SIXTH DIVISION
February 2, 2018

No. 1-15-0734
2018 IL App (1st) 150734-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 01 CR 11206
	)	
MISHUNDA DAVIS,	)	Honorable
	)	Thomas V. Gainer, Jr.,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Cunningham and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court properly dismissed defendant's second stage postconviction petition where defendant failed to make a substantial showing of a constitutional violation in relation to her claims of newly discovered evidence and ineffective assistance of counsel.

¶ 2 This appeal stems from the trial court's dismissal of defendant Mishunda Davis' second stage postconviction petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq*. (West 2014)). On appeal, defendant contends that: (1) she made a substantial showing of actual innocence where she submitted affidavits from three newly discovered witnesses averring that Michele Hiley (the victim) was armed and acting as the aggressor when defendant stabbed her; and (2) defendant made a substantial showing that she was denied effective assistance of counsel at the hearing on her motion to suppress her handwritten

statement that was taken by police and an assistant state's attorney where her attorney failed to present any evidence in support of the allegations made in the motion. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Following a bench trial, defendant was convicted of first degree murder and criminal damage to property. She was sentenced to concurrent 30-year and 3-year sentences, respectively. The facts of this case have been recounted on direct appeal, as well as in the trial court's written order dismissing defendant's postconviction petition. As this court explained on direct appeal, defendant stabbed the victim to death in the parking lot of a carwash in Chicago. *People v. Davis*, 1-04-1553 (2005) (unpublished under Supreme Court Rule 23). Defendant and the victim had been involved in an ongoing dispute over their mutual boyfriend, by whom they were both pregnant at the time.

¶ 5 At trial, the State presented eyewitness testimony regarding the events that led up to the stabbing. The victim's friend, Tamika Harris, and defendant's friend, Asmaa Muhaammad, both testified that defendant, accompanied by Muhaammad, smashed two of the windows on Harris' car with a carjack in a McDonald's parking lot and then left in Muhaammad's car. After reporting the incident to the police, Harris and the victim proceeded to a nearby carwash to clean up the glass. Meanwhile, defendant and Muhaammad met with friends Nicole Davis, Felicia Davis, Candy McKenzie, and Brandi Smith. The women then proceeded to defendant's mother's house, where defendant dropped off her daughter.

¶ 6 According to Muhaammad, defendant came out of the house with a carjack and a knife. The women got into Nicole's car and drove away. As they were driving around, they saw the victim and Harris at the car wash. Nicole pulled into the parking lot and defendant got out of the

car to speak with the victim. When the two women began to argue, the remaining five women in the car got out and joined the fight. Defendant broke the remaining windows on Harris's car with the carjack. Harris then swung a scooter at defendant and someone sprayed mace in Brandi's face. After about 20 minutes, the women got into Nicole's car to leave when either the victim or Harris broke the rear window of the car. The six women then got back out of the car, and according to Muhaammad, defendant was holding a knife in one hand and a jack in the other. Defendant swung the carjack at the victim and then dropped it on the ground. Defendant physically fought the victim and repeatedly stabbed her in the head and neck area. Defendant then dropped the knife and punched the victim in the chest. According to Muhaammad, the victim was not armed and attempted to block defendant with her hands. Thereafter, the car proceeded to a vacant lot, where defendant stated, "I stabbed the b***."

¶ 7 Detective Jose Lopez testified that he was called to the scene where Harris had been pulled over to the side of the road on the way to the hospital. Detective Lopez stated that all of the windows of Harris's car were broken and the windshield had been shattered. Following her arrest, defendant gave a statement in which she admitted that she repeatedly stabbed and punched the victim. She also admitted to smashing Harris's car windows. Brandi Smith testified for the defense that she initially saw the victim with a black metal object in her hand, but when the fight ensued, she saw that the victim was unarmed and attempted to cover her face as defendant stabbed her.

