2017 IL App (1st) 150589-U

FIRST DIVISION
November 6, 2017

No. 1-15-0589

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County,
	)	
v.	)	No. 06 CR 1715503
	)	
FABIO RAMIREZ,	)	Honorable
	)	Timothy Joyce,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

O R D E R

Held: Judgment of the trial court dismissing defendant's postconviction petition at the second stage of proceedings is affirmed. Petitioner failed to make a substantial showing that he was prejudiced by trial counsel's failure to present testimony from an expert witness attacking the credibility of eyewitness identifications.

¶ 1 Petitioner, Fabio Ramirez, appeals the second-stage dismissal of his amended petition for relief under the Post-Conviction Hearing Act (Act) 725 ILCS 5/122-1 *et seq.* (West 2008). On appeal, Mr. Ramirez argues that his postconviction petition made a substantial showing that trial counsel was ineffective for not presenting expert testimony about the fallibility of eyewitness

identification; and that he made a substantial showing that appellate counsel on direct appeal was deficient for failing to raise the issue there. For the following reasons, we affirm the trial court's dismissal of his postconviction petition.

¶ 2 BACKGROUND

¶ 3 We will review the evidence presented at trial in this case only to the extent necessary to discuss the issues raised on appeal from the dismissal of Mr. Ramirez's postconviction petition. A more thorough review of the background facts is presented in the order issued by this court in Mr. Ramirez's direct appeal, *People v. Ramirez*, 2011 IL App (1st) 092431-U (unpublished order under Supreme Court Rule 23).

¶ 4 The petitioner, Fabio Ramirez, Reyes Ramirez (who does not appear to be related to petitioner and will be referred to here at times as "Reyes"), and Alejandro Roman all three were charged with multiple crimes, including the first degree murder of Rosa Mora, in connection with events that transpired in the early morning of July 8, 2006. Fabio Ramirez and Reyes Ramirez were tried simultaneously before separate juries. Alejandro Roman entered into a plea arrangement with the State and, in exchange for a sentence recommendation of 10 years' imprisonment, agreed to testify for the State and against Fabio Ramirez and Reyes Ramirez.

¶ 5 At trial, Pedro Mora (who will be referred here at times as "Pedro") testified that he was a member of a rival dance club to Fabio Ramirez, and that he had an altercation with a member of Mr. Ramirez's dance group at around 9:00 pm on July 7, 2006. Pedro testified that members of Mr. Ramirez's dance group attacked him, beat him up, and hit him on the forehead with a crowbar. He escaped and later broke the front windows of the house of Alejandro Roman—another member of Mr. Ramirez's dance group—and smashed the windows of a vehicle that turned out to belong to Mr. Ramirez. The testimony at trial revealed that the shooting of the

Mora family's home was retaliation for this response from Pedro Mora and his associates.

¶ 6 Three individuals identified Fabio Ramirez as the person who shot Rosa Mora from the passenger seat of an SUV. Each of these three witnesses testified that, at around 3:30 am on July 8, 2006, the SUV stopped in front of the Mora family's home, and that Fabio Ramirez pulled his upper body out of the passenger side window to reach across the roof of the vehicle and fire several shots from a handgun at the residence. Maribel Acosta and Lizeth Vargas testified that they were at the Mora residence—on the porch and the front steps, respectively—when Fabio Ramirez opened fire and that, although the bottom of his face was covered, they recognized him and later identified him in a police lineup. Adriana Sandoval also identified Fabio Ramirez, whom she testified she observed from her position across the street, where the passenger side of the SUV was facing when Fabio Ramirez reached over top of the car and fired at the Mora residence. Although his back was turned to her when he fired at the home, Adriana Sandoval stated that she recognized him from his physical build and haircut. Shortly after the shooting, Adriana Sandoval told detectives that Fabio Ramirez was the shooter, providing them with a picture of Fabio Ramirez that she had downloaded from the internet. All three witnesses testified that the street in front of the home was well-lit from multiple lights and their respective views of Fabio Ramirez were not obstructed.

