's state of mind, it would not have had the effect of rendering his use of deadly force reasonable based on the evidence adduced at trial. Accordingly, counsel was not ineffective for failing to elicit this testimony.

¶ 27 III. CONCLUSION

¶ 28 For the preceding reasons, we affirm the judgment of the circuit court of Winnebago County summarily dismissing defendant's postconviction petition.

¶ 29 Affirmed.