2015 IL App (2d) 140030-U
No. 2-14-0030
Order filed August 20, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. VINCENT E. SMITH, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of McHenry County. No. 10-CF-1083 Honorable Sharon L. Prather, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that trial and appellate counsel were ineffective: trial counsel's presentation of an allegedly unreasonable alibi defense did not arguably prejudice defendant (and thus appellate counsel was not arguably ineffective for failing to so argue), as the State's evidence was strong in any event.

¶ 2 Defendant, Vincent E. Smith, appeals the summary dismissal of his postconviction petition. He claims that he presented the gist of a claim that his trial counsel was ineffective for pursuing a flawed alibi defense and that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. For the reasons that follow, we determine that

defendant did not present the gist of a claim that trial counsel was ineffective, as defendant has not established that he was arguably prejudiced. Accordingly, we affirm.

¶ 3 The facts relevant to the issue raised are as follows. Following a jury trial, defendant was convicted of home invasion (720 ILCS 5/12-11(a)(2) (West 2010)), armed robbery (720 ILCS 5/18-2(a) (West 2010)), armed violence (720 ILCS 5/33A-2 (West 2010)), and two counts of aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2010)). Evidence presented at trial revealed that defendant and his codefendant, Josh Crandall, broke into a home, where Crandall attacked Michael Cody Wilson before stealing money from him. Four witnesses at the scene of the home invasion, including Wilson, identified defendant as one of the perpetrators even though both men wore masks.[1] Three of these witnesses, two of whom had met defendant before, also identified defendant from a photo line-up, advising the police officer in charge that they were absolutely positive that defendant was one of the masked men. With regard to the fourth witness, although she had met defendant before and pointed to defendant in the photo line-up, she did not identify defendant in the photo line-up as one of the perpetrators, as she was almost positive, but not absolutely positive, that defendant was one of the masked men.

¶ 4 To support his claim that he was not one of the men involved in the home invasion, defendant called to testify a local bar owner, the bartender of that bar, and his girlfriend, Melissa Hervas.[2] Defendant claimed that these witnesses would provide him with an alibi. The bar

[1] The witnesses indicated that defendant's mask was a makeshift black ski mask, with large holes cut out for defendant's eyes. From those, the witnesses could see not only defendant's eyes but, according to some witnesses, defendant's eyebrows and portions of his face underneath his eyes.

[2] The evidence indicated that the bar was 2½ miles away from the scene of the home

owner and the bartender testified that defendant closed his bar tab several hours before the home invasion occurred. Although Hervas, with whom defendant has two children, stated that she picked defendant up at the bar at closing time and took him to her house, her testimony was impeached with a recording of a conversation she had with defendant while he was in jail. During that conversation, Hervas asked defendant what she should tell the investigator about what happened on the night the crimes were committed.[3] In another admitted recording, defendant and an unknown man discussed a newspaper article concerning the incident, and defendant asked, "How is that when—when we was masked?"[4] In closing argument, the State claimed that defendant's alibi really was not an alibi at all, noting that defendant, in the recordings, essentially admitted to being one of the masked men.

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invasion.

[3] Before this recording was admitted, and during the State's case-in-chief, the State advised the court that it wanted to introduce the recording. The court asked the State whether it had Hervas under subpoena, and the State said that it did. The State told the court that it wanted to call Hervas not for impeachment purposes, but to lay a foundation for the admission of defendant's statement in the recording. Defense counsel objected and interjected that he was going to call Hervas regardless of what the State was going to do. Based on that, and over defense counsel's objection to the admission of the recorded conversation, the court told the State that it could present the recorded conversation in rebuttal, which is when the recording was played for the jury.

[4] In presenting its rebuttal case, the State sought to introduce this recorded conversation. Defendant objected, arguing that it should have been presented during the State's case-in-chief. The court admitted it over defense counsel's objection.

¶ 5 After the jury found defendant guilty, he was sentenced to a total of 22 years' imprisonment. Defendant appealed, and defense counsel moved to withdraw. Defendant responded, arguing, as relevant here, that defense counsel was ineffective for waiting to hire an investigator to interview alibi witnesses until one week prior to trial. This court granted the motion to withdraw (see *People v. Smith*, 2013 IL App (2d) 110493-U (summary order)), and defendant petitioned for postconviction relief. In his petition, defendant claimed, among other things, that his trial counsel was ineffective for advancing an unreasonable alibi defense and that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. The trial court summarily dismissed the petition, finding the issues barred by *res judicata* and forfeiture. This timely appeal followed.

¶ 6 At issue in this appeal is whether the summary dismissal of defendant's postconviction petition was proper. "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. Proceedings under the Act can consist of three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). This appeal concerns a summary dismissal at the first stage.

¶ 7 At the first stage, a petition must present "the gist of a constitutional claim." *People v. Harris*, 224 Ill. 2d 115, 126 (2007). If, taken as true and liberally construed in the defendant'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. Additionally, claims that are barred by *res judicata* or forfeiture may be summarily dismissed. *People v. Blair*, 215 Ill. 2d 427, 442 (2005).

¶ 8 We review *de* novo a summary dismissal of a postconviction petition. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). In doing so, we note that, while the trial court's reasoning may assist us, we review only its judgment, not its reasoning. *People v. Jones*, 399 Ill. App. 3d 341, 359 (2010).