¶ 7 Among the other witnesses, Erica Ramirez (who will be referred to here at times as "Erica") testified that, later in the early morning hours after the shooting, she was at a hotel with Fabio Ramirez and several friends. Erica Ramirez testified that she left with Fabio Ramirez because she needed to return work keys to an associate. Images taken from the hotel surveillance video corroborated that the two left together in the early morning hours after the shooting. Erica was driving the vehicle when Fabio Ramirez told her to stop at the Jiffy Lube near the Chicago

River at North Avenue in Chicago. When she did so, Fabio Ramirez grabbed something wrapped in dark cloth from the back seat and exited the vehicle. Erica testified that Fabio Ramirez crossed the street and walked onto the bridge over the river and dropped the object he had taken from the back seat into the river. She testified to hearing an exchange between Reyes Ramirez and Fabio Ramirez later that day in which Reyes asked "if he got rid of it," and Fabio Ramirez responded that he had, "by the river." After police arrested Fabio Ramirez and Reyes Ramirez, Erica led detectives to the place where Fabio Ramirez dropped the object into the river.

¶ 8 Additional testimony revealed that Chicago police officers participated in a dive into the Chicago River by the North Avenue Bridge on the day after the shooting. From that dive was recovered a number of items that were wrapped inside a black t-shirt from the river floor, including a loaded gun with the serial number of 302–70902—the same serial number as that of a handgun purchased by Reyes Ramirez in December 2005.

¶ 9 Alejandro Roman testified at trial that he was in the back seat of the SUV, with Reyes driving and Fabio Ramirez in the front passenger seat. This part of his testimony was corroborated by his sister Linda Roman, who testified to dropping Alejandro Roman off at the location where he met Fabio Ramirez and Reyes Ramirez and witnessing Alejandro Roman enter the back seat of the SUV, while Reyes was in the driver seat and Fabio Ramirez was in the front passenger seat. Alejandro Roman testified that Reyes drove them to the Mora house, and when they arrived, Fabio Ramirez pulled himself out of the front passenger-side window, and fired about nine shots at the house over the roof of the vehicle. Reyes then drove away.

¶ 10 The forensic testimony revealed that eight cartridge cases from a semi-automatic weapon were recovered from the street near the Mora house, as were two fired bullets from the stairs and the floor of the vestibule of the Mora house. The parties also stipulated that a fired bullet was

recovered from the body of Rosa Mora during the autopsy. The forensic scientist who compared the recovered cartridge cases and bullets to the gun recovered from the Chicago River concluded that those cartridge cases and two of the three fired bullets, including the bullet recovered from Rosa's body, had been fired from the recovered gun.

¶ 11 Chicago police officer Ocampo testified for the defense that he spoke with Adriana Sandoval at the scene of the shooting at 3:48 a.m. on July 8, 2006, and that she told him that the shooter's name was "Victor Arriola."

¶ 12 Based on this evidence, the jury found Fabio Ramirez guilty of first degree murder and found the additional fact that he personally discharged a firearm that proximately caused death to another during the commission of the murder. The trial court sentenced him to 22 years for the murder conviction, along with an additional 25-year enhancement for the firearm discharge finding, to be served consecutively, for a total of 47 years' imprisonment.

¶ 13 On direct appeal, Mr. Ramirez challenged the sufficiency of the evidence of his guilt by attacking the eyewitness testimony as unreliable, Alejandro Roman's testimony as incredible, and the remaining evidence as inadequate. He argued that he was denied his right to a fair trial due to prosecutorial misconduct during closing argument. This court affirmed Mr. Ramirez's conviction. *Ramirez*, 2011 IL App (1st) 092431-U. Mr. Ramirez's petition for leave to appeal to the Illinois Supreme Court was denied. *People v. Ramirez*, 963 N.E. 2d 249 (2012).

