FOURTH DIVISION
June 30, 2016

1-14-2016



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 09 CR 15667 |
| | ) | |
| JESUS DURAN, | ) | Honorable |
| | ) | James B. Linn, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice McBride and Justice Ellis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's order summarily dismissing defendant's petition for postconviction relief is reversed; the petition raised an arguable claim trial counsel provided ineffective assistance when he failed to call two witnesses who could have provided exculpatory testimony. Because the petition raised one arguable claim of a constitutional violation, the entire petition is remanded for second-stage postconviction proceedings.

¶ 2 Following a jury trial, the circuit court of Cook County convicted defendant, Jesus Duran, of the first degree murder of Reynaldo Ortiz. Defendant appealed, and this court affirmed his

conviction and sentence. Defendant filed a *pro se* petition for postconviction relief claiming, *inter alia*, ineffective assistance of counsel at trial and on appeal. The trial court summarily dismissed the petition at the first stage of postconviction proceedings. For the following reasons, we reverse and remanded with instructions.

¶ 3 BACKGROUND

¶ 4 The State charged defendant and two codefendants, Semajay Thomas and William Castillo, with first degree murder for the death of Reynaldo Ortiz. Ortiz was beaten to death by multiple assailants after he shouted curse words at a group of young men, including defendant, gathered on a porch at midnight in Chicago. Five eyewitnesses testified at defendant's trial. Reinaldo Gonzales, the victim's cousin, Lydell Brown, Lorenzo McKinney, David Calzado, and Terrance Washington. Defense counsel did not call two additional eyewitnesses known to the defense to testify at defendant's trial: Maliek Green and Devin Daivy. That fact forms the basis of one of defendant's claims of ineffective assistance of counsel at trial. Green and Daivy both testified before the grand jury and at the codefendants' trial.

¶ 5 This court recounted the evidence at defendant's trial extensively in defendant's direct appeal of his conviction. *People v. Duran*, 2013 IL App (1st) 112713-U. Thomas and Castillo were tried in simultaneous but separate jury trials which resulted in Thomas's conviction and Castillo's acquittal. *Id.* ¶ 4 *fn* 1. We summarize here only those portions of our recitation of the evidence necessary to understand our disposition of defendant's appeal from the first stage dismissal of his *pro se* postconviction petition. Additional information brought forth from defendant's postconviction petition will be discussed in conjunction with the discussion of the dispositive issues.

¶ 6 Gonzalez testified he and Ortiz left a park at midnight with a friend going to the friend's house. Their friend rode ahead on his bicycle. As Gonzalez and Ortiz passed a group of men sitting on a porch, Ortiz said "What's up bitches?" to the men. The men ran from the porch after Ortiz. Gonzales was standing approximately two houses away from Ortiz. At some point, a man Gonzalez identified as defendant ran past him. A focus of questioning Gonzales was when defendant ran by him. The evidence adduced at trial was that Gonzales gave varying statements to police, the grand jury, and at trial, as to whether he saw defendant run toward the place where Ortiz was being beaten or away from the place where Ortiz was being beaten.

¶ 7 Brown testified at trial that he was not present at the time of the beating and denied any knowledge of what happened. Brown was impeached with a written statement and his testimony before the grand jury. At trial Brown testified the statement to police was a lie. In the written statement, Brown said defendant punched the victim who then fell to the ground. Others continued to kick and punch the victim in the head and body. Before the grand jury, Brown said defendant punched the victim and the victim lost his balance, then Thomas punched the victim and the victim fell. At the trial Brown testified that he spoke to a defense investigator. Brown told the investigator police harassed him into making a statement but Brown was not present on the night of the murder.

¶ 8 Washington testified at trial that he was present the night of the murder but denied seeing defendant or the codefendants attack Ortiz. Washington admitted giving a statement to police but testified he was told what to say. Washington denied telling an assistant state's attorney he saw defendant strike the victim in the head. Washington admitted appearing before the grand jury but testified he could not remember giving any of his testimony to the grand jury. Before the grand jury, Washington testified that after Ortiz cursed at the men defendant and others

rushed off the porch and he saw defendant hit Ortiz in the head. Washington also told the grand jury that he said the same things in a statement to the assistant state's attorney.

