THIRD DIVISION
August 17, 2016

No. 1-14-2011

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. 07 CR 14511
	)	
LORENZO WILSON,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's summary dismissal of defendant's post-conviction petition is affirmed where defendant could not state an arguable claim that he was prejudiced by his counsel's failure to present testimony from several family members who would have contradicted the account of a prosecution witness, given the incriminating testimony of other State witnesses who were present at the crime.

¶ 2 Defendant Lorenzo Wilson appeals the circuit court's order summarily dismissing his post-conviction petition. On appeal, defendant contends that his petition should be remanded for second-stage post-conviction proceedings because it presented an arguable claim of

ineffectiveness of his trial counsel for failing to investigate the potential testimony of seven members of defendant's family who would have challenged the credibility of a State witness.

¶ 3 Following a jury trial, defendant was convicted of first degree murder and armed robbery for the shooting death of Corey Ebenezer. The jury found that defendant personally discharged a firearm that proximately caused Ebenezer's death, and defendant was sentenced to concurrent terms of 75 years in prison for the murder and 20 years for the armed robbery.

¶ 4 Defendant and Erika Ray were tried simultaneously by separate juries. Testimony at those trials established that Ray was fired from her waitress job at Leona's in Hyde Park on June 14, 2006, after arguing with Ebenezer, who was her manager that night.

¶ 5 Paris Gosha and Anthony Macon, who were involved in the shooting, both testified for the State. Gosha testified he was Ray's cousin and defendant's friend and that he cooperated with the State in exchange for a guilty plea to armed robbery and a 30-year sentence.

¶ 6 As to the night in question, Gosha testified that defendant told him that Ray wanted to speak with him, and Ray told Gosha she had been fired and wanted him "to beat her boss' ass." Gosha and Macon went with Ray and defendant, as well as Gosha's brother DJ, to the restaurant. Gosha, Macon, DJ and defendant entered the back of the restaurant, and defendant pointed a gun at Ebenezer's face. Gosha took money from the cash register. A shot was fired as defendant and Ebenezer fought over the weapon. Macon tried to break them apart, and Ebenezer fell to the floor. Defendant stood over Ebenezer and shot him.

¶ 7 Macon testified that he accompanied Ray, Gosha and defendant to the restaurant but that he only thought they were going to beat up Ray's boss. In the car, Macon saw defendant holding a small gun with a pearl handle. After entering the restaurant, Macon went elsewhere, and heard

to gunshots from the area where the others had gone. Macon saw defendant, Gosha and DJ fighting with another man. Macon tried to pull Gosha away from the fight. The group returned to the car and Macon heard defendant say he thought he killed the man in the restaurant.

¶ 8 In July 2006, Macon told police he had no knowledge of the shooting; however, he admitted his involvement two weeks later. Macon was not charged with any crime and testified in defendant's trial that he had not been offered any deal by the State in exchange for his testimony.

¶ 9 Charles Wilson, defendant's great-uncle, was called to testify as a State witness but refused to testify once on the witness stand. When asked if he was in Chicago in June 2006, Wilson first responded that he did not recall and then declared that he would "plead the fifth." The trial court directed Wilson to testify after the court and the attorneys discussed the inapplicability of the fifth amendment right barring self-incrimination to Wilson's testimony, outside of the jury's presence.

¶ 10 Pursuant to section 115-10.1 of the Code of Criminal Procedure (the Code) (725 ILCS 5/15-10.1 (West 2010)), the State introduced prior statements of Wilson in which Wilson said that on June 14, 2006, defendant told him "I think I shot somebody." Those statements included: (1) an audiotaped statement given to a Gulfport, Mississippi, police sergeant on December 6, 2006; (2) a signed written statement given to a Chicago police detective and assistant State's attorney on December 19, 2006; and (3) Wilson's testimony before a grand jury on May 24, 2007. Wilson stated at defendant's trial that he did not recall making those statements. Later in his testimony, Wilson denied making those statements and said he was the person who shot Ebenezer.

¶ 11 We set out only those portions of Wilson's prior statements that this court found admissible on direct appeal. *People v. Wilson*, 2012 IL App (1st) 101038, ¶¶ 22, 42. Wilson said he was visiting defendant's mother at her house in Chicago on June 14, 2006, and that defendant returned home late that night and was not acting like himself. Wilson drove defendant to Wilson's home in Mississippi, where defendant stayed for about four months. During the drive to Mississippi, Wilson saw defendant take a dismantled gun from his pocket. The gun had a "marble" handle, "like pearl" and another color. Wilson testified that defendant threw parts of the gun out of the window as Wilson drove. Defendant later went to stay with a woman he described as his "play niece" in Florida.