¶ 14 Mr. Ramirez, represented by counsel, filed a postconviction petition on October 24, 2012, making several allegations. The only allegations at issue in the present appeal are that his trial counsel was ineffective for failing to call an expert on identification as a witness at trial and that his appellate counsel was ineffective for not raising the issue of trial counsel's failure to present an expert witness regarding identification on appeal. On September 25, 2013, Mr. Ramirez's

counsel filed an amended postconviction petition that included the above arguments and supplemented the record with various supporting documents.

¶ 15 The State filed a motion to dismiss the postconviction petition and, on July 23, 2014, the trial court heard arguments on the motion. The trial court granted the State's motion on January 13, 2015. In its written order, the trial court rejected the claims that Mr. Ramirez raised and, with respect to the expert witness on identification issue, found Mr. Ramirez's claims speculative because he failed to identify who the expert was and what this expert would have offered as testimony.

¶ 16 JURISDICTION

¶ 17 The trial court issued its order granting the State's motion to dismiss Mr. Ramirez's postconviction petition on January 13, 2015, and Mr. Ramirez timely filed his notice of appeal on January 29, 2015. Jurisdiction is thus proper pursuant to article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Mar. 20, 2009); R. 651(a) (eff. Dec. 1, 1984)).

¶ 18 ANALYSIS

¶ 19 On appeal, Mr. Ramirez argues that his postconviction petition made a substantial showing that trial counsel was ineffective for not presenting expert testimony about the fallibility of eyewitness identification. He also argues he made a substantial showing that appellate counsel on direct appeal was deficient for failing to raise the issue there.

¶ 20 The Act establishes procedures by which an incarcerated criminal defendant may challenge his conviction or sentence for violations of his state or federal constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2008); *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). A petition

under the Act is a collateral attack on a prior conviction and sentence whose purpose is "to permit inquiry into constitutional issues involved in the original trial that have not been, and could not have been, adjudicated previously upon direct review." *People v. Taylor*, 237 Ill. 2d 356, 372 (2010).

¶ 21 The Act sets forth a three-stage process for adjudicating postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). In the first stage, the trial court determines whether the petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition survives the initial stage, the court may appoint counsel at the second stage to represent an indigent defendant, and counsel will have an opportunity to amend the petition. *Boclair*, 202 Ill. 2d at 100. The State may then file an answer or a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2008). The trial court will liberally construe the allegations in the petition and supporting documentation in the defendant's favor. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the State moves to dismiss the petition, this "raises solely the question of the sufficiency of the pleadings." *Id.* at 390. At the second stage, the trial court determines "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation" and may dismiss the petition if it fails to do so. *People v. Cotto*, 2016 IL 119006, ¶ 28. Appellate courts review the second-stage dismissal of a petition *de novo* (*Coleman*, 183 Ill. 2d at 366), and the appropriate remedy for erroneous dismissal is to remand for a third-stage hearing (*People v. Allen*, 2015 IL 113135, ¶ 22) to allow the defendant a chance to prove his claims.

¶ 22 A. Ineffective Assistance of Trial Counsel

¶ 23 Mr. Ramirez contends that his petition made a substantial showing that trial counsel was ineffective for failure to call an expert witness to attack his identification as the shooter, arguing that such expert testimony would have provided support for and assisted the jury in evaluating

his misidentification defense.