¶ 9 McKinney testified defendant, Thomas, and Castillo approached the victim and he saw defendant punch the victim once and Castillo punch him twice after which the victim fell. McKinney told police he did not see anything and at trial McKinney testified that statement to police was the truth. McKinney gave a written statement that contradicted his testimony at trial and he testified that police forced him to write that statement. But he testified at trial the written statement was true. At trial McKinney testified his grand jury testimony was the truth. McKinney also spoke to a defense investigator. McKinney testified he told the investigator that his statement and grand jury testimony were all lies. McKinney testified he told the defense investigator he was not present at the time of the murder and that what he told the investigator about not being there was the truth, and McKinney testified on cross-examination that he was not there that night. On cross-examination, McKinney testified his testimony on direct examination was false and that his initial statement to police that he did not see anything was the truth. He testified he lied because police threatened to charge him with a crime. Then on redirect examination McKinney testified that he saw with his own eyes three men including defendant beat up the victim. On redirect examination McKinney further testified that his statement to the defense investigator was a lie. He testified he told the truth in his statement and his testimony before the grand jury, both of which were consistent with his testimony on redirect examination.

¶ 10 Calzado testified the victim began arguing with Thomas then Thomas and Castillo ran off the porch. Calzado did not remember defendant leaving the porch. When asked specifically where defendant was Calzado testified he did not see defendant near the victim. He did testify that Thomas punched the victim "a lot" and Castillo "stomped him" once in the head. Calzado told everyone to leave and they did. Calzado, defendant, and others left in a car after which they

stopped at a gas station and Calzado wiped blood from his leg. Three weeks later Calzado was in jail on an unrelated traffic offense and contacted police.

¶ 11 The State also elicited testimony that the men on the porch, including defendant and the codefendants, were members of the same street gang.

¶ 12 On direct appeal, defendant challenged the sufficiency of the evidence, allegedly improper remarks during closing argument, allowing the jury to view a handwritten statement defendant claimed was never admitted into evidence, and the State's purported reliance on perjured testimony. This court found that the evidence, "when viewed in the light most favorable to the prosecution, was sufficient to establish that defendant intended or knew that Ortiz would die or suffer great bodily harm when he, Castillo, and Thomas punched and kicked Ortiz in the head." *Duran*, 2013 IL App (1st) 112713-U, ¶ 70.

¶ 13 Defendant's argument regarding the prosecutor's allegedly improper remarks during closing argument was forfeited and defendant asked the court to consider the issue under the "closely balanced" prong of the plain-error rule. *Id.* ¶ 73. This court determined that it did not have to decide whether an error occurred at all if the claimed error would not have affected the outcome of defendant's trial. *Id.* ¶ 73 ("When it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred." (Emphasis omitted.) (quoting *People v. White*, 2011 IL 109689, ¶ 148)). This court held the prerequisites of the plain error rule had not been met where defendant failed to establish that the evidence was closely balanced. *Id.* ¶ 74. Specifically, this court found that the evidence "showed that numerous members of the Satan Disciples street gang were hanging out on a porch when an obviously intoxicated, older man, Ortiz, began swearing at them. The evidence established that an argument ensued and that defendant, Castillo, and Thomas rushed off the porch and proceeded to punch and kick Ortiz in the head until he died."

*Id.* Additionally, this court found that the challenged statement was properly admitted as substantive evidence (*id.* ¶ 82) and that there was no indication in the record the State knowingly used perjured testimony to obtain a conviction (*id.* ¶ 91).

