2015 IL App (2d) 141088-U
No. 2-14-1088
Order filed July 21, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Respondent-Appellee,	)	
	)	No. 11-CF-745
v.	)	
MOHAMMAD A. SALAM,	)	Honorable Sharon L. Prather,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court properly dismissed defendant's second-stage postconviction petition for failing to make a substantial showing that defendant was denied the effective assistance of trial counsel; affirmed.

¶ 2 Following a jury trial, defendant, Mohammad A. Salam, was found guilty of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(i) (West 2010)), for knowingly engaging in sexual conduct with G.C., a minor. The court sentenced defendant to two years' probation. Defendant's conviction was affirmed on direct appeal. *People v. Salam*, 2014 IL App (2d) 130892-U (*Salam I*). Defendant filed a postconviction petition, and a supplemental petition,

which the trial court dismissed. On appeal, defendant contends that the judgment dismissing his postconviction petitions at stage two should be reversed and the cause should be remanded for a third-stage hearing because he made a substantial showing that he was denied his right to the effective assistance of counsel. We affirm.

¶ 3 I. BACKGROUND[1]

¶ 4 G.C. attended a daycare operated by defendant and his wife, Atiya Salam. The daycare is on the first floor of their home, and they reside on the second floor. When G.C. was seven years old, she told her mother, Pauline, that defendant had touched her. She stated that there were certain times she was asked to go upstairs to the bedroom to wake defendant. Defendant would pick her up from the side of the bed, take his hand, place it under her underwear, and rub her butt. Other times defendant would play "funny videos" on his computer for G.C. to watch and, while she sat on his lap, defendant would place his hands under her clothes, rub her upper and lower back, and the upper area of her butt. Pauline notified the Algonquin police department and Officer Amy Bucci interviewed G.C.

¶ 5 Prior to trial, the State filed a motion *in limine* requesting that the court bar evidence that the sexual abuse allegation against defendant was determined by the Department of Children and Family Services (DCFS) to be "unfounded." The court granted the motion.

¶ 6 Following closing argument and deliberation, the jury found defendant guilty. The court denied posttrial motions and subsequently sentenced defendant to two years' probation, ordered him to pay fines and to undergo counseling.

[1] A full recitation of the facts of this case appears in *Salam I* affirming defendant's conviction and sentence on direct appeal, but we briefly summarize the facts here.

¶ 7 Defendant filed a postconviction petition, arguing that he could not challenge on appeal the trial court's order granting the State's motion to preclude defense from introducing evidence that the DCFS allegation against defendant related to this matter was deemed "unfounded." Defendant requested that he be allowed to obtain DCFS records to allow him to further develop his postconviction argument that defense counsel was ineffective for failing to obtain those records.

¶ 8 The postconviction court advanced the petition to the second stage, and asked the State to respond to the petition. The State represented to the court that it would permit defendant to obtain the DCFS records in question, and then it would respond to any amended or supplemental postconviction petitions filed afterwards.

¶ 9 Defendant filed a supplemental postconviction petition, incorporating the records obtained from DCFS. In the petition, defendant attached a memorandum written by investigator Mary Richardson, which occurred four days before Bucci's interview of G.C. In the memo, it states that Pauline told Richardson that a few months prior to the outcry, G.C. had told Pauline that defendant and his wife had kissed G.C. on the lips and that Pauline told defendant and his wife, Atiya, that she wanted that behavior to stop.

¶ 10 Defendant set forth four arguments in his postconviction petition concerning why his trial counsel was ineffective for failing to obtain and utilize the DCFS report. First, he argued that this statement impeached Pauline's trial testimony, in which she had testified that she had no concerns about Atiya kissing G.C. and G.C.'s sister, and that Pauline had denied ever giving Atiya a letter concerning kissing. Defendant argued that this would have been important because, in G.C.'s recorded interview introduced at trial, G.C. told Bucci that defendant used to kiss her on the lips "for a couple of minutes" before doing a "new thing" of touching her butt.

G.C. also stated during the interview that her parents wrote a letter to defendant and his wife telling defendant to stop the kissing.

¶ 11 Second, defendant argued that the DCFS interview would have undermined Pauline's credibility because no reasonable parent, after being notified that her daycare provider and her husband were inappropriately kissing their daughter on the lips would react by sending them a stern warning, rather than immediately removing the children from daycare and notifying authorities.