¶ 8 On direct appeal, defendant contended that: (1) her felony conviction for criminal damage to property should have been reduced to a misdemeanor because the State failed to prove that the damage exceeded $300; (2) she was entitled to a new trial because her attorney entered into a stipulation without establishing that defendant knowingly and intelligently waived her

confrontation rights; and (3) her 30-year sentence for first degree murder was excessive. *Davis*, 1-04-1553 (2005) (unpublished under Supreme Court Rule 23). This court affirmed defendant's conviction for first degree murder, reduced defendant's conviction for felony criminal damage to property to a Class A misdemeanor, and remanded the matter for sentencing. *Id*. On remand, the trial court resentenced defendant on the Class A misdemeanor to 364 days in the Cook County jail, time served. Defendant petitioned for leave to appeal to the Illinois Supreme Court, but her petition was denied. *People v. Davis*, 222 Ill. 2d 582 (2006). Thereafter, the United States Supreme Court denied defendant's writ of *certiorari*. *Davis v. Illinois*, 549 U.S. 1352 (2007).

¶ 9 In 2007, defendant filed a *pro se* postconviction petition. She alleged that her trial counsel was ineffective for various reasons, including for failing to call defendant at the hearing on her motion to suppress even though defendant was "the only person who could have provided any evidence to support the motion and contradict" the State's claims. She also made various due process violation claims. The record indicates that this *pro se* postconviction petition was first before the court in August 2008, when the court appointed postconviction counsel.

¶ 10 In August 2013, defendant, via counsel, filed a supplemental petition for postconviction relief, alleging actual innocence based on affidavits from witnesses who averred that the victim had a crowbar in her hand during the altercation. Ian Williams stated in his affidavit that he was at the car wash on the night in question and observed two girls vacuuming a "little red car with broken windows." He stated that he saw a truck pull up with a number of girls inside. Williams averred that the "girl from the red car went to the truck and the girls had words." He then looked away, and when he returned his attention to the red car, he saw the girl from the red car "run after the truck and break out a window." Williams stated that the girls started fighting, and that "[o]ne of the girls fighting was the girl who had broken the window," and she "had a crowbar in

her hand during the fight." Williams stated, "I know now that one of the girls fighting with the girl from the red car was [defendant]."

¶ 11 Antaeus Williams stated in his affidavit that he was also at the car wash on the night in question, and he saw a big truck pull up that "might have been an Expedition." He stated that as the girls were leaving after their fight, he saw "one of the girls from the red car break out a window in the Expedition with what looked to me like a crow bar. It looked like the kind of crow bar used to jack a car up."

¶ 12 Maurice Gaiter stated in his affidavit that he saw "a girl with brown skin and braids in her hair break a window out of the back of the SUV with something that looked like a crow bar."

¶ 13 Christopher Young stated in his affidavit that he has been employed as an investigator for the Law Office of the Cook County Public Defender since 1991, and that he was assigned to investigate this case in 2001. As part of his investigation, he canvassed the area around the carwash and interviewed a number of people regarding the events of the evening in question. He stated, "None of the individuals that I interviewed stated that they witnessed the fight at the carwash. I did not, in the course of my investigation, learn that Ian Williams, Antaeus Williams, or Maurice Gaiter witnessed the confrontation between [defendant] and [the victim]."

¶ 14 The State filed a motion to dismiss, alleging that defendant's claims of ineffective assistance of counsel were not specific enough and conclusory in nature. The State argued that the defendant's right to testify at the motion to suppress was not violated, and that defendant's actual innocence claim was not valid. The State contended that because defendant knew of the self-defense evidence prior to trial, those facts could not be transformed into newly discovered evidence simply because the source of the facts may have been unknown, unavailable, or uncooperative at the time.

¶ 15 The trial court heard arguments on defendant's *pro se* postconviction and supplemental postconviction petitions on September 25, 2014. The trial court took the case under advisement.

¶ 16 On January 29, 2015, the trial court issued a written order dismissing all of defendant's claims. The trial court found, in relevant part, that defendant failed to establish that "but for" counsel's alleged errors the outcome of the case would have been different, considering the substantial evidence against defendant at trial. While the trial court did find that defendant met the burden of demonstrating that all three affidavits were newly discovered evidence, it found that the affidavits would be cumulative in nature where defendant presented a self-defense theory. The court also noted that Brandi Smith testified that the victim broke the rear window of the truck with a tire iron and that as a result, a fist fight ensued. As such, the trial court found that the testimony of the additional witnesses would not add any new evidence to what the trier of fact already heard. Defendant now appeals.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant contends that: (1) she made a substantial showing of actual innocence where she submitted affidavits from three newly discovered witnesses averring that the victim was armed and acting as the aggressor when defendant stabbed her; and (2) she made a substantial showing that she was denied effective assistance of counsel at the hearing on her motion to suppress her handwritten statement where her attorney failed to present any evidence in support of the allegations made in the motion.