¶ 12 On direct appeal, this court held, *inter alia*, that the trial court erred in admitting portions of several of Wilson's audiotaped and handwritten statements in which Wilson stated that defendant confessed to him that he shot someone. *Wilson*, 2012 IL App (1st) 101038, ¶¶ 22, 42. This court determined that parts of Wilson's prior statements were only admissible where Wilson had "personal knowledge" of the events he described, including his description of defendant's demeanor on the night of the shooting, his trip to Mississippi with defendant, and seeing defendant throwing parts of a pearl-handled gun out of the car window as Wilson drove. *Id.* ¶¶ 38-42, citing 725 ILCS 5/115-10.1(c)(2) (West 2010).

¶ 13 However, this court held that the admission of those statements constituted harmless error because defendant's description of the shooting and the other challenged portions of Wilson's prior statements were duplicated in Wilson's grand jury testimony, noting that the grand jury testimony contained "all the portions of the audiotaped and handwritten statements that we have found were not properly admitted." This court held that Wilson's grand jury testimony was

"indisputably admissible" pursuant to section 115-10.1(c)(1) of the Code (725 ILCS 5/115-10.1(c)(1) (West 2010)), which allows into evidence prior statements "made under oath at a trial, hearing or other proceeding[.]" *Id.* ¶¶ 55-58. The court reviewed the evidence presented at defendant's trial and held that there was no reasonable probability that the jury would have acquitted defendant even if the improperly admitted portions of Wilson's prior audiotaped and handwritten statements had been excluded. *Id.* ¶ 58.

¶ 14 On October 8, 2013, defendant's counsel filed a petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). Among other claims, defendant asserted that his trial counsel was ineffective for failing to "make any meaningful effort to challenge" Wilson's credibility. Attached to defendant's petition were seven affidavits from defendant's parents, grandparents, brothers and uncle, each of whom attested that they were willing to testify at defendant's trial that Wilson was not trustworthy. Each of defendant's relatives stated that he or she was available to testify but was never asked. Defendant's parents, Charles L. Wilson and Laverne Wilson, and two of defendant's brothers, C.A. Wilson and Tevin Wilson, each attested that defendant's great-uncle was not at their home in June 2006 and was not allowed in their home. Defendant's grandparents, John Wilson and Maddie Wilson, attested that defendant's great-uncle was untrustworthy and would not have been at the Wilson home in June 2006. Several of the affidavits referred to Wilson as the "black sheep" of the family.

¶ 15 On January 3, 2014, the circuit court dismissed defendant's petition. Defendant filed a motion to reconsider that ruling. On June 4, 2014, the circuit court denied defendant's motion to reconsider. This appeal followed.

¶ 16 On appeal, defendant contends the circuit court erred in summarily dismissing his post-conviction petition because the petition raised an arguable claim of his trial counsel's ineffectiveness. He asserts that his trial counsel provided deficient representation by failing to investigate the accounts of his family members who would have contradicted Wilson's version of events and testified as to his reputation for untruthfulness. Defendant further contends that counsel's failure to investigate and present those witnesses at his trial prejudiced his case because the jury was left to only consider the testimony of Gosha and Macon. He argues that had the jury heard about Wilson's reputation for untruthfulness, the jury "arguably would have disregarded [Wilson's] statements altogether."

¶ 17 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq*. (West 2012). At the first stage of a post-conviction proceeding, a defendant need only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). The circuit court may dismiss the petition if the allegations therein, taken as true, render the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). If a petition is not dismissed by the circuit court, the petition advances to the second stage, where counsel may be appointed for defendant and where the State may file a motion to dismiss or answer the petition. 725 ILCS 5/122-4, 122-5 (West 2012). The petition may proceed to a third-stage evidentiary hearing if the defendant makes the requisite showing that the petition and any accompanying documentation present a substantial showing of a constitutional violation. *People v. Domagala*, 2013 IL 113688, ¶ 34. This court's review of the

summary dismissal of a post-conviction petition is *de novo*. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 18 At this first stage of review, the defendant need only present the gist of a constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Moreover, all well-pled facts in the petition and any supporting affidavits are taken as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002).

¶ 19 The circuit court can dismiss a post-conviction petition as frivolous or patently without merit if has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. A petition that lacks an arguable basis in law or in fact is one "which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. at 16. When a post-conviction petition presents a claim of the ineffective assistance of trial counsel, the defendant must show both that it is arguable that: (1) his counsel's performance fell below an objective standard of reasonableness; and (2) counsel's deficient performance resulted in prejudice to the outcome of the defendant's trial. *Id*. at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶ 20 First, as to whether defendant's trial counsel provided deficient representation, the State contends that counsel met with defendant's mother, father and brother during pre-trial proceedings and made a reasonable strategic decision in choosing not to present them as witnesses. Because our supreme court has held that arguments related to trial strategy are "inappropriate for the first stage" of post-conviction proceedings (see *People v. Tate*, 2012 IL 112214, ¶ 22), we will proceed to the prejudice prong of the *Strickland* and *Hodges* analysis.