¶ 12 Third, defendant argued that the DCFS statement would have undermined the plausibility of G.C.'s story and the State's theory of the case that defendant was "grooming" G.C. as a victim, and that the touching of the butt was a test to determine whether she would tell anyone about the touching before going on to more advanced touching.

¶ 13 Finally, defendant argued that the DCFS interview would have impeached G.C.'s testimony because, had the touching of the butt occurred *before* the kissing outcry, then it would have been improbable that G.C. would have only mentioned the kissing but not the touching of the butt. Alternatively, defendant argued that, had the touching of the butt occurred *after* the kissing outcry, then it would have been hard to believe defendant would have advanced from kissing to touching, knowing G.C. was a child who told her parents about inappropriate sexual behavior.

¶ 14 The State filed a motion to dismiss defendant's postconviction petition and supplemental postconviction petition. To the motion, the State attached exhibits purporting to demonstrate defense counsel had been given this memo before trial. In support, the State noted that, prior to trial, defense counsel had tendered to the State a seven-page summary of the DCFS investigation, along with a one-page letter from DCFS stating that the abuse allegation was "unfounded." Page

two of that exhibit generally summarized the substance of the Richardson memo regarding the kissing allegation, but it does not contain a date when the conversation occurred, a place where the interview occurred, or the author of that report, *i.e.*, a person who could be called as a witness to prove up the impeachment. The summary also has circles and notes on the record (presumably made by defense counsel) indicating the kissing information, and a "?" near the portion of the statement referencing the kissing allegation. The State argued defense counsel employed "trial strategy" by not introducing this evidence.

¶ 15 The court granted the State's motion to dismiss. The court found defendant's claim that trial counsel was ineffective for failing to discover and use the DCFS documents "is positively rebutted by the record." In making this determination, the court explained the following:

> "The court file reflects that on September 26, 2011, the State filed its Answer to Defendant's Motion for Discovery and listed Mary Richardson from DCFS as a potential witness. On November 2, 2012, Defendant filed Defendant's Answer to Discovery and tendered to the State[:] DCFS Investigation Summary, 3 CR #1950366-A, seven (7) pages in length; [and] DCFS one (1) page letter, dated December 19, 2011. A review of the investigation summary included by defense clearly indicates that the defense had in its possession records from DCFS and those records clearly indicated that [Pauline] responded to DCFS that she asked the Salams not to kiss her daughters as they have taught their daughters they should only kiss their spouses. Further trial counsel did cross-examine [Pauline] on this issue at trial."

¶ 16 Defendant timely appeals from the dismissal of his postconviction petitions.

¶ 17 II. ANALYSIS

¶ 18 Defendant argues that the trial court erred by dismissing his postconviction petition because he made a substantial showing that he received ineffective assistance of counsel. He maintains that a hearing should be required to determine whether defense counsel obtained the "Richardson" memo and whether defense counsel chose not to impeach Pauline with these statements as a matter of trial strategy.

¶ 19 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq*. (West 2012)) provides a way for defendants to challenge their convictions based on claims of the substantial denial of their constitutional rights. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). A proceeding under the Act is a collateral challenge to the judgment, and is not designed to relitigate the defendant's guilt or innocence. *Id*. Issues raised on direct appeal are barred by *res judicata* and issues that could have been raised but were not are procedurally defaulted. *Id*.

¶ 20 The Act contemplates a three-stage process. *Id*. A petition may be dismissed at stage two, as in this case, when it fails to make a substantial showing of a constitutional violation. See *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, all well-pleaded facts are taken as true, and the dismissal of the petition is subject to *de novo* review. *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005).

¶ 21 Where the petitioner's claims "are based on matters outside the record, the trial court is prohibited from engaging in fact finding." *People v. Alexander*, 2014 IL App (2d) 120810, ¶ 25. When factual disputes require a determination of the truth or falsity of supporting affidavits or exhibits, that determination cannot properly be made at a hearing on a motion to dismiss; rather, it can only be made during a third-stage evidentiary hearing. *Id*.

¶ 22 Under the two-prong *Strickland* test for determining whether assistance of counsel has been ineffective, a defendant must show that (1) counsel's performance was deficient in that it

fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). With regard to the second prong of *Strickland*—the prejudice prong—a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). 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).

