

NOTICE
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2015 IL App (5th) 130337-U

NO. 5-13-0337

IN THE

APPELLATE COURT OF ILLINOIS

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	St. Clair County.
)	
v.)	No. 07-CF-1325
)	
ROBERT MYERS,)	Honorable
)	John Baricevic,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly granted the State's motion to dismiss defendant's second stage postconviction petition where defendant's allegation was rebutted by the record.

¶ 2 This appeal arises from the trial court's judgment dismissing defendant's petition for postconviction relief at the second stage after finding defendant's allegation of ineffective assistance of counsel was rebutted by the record. For the following reasons, we affirm the judgment of the trial court.

¶ 3

BACKGROUND

¶ 4 Defendant, Robert Myers, was convicted by a jury of attempted first-degree murder (720 ILCS 5/8-4(a) (West 2006)) and aggravated battery (720 ILCS 5/12-4(a) (West 2006)) in conjunction with the stabbing of the victim, Kevin Allen. Since the attempted murder charge was predicated on the same evidence as the aggravated battery charge, a judgment was entered only for attempted murder. Defendant was sentenced to 22 years in the Department of Corrections, and his conviction was affirmed on direct appeal.

¶ 5 Defendant subsequently filed a *pro se* postconviction petition and was appointed counsel. Defendant's amended postconviction petition alleged he received ineffective assistance of counsel for several reasons, one being that counsel failed to call defendant's relative, Annie Henley, as a witness at trial to testify about an alleged conversation she overheard between the victim and a witness, Lakeisha Matkins, during a break in the trial proceedings. According to Henley's affidavit attached to the petition, the victim told Matkins he did not know defendant. In response, Henley claims Matkins described defendant to the victim, who then identified defendant as his attacker in court.

¶ 6 The amended petition further alleged that defendant was denied due process and equal protection, and defendant argued the trial court improperly allowed the jury to see the victim's scars. In response to defendant's amended petition, the State filed a motion to dismiss asserting Henley's affidavit was rebutted by the record and defense counsel's

conduct failed to amount to ineffective assistance of counsel. The court granted the State's motion to dismiss, and defendant timely filed a notice of appeal.

¶ 7

ANALYSIS

¶ 8 Defendant alleges the trial court erred in granting the State's motion to dismiss his second stage postconviction petition because he made a substantial showing that counsel was ineffective for failing to call Henley as a witness at trial based on Henley's affidavit concerning the victim's in-court identification of defendant as his attacker. Specifically, defendant claims Henley was in a hallway outside the courtroom during a break in the trial when she heard the victim tell Matkins that he did not know what defendant looked like, and in response Matkins described defendant's appearance to the victim. Defendant further claims he told counsel about this conversation, and alleges counsel was ineffective for failing to act upon such knowledge because the victim "suddenly recalled" the identity of his attacker at trial after the alleged conversation. For the following reasons, we find defendant's allegation is rebutted by the record.

¶ 9 The standard of review for a postconviction petition dismissed at the second stage is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). Throughout the second stage of a postconviction proceeding, a defendant bears the burden of making a substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial court record are to be taken as true. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008.

¶ 10 However, where the allegations in a postconviction petition are contradicted by the record, the dismissal of the petition is proper. *People v. Coleman*, 183 Ill. 2d 366, 382, 701 N.E.2d 1063, 1072 (1998). It is only through a careful review of the record of the trial court proceedings that a trial court can determine whether the allegations in a postconviction petition are positively rebutted by the record. *People v. Jefferson*, 345 Ill. App. 3d 60, 76, 801 N.E.2d 552, 565 (2003). If the claims made in a petition are positively rebutted by the record, they should not be taken as true, as those claims are patently without merit. *Jefferson*, 345 Ill. App. 3d at 76, 801 N.E.2d at 565.

¶ 11 The single issue raised by defendant on appeal claims ineffective assistance of counsel. In order to succeed on a claim of ineffective assistance of counsel, defendant must satisfy the two-pronged *Strickland* test adopted by our supreme court: (1) defendant must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984); *People v. Albanese*, 104 Ill. 2d 504, 526, 473 N.E.2d 1246, 1255 (1984).