¶ 24 Ineffective assistance of counsel can be a proper basis for postconviction relief. See *People v. Kunze*, 193 Ill. App. 3d 708, 726 (1990) (explaining why such claims are best made in postconviction proceedings). Criminal defendants are guaranteed the right to a fair trial, including the right to effective assistance of counsel, by the federal and Illinois constitutions. U.S. Const., amend. VI, XIV; Ill. Const. 1970, art. I, §§ 2, 8. Ineffective assistance claims are judged under the two-prong standard in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Mahaffey*, 165 Ill. 2d 445, 457 (1995). First, a defendant must demonstrate that his defense counsel's performance was deficient in that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." (Internal citations omitted.) *Coleman*, 183 Ill. 2d at 397. Second, a defendant must demonstrate that, "but for defense counsel's deficient performance, the result of the proceeding would have been different." *Id.* While both prongs must be satisfied for a defendant to succeed on an ineffective assistance claim, courts may resolve ineffectiveness claims under *Strickland* by reaching only the prejudice component, "for lack of prejudice renders irrelevant the issue of counsel's performance." *Id.* at 397-98. With claims of ineffective assistance of appellate counsel, "the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." (Internal citations omitted.) *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 25 As an initial matter, the State claims Mr. Ramirez's petition is procedurally flawed because it omits an affidavit from a designated expert witness setting out his or her proffered testimony. See, *e.g.*, *People v. Jones*, 210 Ill. App. 3d 375, 379 (1991) (finding the petitioner was

not entitled to an evidentiary hearing on his postconviction claim of ineffective assistance, where he did not attach an affidavit of the witness who purportedly would have corroborated his testimony). The State argues that Mr. Ramirez's petition was defective under section 122-2 of the Act (725 ILCS 5/122-2 (West 2008)), as it did not "have attached thereto affidavits, records, or other evidence supporting its allegations or [] state why the same are not attached."

¶ 26 This argument is not well taken. Defense counsel in the hearing on the State's motion to dismiss explained to the trial court the reason for omitting the affidavit. Counsel stated that an affidavit "is often $10,000 to $15,000" and sought instead to rely on consistent case law outlining how an expert on witness identification could help the jury. In response, the trial court acknowledged "I am familiar with the type of expert evidence that you are referring to and that your petition refers to," and offered to "proceed as is unless anybody wants me to continue it for that purpose." Both sides asked to proceed on the motion to dismiss. We agree with Mr. Ramirez that all parties understood what the testimony would have been and that the State's argument places form over substance, especially given that Mr. Ramirez's counsel explained "why the same [affidavits] are not attached." (725 ILCS 5/122-2 (West 2008)).

¶ 27 Much of the remainder of the parties' briefing concerns the first prong of the *Strickland* test and whether the absence of an expert witness to challenge Mr. Ramirez's identification was valid trial strategy within the evolving landscape of Illinois law on eyewitness misidentification. However, while both parties make compelling arguments about the counterintuitive nature of eyewitness testimony and whether the admissibility of expert testimony on this issue has changed since this 2009 trial, none of that really matters here. Even if we were to assume that Mr. Ramirez made a sufficient showing that his trial counsel should have asked to call an expert on the unreliability of eyewitness testimony, we would find that Mr. Ramirez' petition was

properly dismissed because he did not make a substantial showing that he met the second prong of the *Strickland* test.

¶ 28 If Mr. Ramirez had called an expert witness to help him to undermine the credibility of the three eyewitnesses who identified him as the shooter, we cannot say that it is likely that the outcome would have changed, given the other evidence presented to the jury. First, another witness, Alejandro Roman, testified that Mr. Ramirez fired the shots that killed Rosa Mora. Alejandro Roman's testimony, while it was attacked by the defense as motivated by what Mr. Ramirez characterizes as a "sweetheart deal," was corroborated in part by that of his sister, Linda who also placed Mr. Ramirez in the front passenger seat of the SUV. Second, Mr. Ramirez was linked to the murder weapon. Erica testified to leaving the hotel with Mr. Ramirez, a fact corroborated by hotel security footage, and driving to the Chicago River at North Avenue. There, Mr. Ramirez disposed of an object wrapped in dark cloth. A Chicago police officer testified to retrieving a firearm with a serial number matching this handgun from that point in the river the day after the shooting. Forensic investigators confirmed that one of the two fired bullets and eight fired cartridge cases taken from the scene of the shooting, along with the bullet from Rosa Mora's body, were fired from the gun Mr. Ramirez dropped into the river. Also, Erica testified to overhearing Fabio Ramirez and Reyes Ramirez's later conversation, with the latter asking if Fabio Ramirez "got rid of it," and Fabio Ramirez confirming that he did, "by the river." Third, the State presented evidence as to Mr. Ramirez's motive—that he was retaliating against Pedro Mora for breaking the windows in Mr. Ramirez's vehicle after an altercation. Reviewing all of this significant evidence that was presented, in addition to the identification testimony of the three eyewitnesses, we cannot say that Mr. Ramirez's petition made a substantial showing that, if an expert could have exposed the fallibility of eyewitness identification, "the result of the

proceeding would have been different." *Coleman*, 183 Ill. 2d at 397.