¶ 23 Decisions concerning which witnesses to call at trial and what evidence to present are for defense counsel to make and, as matters of trial strategy, are generally immune from ineffective assistance of counsel claims. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003). Counsel's representation is not rendered incompetent even where a mistake in trial strategy or in judgment is made by counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). "In fact, counsel's strategic choices are virtually unchallengeable." *Palmer*, 162 Ill. 2d at 476. "The only exception to this rule is where counsel's chosen trial strategy is so unsound that counsel fails to conduct any meaningful adversarial testing." *Deloney*, 341 Ill. App. 3d at 634.

¶ 24 Defendant argues that the court erred in concluding that defendant failed to make a substantial showing that his trial counsel did not "discover" the Richardson memo because the record does not affirmatively rebut that defense counsel failed to discover the memo. Defendant argues that the court relied on the exhibits introduced by the State, which do not establish defense counsel had the Richardson memo, but instead, merely show counsel obtained a seven-

page summary without specifics as to the date or place of the interview, or an indication of who conducted the interview.

¶ 25 The record belies defendant's assertion that defense counsel did not have the Richardson memo. In a discovery answer tendered by defendant on September 26, 2011, Richardson was listed as a witness. Defense counsel also tendered documents from DCFS in discovery on November 2, 2012. The investigative summary tendered to the State included interviews with Pauline that contained the same information disclosed in the memo presented as defendant's exhibit E in his postconviction petition. Furthermore, the DCFS reports tendered to the State by defense counsel included the information that Pauline told DCFS that G.C. disclosed to her that defendant and his wife would kiss G.C. and that Pauline confronted the Salams and told them not to kiss her daughters, as they should only kiss their spouses. More importantly, the record shows that defense counsel was aware of this information because she cross-examined Pauline about the kissing incidents. Therefore, the record disproves defendant's ineffective assistance of counsel claim.

¶ 26 Nevertheless, defendant questions the chronology of the incidents regarding when he and his wife had kissed G.C. and her sister against when he had fondled G.C. The record again undermines this claim. Bucci interviewed G.C. several days after her outcry where G.C. told Bucci "that defendant used to kiss her on the lips 'for a couple of minutes,' but then he 'started a new thing' of touching her 'butt' after her parents told defendant to stop the kissing." See *Salam I*, ¶ ¶ 12, 13.

¶ 27 Defendant argues that counsel should have used the DCFS report about the kissing to impeach Pauline and G.C. He asserts that no reasonable parent would have reacted to inappropriate kissing with a warning instead of contacting authorities and removing their

children from daycare. Defendant further maintains that it would be difficult to believe that defendant would advance to fondling, when he knew that G.C. told her parents about such inappropriate behavior.

¶ 28 First, G.C. could not have been impeached with Pauline's statements, and the statements could not have been used as substantive evidence to "undermine" G.C.'s testimony. See *People v. Smith*, 177, Ill. 2d 53, 83 (1997) (when prior inconsistent statements are made out of court, they are hearsay and thus inadmissible as substantive evidence, but the prior statement may be used for the sole purpose of impeaching and undermining the credibility of the witness).

¶ 29 Second, while the DCFS statements could be used to impeach Pauline, the decision to refrain from such impeachment is a matter of trial strategy. Counsel may have decided it was best to avoid highlighting the inappropriate kissing between someone of defendant's age and a five-year-old. Additionally, such impeachment would corroborate G.C.'s recorded statement where she said defendant would kiss her on the lips for a couple of minutes. Thus, we believe that counsel's decision falls squarely within the realm of trial strategy.

¶ 30 Finally, even if counsel had been ineffective for failing to discover and use the DCFS records, it would not have affected the outcome of the trial. We previously determined that the evidence was not closely balanced (see *Salam I*, ¶ 65, 74), and therefore defendant cannot establish the required prejudice to sustain his ineffective assistance of counsel claim. See *People v. Marcos*, 2013 IL App (1st) 111040, ¶ 77 (failure to establish either prong of *Strickland* test will doom an ineffectiveness claim); see generally *People v. White*, 2011 IL 109689, ¶ 133 (holding that prejudice prong for ineffective assistance of counsel is similar to closely balanced evidence prong of plain error review).

¶ 31 III. CONCLUSION

¶ 32 For the preceding reasons, we affirm the judgment of the circuit court of McHenry County dismissing defendant's postconviction petition. 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 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 33 Affirmed.