¶ 19 The Act provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. See 725 ILCS 5/122-1 *et seq*. (West 2010). Proceedings under the Act are commenced by the filing of a petition in the circuit court

where the original proceeding took place. *People v. Rivera*, 198 Ill. 2d 364, 368 (2001). Section 122-2 of the Act requires that a postconviction petition must "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2010). At this stage, a *pro se* defendant must only allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. See *People v. Porter*, 122 Ill. 2d 64, 74 (1988) (stating that only a "gist" of a constitutional claim is needed at the first stage).

¶ 20 If the court does not dismiss the petition as frivolous or patently without merit, then the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2010)), and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2010)). At this second stage, the circuit court must determine whether the petition and any accompanying documentation make "a substantial showing of a constitutional violation." *Edwards*, 197 Ill. 2d at 246. If no such showing is made, the petition is dismissed. *Id*. If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. *Id*. The dismissal of a postconviction petition is reviewed *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 21 Here, defendant's *pro se* postconviction petition advanced to the second stage due to the trial court's failure to rule on it within 90 days. See *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (at the first stage, the circuit court must, within 90 days, independently review the petition and determine whether the petition is frivolous or patently without merit). It was then dismissed before advancing to the third stage. During the second stage, the petitioner bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). This does not mean, however, that evidentiary questions are to be resolved at this

stage. *People v. Domagala*, 2013 IL 113688, ¶ 35. As our supreme court stated in *People v. Coleman*, 183 Ill. 2d 366, 385 (1998):

> "At the dismissal stage of a post-conviction proceeding, all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations. The Act contemplates that such determinations will be made at the evidentiary stage, not the dismissal stage, of the litigation. Due to the elimination of all factual issues at the dismissal stage of the post-conviction proceeding, a motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law."

¶ 22 Unless the petitioner's allegations are affirmatively refuted by the record, they are taken as true, and the question is whether those allegations establish, or "show" a constitutional violation. "In other words, the 'substantial showing' of a constitutional violation that must be made at the second stage (*Edwards*, 197 Ill. 2d at 246) is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Domagala*, 2013 IL 113688 ¶ 35.

¶ 23 Actual Innocence

¶ 24 Defendant contends that her petition showed a constitutional violation of due process where she asserted actual innocence through newly-discovered evidence. Because the conviction of an innocent person violates the due process clause of the Illinois Constitution, our supreme court has recognized the right of a postconviction petitioner to assert a claim of actual innocence

based on newly discovered evidence. *People v. Anderson*, 375 Ill. App. 3d 990, 1006 (2007). To obtain relief under this theory, a defendant must show that the evidence she is relying on: (1) is of such conclusive character that it will probably change the result on retrial; (2) is material to the issue, not merely cumulative; and (3) was discovered since trial and is of such character that the defendant in the exercise of due diligence could not have discovered it earlier. *Id*. "Generally, evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative." *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007).

¶ 25 We agree with the trial court that the affidavits were discovered since trial and that they were of such character that defendant in the exercise of due diligence could not have discovered the evidence, considering Young testified that while investigating the case he did not discover the witnesses. However, we also agree with the trial court that the evidence is cumulative and not of such conclusive nature that it would probably change the result on retrial. First, defense counsel argued that defendant was acting in self-defense when she stabbed the victim. During closing arguments, defense counsel stated that "[t]he reason defendant took a weapon was because she had been attacked physically, personally in the car, the car where she was in and right in the back where she was at. Tamika Harris wants us to believe that she and [the victim] just had no weapons out there, except [the victim] had mace. She had a scooter. She had a tire iron. It was found in the back of the car. It was found in Tamika Harris's car. Those were the weapons they used and that had, the same weapon she used to bust out the window ***."

¶ 26 Second, Brandi Smith testified for the defense that the victim broke the rear window of the SUV with a tire iron and a fist fight ensued. Specifically, she stated that after the back window was broken, she saw "[the victim] with a black metal object." And later she stated, "[the

victim] had a metal object in her hand." As such, the testimony of the three new witnesses would not add any new evidence to what was presented at trial.