¶ 14 In November 2013 defendant filed a *pro se* petition for postconviction relief. Defendant's *pro se* petition argued trial counsel rendered ineffective assistance in failing to: interview Gonzales before trial and to perfect impeachment of Gonzales at trial, object to improper closing arguments, and call Green and Daivy as witnesses.[1] Defendant's *pro se* petition also argued appellate counsel, who had also been trial counsel, rendered ineffective assistance in failing to petition for rehearing or for leave to appeal to our supreme court after this court affirmed his conviction on direct appeal. The trial court summarily dismissed defendant's *pro se* postconviction petition. In dismissing the petition the trial judge noted that defendant was represented *pro bono* by an attorney who subsequently was appointed a federal district court judge and that the court did not find that defendant's lawyers did or failed to do anything that might have changed the result of defendant's trial.

¶ 15 This appeal followed.

¶ 16 ANALYSIS

¶ 17 We review a dismissal of a postconviction petition at the first stage *de novo*. *People v. White*, 2014 IL App (1st) 130007, ¶ 18.

> "At this stage, the court treats allegations of fact as true so long as those allegations are not affirmatively rebutted by the record. [Citation.] Any petition deemed frivolous or patently without merit must be dismissed. [Citation.] A petition is frivolous or patently without merit where it has no arguable basis either

[1] Defendant's trial counsel noted Green and Daivy's testimony in a posttrial motion challenging the sufficiency of the evidence.

> in law or in fact in that it is based on an indisputably meritless legal theory or fanciful factual allegations. [Citation.] An example of an indisputably meritless legal theory is one that is completely contradicted by the record. [Citation.] Fanciful factual allegations include those that are fantastic or delusional. [Citation.]" (Internal quotation marks omitted.) *Id.*

¶ 18 The first stage of postconviction proceedings in a noncapital case presents the defendant with a "low threshold" requiring only that the defendant plead sufficient facts to assert an arguably constitutional claim." *Id.* ¶ 26. "Partial summary dismissals are not permitted under the Post-Conviction Hearing Act. [Citation.]" *People v. Cathey*, 2012 IL 111746, ¶ 34. If this court concludes that defendant's petition sets forth an arguable claim of ineffective assistance of counsel with respect to any one of the claimed errors, "the entire petition must be remanded for further proceedings, regardless of the merits of any other claims." See *Id.*

> "Claims of ineffective assistance are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668. [Citation.] To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance prejudiced the defendant. [Citation.] More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [Citation.] At the first stage of proceedings under the Act, a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is

arguable that the defendant was prejudiced. [Citation]" (Internal quotation marks omitted.) *Id.*

¶ 19 We hold defendant has plead sufficient facts to assert an arguable claim that counsel rendered ineffective assistance in failing to elicit testimony from Green and Daivy. The State concedes this argument is not forfeited by the fact this claim could have been, but was not, raised on direct appeal, because defendant's appellate counsel was the same as his trial counsel, and the forfeiture is the result of ineffectiveness of appellate counsel. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010) ("this court has elected to relax the ordinary forfeiture rules with respect to postconviction claims stemming from appellate counsel's ineffectiveness"). Nor does the State dispute defendant's contention he adequately explained the absence of affidavits by Green and Daivy and supported his claim with their grand jury testimony. 725 ILCS 5/122-2 (West 2012) "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached.").

¶ 20 Green testified before the grand jury that Thomas and Castillo ran across the street, Thomas punched Ortiz three times in the face and Castillo kicked Ortiz after the victim fell to the ground. In a written statement Green said that Thomas and Castillo ran across the street toward the victim, Thomas punched the victim, who fell to the ground, and Castillo kicked the victim after the victim fell. Daivy testified similarly that although all three men left the porch, Thomas punched Ortiz three times in the face and Castillo kicked Ortiz after Ortiz fell. Daivy testified more specifically that defendant was present but Daivy did not see defendant do anything. On appeal, defendant argues their testimony would have supported the defense theory that defendant was at the scene but did not participate in the fatal beating and would have corroborated Calzado's testimony that defendant was not involved in beating Ortiz.

¶ 21 We hold that it is arguable that counsel's performance fell below an objective standard of reasonableness when counsel did not call Green and Daivy to testify in defendant's trial, and it is arguable that the failure to call them as witnesses prejudiced defendant.