¶ 21 To prove prejudice, a defendant must show it is arguable that a reasonable probability exists that the outcome of his trial would have been different had counsel not provided the

allegedly deficient representation. *Hodges,* 234 Ill. 2d at 17; *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 34. "Whether the failure to investigate constitutes ineffective assistance of counsel is determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *Id*., citing *People v. Montgomery*, 327 Ill. App. 3d 180, 185 (2001).

¶ 22 Here, seven members of defendant's family members offered affidavits unanimously describing Wilson as untrustworthy and unwelcome in the home of defendant's parents. However, those accounts did not render it impossible for Wilson to have taken part in the events as described. Wilson's grand jury testimony was admitted at defendant's trial and established that he observed defendant acting different on the night of the shooting. Wilson then drove defendant to Mississippi, where defendant lived with Wilson for several months. During their drive, defendant took out parts of a pearl-handled gun and discarded them out the window.

¶ 23 The record reveals that the jury heard evidence with which it could weigh Wilson's credibility. In disavowing his prior audiotaped and handwritten statement, Wilson stated before the jury that he did not make the statements and also stated he was the one who shot Ebenezer, a declaration that the jury clearly rejected in convicting defendant.

¶ 24 Next, as to the closeness of the evidence presented at trial, we consider, in addition to Wilson's testimony, the accounts of Gosha and Macon that incriminate defendant. Gosha testified that he saw defendant stand over Ebenezer and shoot him. Macon also described a pearl-handled gun carried by defendant immediately before the shooting. Although Macon did not witness the shooting, his account was consistent with that of Gosha, and Macon testified that he heard defendant say he thought he killed the man in the restaurant.

¶ 25 Defendant contends that Gosha and Macon were "problematic witnesses" because they were involved in the crime. He points out that Gosha entered into a plea agreement with the State and that both Gosha and Macon did not come forward to authorities until 6 to 12 months after the shooting. This court noted on direct appeal that those circumstances "somewhat weakened" their testimony but that their accounts corroborated defendant's statement to Macon that defendant thought he killed the man in the restaurant. *Wilson*, 2012 IL App (1st) 101038, ¶ 57.

¶ 26 Although defendant compares the facts of this case to those in *Tate*, we fail to find the facts here similar. In *Tate*, four eyewitnesses identified the defendant as the shooter at his bench trial; however, the defendant stated in his post-conviction petition that his trial counsel should have presented four defense witnesses whose affidavits he attached to his petition. *Tate*, 2012 IL 112214, ¶ 4. Defendant claimed, and the individuals' affidavits attested, that two potential witnesses could have provided him with an alibi and that a third would aver that he saw the shooting and was "sure that the shooter was not Douglas Tate." *Tate*, 2012 IL 112214, ¶¶ 4, 23. The defendant asserted in his own affidavit that he was with his girlfriend at the time of the shooting. *Id*. ¶ 5. After determining that the State could not raise strategy-related arguments at the first stage of post-conviction review, the supreme court reversed the summary dismissal of the defendant's petition, holding that the affidavits met the "arguable" standard for prejudice because the testimony of the third witness would directly contradict the accounts of the State witnesses. *Id*. ¶ 24.

¶ 27 Here, in contrast to *Tate*, defendant has not brought forth a potential witness that would contradict the State witnesses. Instead, defendant offers attestations of his family members that another one of his family members provided testimony that was not to be believed. Though

defendant asserts that, like in *Tate*, no medical or ballistics evidence linked him to the victim's death, the State in this case presented two witnesses, Gosha and Macon, who testified that defendant was the person who shot Ebenezer.

¶ 28 In conclusion, it is not arguable that the outcome of defendant's trial would have changed as a result of the testimony of members of defendant's family regarding their relative, Wilson. See *People v. Douglas*, 2011 IL App (1st) 093188, ¶¶ 44-48 (in affirming summary dismissal of the defendant's post-conviction claim that his counsel was deficient for failing to offer testimony from a witness to undermine the account of a State witness, this court held that the claimed inadequate impeachment of the State witness did not "rise to the level of a constitutional violation of the defendant's right to effective assistance of counsel").

¶ 29 Accordingly, the circuit court's order summarily dismissing defendant's post-conviction petition is affirmed.

¶ 30 Affirmed.