¶ 29 None of the cased relied upon by Mr. Ramirez to show prejudice persuade us otherwise. He cites *People v. Popoca*, 245 Ill. App. 3d 948 (1993), in which an appellate court reversed the dismissal of a postconviction petition claiming ineffective assistance regarding counsel's failure to offer expert testimony to support the petitioner's voluntary intoxication defense, in a prosecution for assault and attempted murder. The reviewing court held that there was "a substantial likelihood the proffered evidence would have made a difference" since an expert would have explained the rate of absorption of the sixteen ounces of alcohol the petitioner had consumed and how impaired he was at the time of the alleged crimes. *Id.* at 956-57. Mr. Ramirez also cites *People v. York*, 312 Ill. App. 3d 434 (2000), which addressed an ineffective assistance claim on direct appeal rather than through postconviction relief. In *York*, the court found trial counsel's performance ineffective for failing to introduce exculpatory DNA evidence that would have excluded the defendant as the perpetrator of the charged aggravated criminal sexual assault. *Id.* at 440. In both of these cases experts could have offered powerful exculpatory evidence that could have exonerated the defendant. Mr. Ramirez cannot make the necessary substantial showing that the expert testimony that he claims was missing here would likely have had such an impact, given the other evidence offered at trial.

¶ 30 Mr. Ramirez's reliance on *People v. Montgomery*, 327 Ill. App. 3d 180 (2001), is also unpersuasive. First, the court in *Montgomery* reversed the trial court's finding, at a first stage postconviction, that the petition was "patently without merit" under the Act. *Id.* at 182, 183-84. The requirement for moving forward at that stage is far less than what is required here, where Mr. Ramirez must make a substantial showing of a constitutional violation in response to the State's motion to dismiss. Compare 725 ILCS 5/122-2.1(a)(2) (West 2008), with *Cotto*, 2016 IL

119006, ¶ 28. In addition, counsel in *Montgomery* failed to investigate evidence, much less offer expert testimony, that would have shown that the victim died by seizure, rather than strangulation. *Montgomery*, 327 Ill. App. 3d at 185-86. This was a critical issue in that case since showing that the death was by seizure would have completely contradicted the defendant's confession, which was the only evidence that he had strangled the victim. Again, the prejudice from this failure by trial counsel was far more evident than it is in Mr. Ramirez's case.

¶ 31 For these reasons, we affirm the trial court's dismissal of Mr. Ramirez's postconviction petition with respect to his claim of ineffective assistance of trial counsel.

¶ 32 B. Ineffective Assistance of Appellate Counsel

¶ 33 Having found that Mr. Ramirez's petition did not make a substantial showing that trial counsel was ineffective because the outcome of his trial would not have been different, appellate counsel could not have been ineffective for failing to argue on direct appeal that his trial counsel was deficient. *Simms*, 192 Ill. 2d at 362 (2000) (finding "a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal"). We affirm the second-stage dismissal of Mr. Ramirez's postconviction petition with respect to this claim as well.

¶ 34 CONCLUSION

¶ 35 In sum, Mr. Ramirez's postconviction petition was properly dismissed at the second stage of proceedings because he did not make a substantial showing that he suffered prejudice from trial counsel's omission of expert testimony on witness identification. Accordingly, we affirm the trial court's dismissal of Mr. Ramirez's postconviction petition.

¶ 36 Affirmed.