¶ 12 Under the *Strickland* test, a reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance caused the result of the trial to be unreliable or the proceeding fundamentally unfair. *People v. Enis*, 194 Ill. 2d 361, 376, 743 N.E.2d 1, 11 (2000). There is 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 is sound trial strategy. *Strickland*, 466 U.S. at 689. The failure to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *Enis*, 194 Ill. 2d at 377, 743 N.E.2d at 11.

¶ 13 Here, defendant's claim of ineffective assistance of counsel based on Henley's affidavit is rebutted by the record and, therefore, patently without merit. The record indicates all witnesses were excluded from the courtroom prior to the commencement of trial. The first witness the State called was Matkins, which was the first time Matkins saw defendant that day. Matkins was excused after she testified, and the victim was immediately called to the stand thereafter. Thus, there was no break in the proceedings between the time Matkins and the victim testified.

¶ 14 Nonetheless, Henley claims in her affidavit that she overheard a conversation between Matkins and the victim during a break in the proceedings in the hallway outside the courtroom. Henley claims Matkins informed the victim of defendant's appearance, which allowed the victim to identify defendant when the victim was called as a witness.

¶ 15 After a careful review, we find this allegation is clearly rebutted by the record, which indicates there was no break in the proceedings during which the alleged conversation could have taken place between the time Matkins and the victim testified. Breaks in the trial court proceedings are consistently reflected throughout the record. For example, in response to defendant's request for a 15-minute break to obtain case law, the court stated:

"All right. We're going to take a break at this time. *** We're going to try to reconvene in about 15 minutes or so. About 15 minutes."

The court took a similar break between the testimony of the victim and Dr. Nwaobasi. After the victim was excused as a witness, the court stated the following:

"All right. We're going to take a short break. *** We're going to try to make it like 10 to 15 minutes, if possible. So we'll see you back here in that amount of time."

¶ 16 No such break is reflected in the record which suggests a break was taken between the time Matkins and the victim testified in court. In contrast, the record indicates the victim was called to the stand immediately after Matkins was excused from the stand.

¶ 17 While defendant acknowledges that the State has pointed to instances in the record where the trial judge referred to specific break times, he argues these accounted-for breaks do not suggest that no other breaks occurred during trial. Defendant also claims the alleged conversation between Matkins and the victim may have occurred when defense counsel requested a moment to gather her thoughts on at least three instances during cross-examination, as the record is silent regarding the length of each moment. We disagree.

¶ 18 Defendant offers no support to his assertion that breaks occurred during trial which are not reflected in the record. Further, the record offers no indication that a break was taken when defense counsel requested a moment to gather her thoughts during cross-examination. Accordingly, we find Henley's affidavit is rebutted by the record.

¶ 19 Defendant further alleges the court's assessment that the record rebuts Henley's claim is unfounded without an evidentiary hearing. We disagree. A defendant must plead "sufficient facts to enable him to obtain an evidentiary hearing." *People v. Patterson*, 192 Ill. 2d 93, 123, 735 N.E.2d 616, 634 (2000). In the instant case, Henley's affidavit contains no facts to support her claim. Accordingly, we reject defendant's claim of ineffective assistance of counsel based on the exclusion of the alleged conversation.

¶ 20 Lastly, we note there is no reasonable probability that the outcome of the trial would have been different had Henley testified. As previously indicated, in order to support a claim of ineffective assistance of counsel, a defendant must allege facts demonstrating his counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 694.

¶ 21 In the instant case, the victim repeatedly testified that he did not see the man who attacked him from behind and never claimed to have seen defendant attack him. This testimony was given after Henley allegedly overheard Matkins describe defendant's appearance to the victim before the victim took the stand. Moreover, the victim never recalled the identity of his attacker at trial from the alleged conversation with Matkins. The victim merely stated that he saw defendant at a party before he was attacked, and used a process of elimination to identify defendant as his attacker. Therefore, defendant has failed to establish a reasonable probability that the outcome of the trial would have been different had counsel called Henley as a witness.

¶ 22

CONCLUSION

¶ 23 For the reason stated herein, we conclude that defendant's postconviction petition is patently without merit and we affirm the trial court's dismissal of the petition.

¶ 24 Affirmed.