2017 IL App (1st) 163026-U

No. 1-16-3026

Order filed December 29, 2017

Fifth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 98 CR 29589
	)	
PATRICK JONES,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge, presiding.
	)	
	)	

JUSTICE HALL delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed petitioner's supplemental post-conviction petition at the second-stage of the post-conviction proceedings where he failed to establish that his trial counsel provided ineffective assistance. Petitioner's sentence of 40 years' imprisonment for first-degree murder was not unconstitutional as applied to him under *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny.

¶ 2 Petitioner, Patrick Jones, appeals from a trial court order dismissing his supplemental post-conviction petition at the second-stage of the post-conviction proceedings under the Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). For the reasonas that follow, we affirm.

¶ 3 Following separate, simultaneous jury trials, petitioner and codefendant Troy Binion were convicted of first-degree murder in connection with the gang-related shooting of Brian Thomas and the attempted first-degree murder of Antonio McGee. Binion was convicted on an accountability theory and sentenced to concurrent prison terms of 30 years for first-degree murder and 20 years for attempt murder. Petitioner was sentenced to concurrent prison terms of 40 years for first-degree murder and 20 years for attempt murder.

¶ 4 Petitioner and Binion filed separate direct appeals, which our court consolidated on the State's motion. Their convictions and sentences were subsequently affirmed. *People v. Binion*, 358 Ill. App. 3d 612, 626 (2005). The Illinois Supreme Court rejected petitioner's petition for leave to appeal. *People v. Binion*, 217 Ill. 2d 570 (2005).

¶ 5 On May 31, 2006, petitioner filed a postconviction petition, which was summarily dismissed. On March 20, 2009, our court granted an agreed motion for summary disposition, remanding the petition back to the trial court for further proceedings on the ground that the dismissal was untimely. *People v. Jones*, No. 1-06-2878 (2009).

¶ 6 On December 11, 2015, petitioner, through counsel, filed a supplemental postconviction petition raising a number of issues including ineffective assistance of trial counsel and allegations that his 40-year prison sentence was unconstitutional because it violated the proportionate penalties clause of the Illinois Constitution (Ill. Const.1970, art. I, § 11) and the

cruel and unusual punishment clause of the eighth amendment to the United States Constitution (U.S. Const., amend.VIII). The trial court granted the State's motion dismissing the petition at the second-stage of the postconviction proceeding giving rise to the instant appeal.

¶ 7 The underlying facts are set out at length in our decision on direct appeal and therefore in our analysis we repeat only those facts relevant to the disposition of the issues raised in this postconviction appeal.

¶ 8 ANALYSIS

¶ 9 The Act provides a statutory remedy to criminal defendants who claim that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83 (2008).

¶ 10 A postconviction proceeding under the Act is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Therefore, issues that were decided on direct appeal are barred by *res judicata* and issues that could have been raised, but were not, are considered forfeited. *Beaman*, 229 Ill. 2d at 71.

¶ 11 A postconviction proceeding not involving the death penalty is divided into three stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). Petitioner's supplemental postconviction petition was dismissed at the second-stage of the postconviction process. A petition will be dismissed at the second stage if the allegations in the petition and any accompanying affidavits, liberally construed in light of the trial record, fail to make a substantial showing of a

constitutional violation. *Coleman*, 183 Ill. 2d at 381; *People v. Hall*, 217 Ill. 2d 324, 334 (2005). If no such showing is made, apetitioner is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). However, if the allegations in the petition, supported by the record and accompanying affidavits, demonstrate a substantial violation of a constitutional right, then the petition advances to the third stage where the trial court conducts an evidentiary hearing. *People v. Edwards*, 17 Ill. 2d 239, 246 (2001). Review of a trial court's dismissal of a postconviction petition at the second stage is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 12 On appeal, petitioner contends his trial counsel rendered ineffective assistance by failing to investigate and call Michelle Wright as a defense witness to testify on his behalf at trial. He claims that Wright's trial testimony would have bolstered his defense-theory that Antonio McGee falsely identified him as the shooter.

¶ 13 At trial, McGee, who admitted being a former member of Gangster Disciples street gang, testified that on August 28, 1998, at about 1:30 p.m., he was driving near 64th Street and Eberhart Avenue, with Brian Thomas as his passenger. McGee claimed that as he turned left on Vernon Avenue, he saw a man run from an alley and fire a gun in the direction of his car. The incident happened in a matter of seconds, and after McGee turned the corner, he asked Thomas if he "saw that." When McGee discovered that Thomas had been shot, he drove him to the hospital, where Thomas later died.

¶ 14 About two months after the shooting, McGee identified petitioner in a lineup as the shooter. He later identified petitioner in court as the shooter. McGee testified that he did not know petitioner personally, but had seen him on prior occasions when he used to drive down

King Drive. McGee testified that during the shooting, as petitioner approached his car, he glimpsed a second man in the alley, but he could not identify anyone in court as the second man.