> "The decision of which witnesses to call at trial is a matter of trial strategy within trial counsel's discretion. [Citation.] Such a decision comes with the strong presumption that it is a product of sound trial strategy, and it is generally immune from claims of ineffective assistance of counsel. [Citation.] Still, an attorney may be deemed ineffective for failing to present exculpatory evidence, *such as* failing to call witnesses to support an otherwise uncorroborated defense theory. [Citation.] *** 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. [Citation.]" (Emphasis added.) *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 22 On appeal, the State argues trial counsel's decision not to call Green and Daivy was strategic but does not explain what it thinks trial counsel's strategy was. "A defendant can overcome the strong presumption that defense counsel's choice of strategy was sound if his or her decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy." *People v. Jones*, 2012 IL App (2d) 110346, ¶ 82. The State does not postulate, and we cannot think of any reasonable strategy that includes a decision not to call witnesses who could provide the foundation for exculpatory evidence. Moreover, as defendant argued in reply, our supreme court has held that a "trial strategy" argument is more appropriate to the second stage of postconviction proceedings. See *People v. Tate*, 2012 IL 112214, ¶ 22.

¶ 23 The State also argues there is no probability the outcome of the trial would have been different even if trial counsel had called Green and Daivy to testify. We agree with defendant that this argument imposes a greater burden than exists at this stage of proceedings. As we stated above, to ultimately *prevail* on a claim of ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. However, a "different, more lenient formulation applies at the first stage." *Id.* ¶ 19. At the first stage, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that the defendant was prejudiced. *Id.* Here, it is arguable that counsel's failure to call Green and Daivy as witnesses fell below the standard of reasonableness because their accounts could have changed the outcome of defendant's trial, and consequently, counsel's failure prejudiced defendant.

¶ 24 In *Tate*, the State's case against the defendant consisted of the testimony of four eyewitnesses who identified the defendant as the shooter. *Id.* ¶ 24. There was no confession or physical evidence linking the defendant to the crime. *Id.* Our supreme court found that the testimony of the witness defense counsel failed to call "would have provided a first-person account of the incident which directly contradicted the prior statements of the State's eyewitnesses." *Id.* The court held it was at least arguable that the defendant was prejudiced by the lack of that witness and that defense counsel's performance fell below an arguable standard of reasonableness. *Id.* Similarly, here, Green and Daivy's testimony would directly contradict the testimony of Brown, McKinney, and Washington that defendant was engaged in beating Ortiz rather than merely being present.

¶ 25 The State argues that Green and Daivy's testimony does not exonerate defendant because Daivy placed defendant near the scene of the beating and did not have an unobstructed view, and Green did not say that Thomas and Castillo were the *only* offenders surrounding Ortiz. On the contrary, the State's evidence included witness statements that defendant participated in the beating. *Id.* ¶ 69. Nonetheless, it is at least arguable that the addition of Green and Daivy's accounts would have changed the outcome of defendant's trial.

¶ 26 In *People v. Ortiz*, 235 Ill. 2d 310, 337 (2009), our supreme court found the defendant met the criteria to warrant a new trial based on newly discovered evidence supporting a claim of actual innocence. In *Ortiz*, that newly discovered evidence directly contradicted the recanted testimony of the two prosecution witnesses. *Id.* Our supreme court found that at retrial, the evidence of the defendant's innocence "would be stronger when weighed against the recanted statements of the State's eyewitnesses. The fact finder will be charged with determining the credibility of the witnesses in light of the newly discovered evidence and with balancing the conflicting eyewitness accounts." *Id.* Although this court previously found that the recanted statements in this case were not the only evidence of defendant's guilt, two of the witnesses who did not recant their prior statements either did not see defendant participate in the beating (Gonzalez) or near the victim (Calzado), and one changed his story three times on the witness stand (McKinney). This court previously found that the evidence of defendant's guilt was not closely balanced where the evidence established that "defendant, Castillo, and Thomas rushed off the porch and proceeded to punch and kick Ortiz in the head until he died." *Duran*, 2013 IL App (1st) 112713-U, ¶ 74. This court specifically noted that "there was evidence in the instant case that defendant hit Ortiz." *Id.* ¶ 66. Green and Daivy could have provided evidence that defendant did not participate in the beating. Green and Daivy testified consistently with each