¶ 9 Before addressing the substance of defendant's claim, we note that the State contends that defendant's petition was properly dismissed, because his claim concerning the ineffective assistance of trial counsel was raised in his response to the *Anders* motion. Specifically, the State argues that defendant's claim there that defense counsel was ineffective for failing to hire an investigator until one week prior to trial bars defendant's argument here that defense counsel was ineffective for advancing a flawed alibi defense. We disagree.

¶ 10 Although it is true that a defendant may not obtain relief under the Act by merely rephrasing a previously addressed issue (see *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992); see also *People v. Barrow*, 195 Ill. 2d 506, 522 (2001) (commenting that a mere change in phraseology does not warrant reconsideration of the issue)), we cannot conclude that that was done here. In his response to the *Anders* motion, defendant took issue with counsel's delay in obtaining an investigator to interview potential alibi witnesses. Now, defendant challenges the substance of what that investigation uncovered and argues that, because the alibi was allegedly flawed, counsel should not have presented the alibi defense. Because these are two separate issues, defendant is not barred from raising the claim he does here. See *People v. Harris*, 206 Ill. 2d 1, 42 (2002).

¶ 11 Moreover, the State claims that the issue here is barred because defendant pushed for counsel to hire an investigator and pursue an alibi defense. According to the State, given defendant's insistence that counsel proceed a certain way, he is prohibited from insisting now

that counsel was ineffective for doing so. See *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). We disagree. As defendant indicates in his reply, the record does not support the contention that defendant wished to pursue an alibi defense *after* an investigation had been conducted, but, more importantly, the decision to present an alibi rested solely with defense counsel. See *People v. York*, 312 Ill. App. 3d 434, 437 (2000). Indeed, the trial court advised defendant as much when it told him, after granting counsel's request to proceed with an investigation, that all strategic decisions belonged to counsel.

¶ 12 Turning to the merits, when presenting an ineffective-assistance claim in a postconviction petition, the defendant must show that it is arguable that trial counsel's performance (1) was deficient and (2) resulted in prejudice to the outcome of the defendant's trial. *Hodges*, 234 Ill. 2d at 17; *Stickland v. Washington*, 466 U.S. 668, 687 (1984). We assess counsel's performance by 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). Because both prongs of the test must be established to succeed on an ineffective-assistance claim, we may dispose of such a claim if, for example, the defendant fails to establish that he was prejudiced. See *People v. Clendenin*, 238 Ill. 2d 302, 317-18 (2010); see also *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 77 (failure to establish either prong of *Strickland* test will doom an ineffectiveness claim).

¶ 13 The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and that counsel's decision prejudiced the defendant. *Id.* Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetent to refrain from raising issues that, in counsel's judgment, are without merit, unless counsel's assessment is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the prejudice inquiry requires the reviewing court to examine the merits of the underlying issue, because a defendant suffers no prejudice from appellate counsel's failure to raise a nonmeritorious claim. *Id.*

¶ 14 Here, a challenge to trial counsel's decision to advance the alibi defense would not have been meritorious. Putting aside the fact that the State was going to introduce the conversation with Hervas whether defendant called her or not, defendant was not prejudiced by the admission of the alibi defense. Most importantly, four witnesses, three of whom had met defendant before, testified that defendant was one of the masked men. Of these four witnesses, three positively identified defendant as one of the masked men when the police showed them a photo line-up, with the fourth witness indicating at the photo line-up that she was almost sure, though not absolutely sure, that defendant was one of the masked men. Given this eyewitness evidence, it is not arguable that defendant was prejudiced by the alibi defense. *People v. Lewis*, 165 Ill. 2d 305, 356 (1995); see also *People v. McCullough*, 2015 IL App (2d) 121364, ¶ 80 (a single eyewitness's identification of the defendant as the perpetrator is sufficient to sustain a conviction if viewed under conditions permitting positive identification).

¶ 15 Citing *People v. Tate*, 2012 IL 112214, defendant argues that, irrespective of the identification testimony, he presented the gist of a claim that trial counsel was ineffective, as the standard for asserting such a claim is very low. In *Tate*, four eyewitnesses identified the defendant as the person who shot the victim. *Id.* ¶ 3. No alibi testimony was presented at trial to establish that the defendant did not shoot the victim. *Id.* ¶ 4. In his postconviction petition, the defendant argued that his trial counsel was ineffective for failing to investigate four witnesses, two of whom could have provided the defendant with an alibi defense. *Id.* One of those two witnesses attested that he had known the defendant for years, he was standing five feet from the victim when the victim was shot, and he was sure that the defendant was not the shooter. *Id.* ¶ 5. Our supreme court found that it was arguable that the defendant was prejudiced by counsel's failure to call these witnesses, as no other evidence linked the defendant to the crime, and the witnesses, especially the one who was standing next to the victim, could have contradicted the testimony of the four eyewitnesses. *Id.* ¶ 24.

¶ 16 Here, unlike in *Tate*, defendant has not pointed to anything that contradicts the State's case against him. Rather, he claims only that, had his trial counsel not presented an alibi, the jury arguably would have found him not guilty. We fail to see how that could have happened. Under either scenario, whether counsel presented defendant's alibi or not, the fact remains that four people identified defendant as one of the masked men. Without evidence contradicting the eyewitnesses' testimony, we find *Tate* unpersuasive.

¶ 17 For the above-stated reasons, the judgment of the circuit court of McHenry County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 18 Affirmed.