¶ 15 In support of his contention that trial counsel was ineffective for failing to investigate and call Wright as a defense witness, petitioner attached an affidavit from Wright to his postconviction petition. In her affidavit, Wright claimed that on the day McGee picked petitioner out of the lineup, he came to her house and told her that he did not know who shot Thomas, but at the lineup he picked out "one of them bitch ass BD's" from Parkway. Petitioner now claims that if Wright's testimony had been introduced at his trial, it would have challenged the accuracy of McGee's identification of him as the shooter.

¶ 16 The State initially responds that petitioner has forfeited this claim by failing to raise it on direct appeal. See *People v. Youngblood*, 389 Ill. App. 3d 209, 214-15 (2009). As acknowledged by petitioner, Wright's name was included in his amended answer to discovery. Therefore, trial counsel's alleged ineffectiveness in failing to call Wright as a defense witness should have been raised on direct appeal. Forfeiture aside, we find the trial court properly dismissed petitioner's postconviction petition at the second stage of the post-conviction proceedings, since our review shows he failed to make a substantial showing that he was prejudiced by trial counsel's alleged failure to investigate and call Wright as a defense witness.

¶ 17 Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronic*, 466 U.S. 648, 655-56 (1984).

¶ 18 The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is comprised of two prongs: deficiency and prejudice.

¶ 19 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome of the trial would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 20 A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need not determine whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 21 Here, petitioner has failed to make a substantial showing that there is a reasonable probability that the outcome of petitioner's trial would have been any different if trial counsel had introduced Wright's testimony. See, *e.g.*, *People v. Enis*, 191 Ill. 2d 361, 384 (2000).

Petitioner characterizes McGee's identification of him as the shooter, as "questionable," but the record demonstrates otherwise.

¶ 22 Approximately two months after the shooting, McGee identified petitioner in a lineup as the shooter. He subsequently identified petitioner in court as the shooter. McGee testified that on the afternoon of the shooting, he was driving his car near 64th Street and Vernon Avenue, when he saw petitioner with a handgun, running from an alley and firing shots at his car. McGee claimed that he did not know petitioner personally, but had seen him on prior occasions when he used to drive down King Drive. There was nothing questionable about McGee's identification of petitioner as the shooter.

¶ 23 Moreover, McGee's identifications and trial testimony were not the only evidence implicating petitioner. Chicago police detective Maude Noflin testified that following petitioner's arrest, he agreed to speak with her after being advised of his *Miranda* rights. Although petitioner initially denied involvement in the shooting, he eventually stated that the shooting was an organized "hit" by a commander of the Black Disciples street gang. Petitioner later spoke with an Assistant State's Attorney (ASA), who reduced his statement to writing. Petitioner stated that the shooting occurred because the black car had entered Black Disciple's territory on an earlier occasion, with the occupants shouting out gang threats and insults. Petitioner admitted that when the black car was seen in his gang's territory on the day of the shooting, he had a handgun and fired a number of shots at the passenger side window. The jury could have reasonably inferred that petitioner's statement confirmed the motive for the shooting.

¶ 24 In light of this evidence, petitioner has failed to make a substantial showing that there is a reasonable probably to conclude that the jury's verdict would have been any different if trial

counsel had called Wright to testify as a defense witness. And therefore, we cannot say that trial counsel's supposed failure to call Wright as a defense witness was so unreasonable or prejudicial as to constitute ineffective assistance of trial counsel.

¶ 25 Petitioner finally contends that because he was only a 17-year old juvenile with no prior criminal background at the time of the offenses, his 40-year sentence amounts to a *de facto* life sentence in violation of *Miller v. Alabama*, 567 U.S. 460 (2012), and its progeny. In *Miller*, the United States Supreme Court held that sentencing a juvenile offender to mandatory life imprisonment without the possibility of parole violates the eighth amendment's prohibition against cruel and unusual punishment. *Miller*, 567 U.S. at 489. We do not believe that the rule of constitutional law announced in *Miller* and its progeny apply to the factual circumstances in this case.

¶ 26 We find that petitioner's sentence of 40 years' imprisonment for first-degree murder is not unconstitutional as applied to him under *Miller*. While no bright-line rule has been established as to how long a sentence must be in order to qualify as a *de facto* life sentence, petitioner's 40-year sentence is less than prison terms found unconstitutional under *Miller*. See *People v. Reyes*, 2016 IL 11927, ¶ 10 (*per curiam*) (aggregate sentence of 97 years); *People v. Nieto*, 2016 IL App (1st) 121604, ¶ 43 (78-year sentence). Here, the length of petitioner's prison sentence compares favorably with cases not involving a *de facto* life sentence. See *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 58 (45-year sentence, allowing release at age 62); *People v. Gipson*, 2015 IL App (1st) 122451, ¶¶ 65-67 (52-year sentence, allowing release at age 62).

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we affirm the judgment of the trial court of Cook County dismissing petitioner's supplemental postconviction petition at the second-stage of the postconviction proceedings.

¶ 29 Affirmed.