other that Thomas punched Ortiz three times in the face, Ortiz fell to the ground, and Castillo kicked Ortiz in the head, Daivy affirmatively testified he did not see defendant do anything, and Green did not mention defendant in his account of the beating. It is at least arguable that if the jury had been presented with additional evidence that defendant did not participate in the beating it would have weighed the conflicting evidence differently. See *Tate*, 2012 IL 112214, ¶ 24.

¶ 27 Defendant's postconviction petition must proceed to the second stage of postconviction proceedings because defendant has raised an arguable claim that trial counsel rendered ineffective assistance of counsel based on trial counsel's failure to call Green and Daivy as witnesses at defendant's trial. Because we find defendant has raised one claim in his postconviction petition that should proceed to the second stage, the trial court's judgment will be reversed and the entire petition will proceed to the second stage. *Cathey*, 2012 IL 111746, ¶ 34. Defendant asks this court to remand with directions that his petition should be heard before a different trial judge because the trial judge that summarily dismissed the petition demonstrated an "unwillingness to believe that attorneys from Mayer Brown, including a [recently appointed] federal judge, could have been ineffective."

¶ 28 Defendant's argument for a new trial judge is based on the trial judge's comments that defendant's trial attorneys represented him *pro bono* and one of them was subsequently appointed to be a federal district court judge. The trial court did not find any fault with trial counsel's representation or that it prejudiced defendant.

> "There is no absolute right to a substitution of judge at a postconviction proceeding. [Citations.] Rather, the same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced. [Citations.] [Citation.] In order to obtain a remand to a new judge, a defendant must show 'something more' than

> simply that the judge presided over the defendant's earlier trial. [Citation.] A defendant can show 'something more' by demonstrating 'animosity, hostility, ill will, or distrust' ([citation]), or 'prejudice, predilections or arbitrariness' ([citation]). To conclude that a judge is disqualified because of prejudice is not *** a judgment to be lightly made. [Citation.]" (Internal quotation marks omitted.) *People v. Reyes*, 369 Ill. App. 3d 1, 25 (2006),

This court held that the defendants in that case would be substantially prejudiced if their postconviction petition were remanded to the same trial judge that summarily dismissed them because the trial judge made findings that "essentially decided *** the entire case." *Id.* at 26. This court found the trial judge's findings were "more appropriate to a second-stage proceeding, or, possibly, a proceeding at the third stage, where an evidentiary hearing is held." *Id.*

¶ 29 In *Reyes*, the trial judge decided a substantive question relating to the issues raised in the petition. In this case, the trial judge stated it did not "find any fault with [defendant's] lawyers *** or [that] somehow they did something or didn't do something that might have changed the result. The evidence against him was substantial, plus he made a confession to the police."[2] The State does not directly address this aspect of the trial judge's comments, arguing only that defendant's interpretation of the judge's comments about the attorneys is a "contrived interpretation of an innocuous comment *** based upon facts that appeared throughout the record, that Mayer Brown represented defendant at trial." Although we have confidence in the ability of this trial judge to determine the issues on remand without predetermination or bias, when viewed objectively, the trial judge's comments, that he could not find any fault in trial

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[2] Defendant separately argues the trial judge merely speculated defendant confessed to police because the trial court granted defendant's motion to suppress defendant's statement to police.

counsel's representation of defendant, can be taken as findings which "essentially decided the issue" of the effectiveness of the representation "and, in effect, the entire case." We believe that given the judge's statements, pursuant to *Reyes*, prudence warrants that we remand this case with instructions that the presiding judge assign further proceedings on defendant's postconviction petition to a different trial judge. See *Id.*

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the circuit court of Cook County is reversed and the cause remanded with instructions.

¶ 32 Reversed and remanded, with instructions.