¶ 27 Accordingly, because defense counsel presented a theory of self defense at trial, and because at least one witness had testified that the victim had a tire iron and used it to break out a window of the SUV, the testimony of Ian Williams, Antaeus Williams, and Maurice Gaiter would be cumulative. See *Anderson*, 375 Ill. App. 3d at 1006. Moreover, we note that the fact that the victim had a tire iron in her hand at some point at the car wash does not indicate defendant was acting in self-defense when she stabbed the victim. None of the newly discovered witness accounts stated that they saw defendant stab the victim or the victim engage in combat with defendant with the tire iron. Accordingly, the mere fact that the victim had a tire iron in her hand at some point during the melee at the car wash does not change the fact that the evidence overwhelmingly shows that defendant stabbed the victim while the victim was unarmed. Muhaamed and Harris, both of whom were in the immediate vicinity during the fight, testified at trial that defendant stabbed the victim multiple times with a knife and that the victim was unarmed. Defendant then left the vicinity and stated, "yeah I stabbed the b***." Defendant also signed a statement confessing that she had stabbed the victim, but did not state that the victim was armed.

¶ 28 Ineffective Assistance of Counsel

¶ 29 Next, defendant contends that she made a substantial showing that she was denied effective assistance of counsel when her trial counsel failed to call defendant to testify or failed to present any evidence in support of her pre-trial motion to suppress inculpatory statements. The State contends that defendant has forfeited this argument because she could have raised the argument on direct appeal. However, as our supreme court has stated, "a default may not

preclude an ineffective assistance of counsel claim for what trial counsel allegedly ought to have done in presenting a defense." *People v. West*, 187 Ill. 2d 418, 420 (1999); see also *People v. Kokoraleis*, 159 Ill. 2d 325, 328-29 (1994) (distinguishing between ineffective assistance of counsel claims based on what counsel did and what counsel ought to have done).

¶ 30 Claims of ineffective assistance of counsel are analyzed under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To succeed on such a claim, a defendant must first prove that his attorney's performance fell below an objective standard of reasonableness. *People v. Wiley*, 205 Ill. 2d 212, 230 (2001). In so doing, a defendant must overcome the strong presumption that the alleged action or inaction of counsel was the product of sound trial strategy and not incompetence. *People v. Barrow*, 133 Ill. 2d 226, 247 (1989). Secondly, a defendant must demonstrate that the substandard representation so prejudiced defendant that there exists a reasonable probability that but for the errors, the outcome would have been different. *Strickland*, 466 U.S. at 687. Because a defendant must satisfy both prongs of this test, the failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 697.

¶ 31 Trial counsel has the right to make the ultimate decision with respect to matters of tactics and strategy after consulting with his client, including what witnesses to call and the defense to be presented at trial. *People v. Campbell*, 208 Ill. 2d 203, 210 (2003). "Generally speaking, unless counsel refused to allow defendant to testify, advice not to testify constitutes trial strategy and does not support an ineffective-assistance claim." *People v. Hernandez*, 2014 IL App (2d) 131082, ¶ 33.

¶ 32 Here, defendant alleged in her affidavit attached to her postconviction petition that prior to giving her confession, she was shaking, hyperventilating, and had trouble breathing. She stated that she was in fear for the life of her unborn child and her own life. She stated that the

police told her she would be able to leave if she signed the statement, and that she had told these facts to her trial counsel. Defendant alleged that trial counsel did not call her as a witness and in fact presented no evidence to contradict the State's witnesses. Specifically, defendant stated in her affidavit, "I told [trial counsel] that I wanted to testify at my Motion To Suppress hearing. My attorney told me that it would not be a good idea for me to testify." Defendant stated that she told trial counsel during the hearing that she thought she should testify to clarify some things and that trial counsel "told me again that it wasn't a good idea." Defendant further alleged that trial counsel "brushed me off" and told her "not to testify at the hearing." While it is clear from these facts that trial counsel advised defendant not to testify, they do not indicate that trial counsel refused to let her testify. Rather, it is presumed that it was a strategic decision on the part of trial counsel to discourage defendant from testifying at her motion to suppress.

¶ 33 Moreover, we find that defendant has not shown that the outcome of her trial would have been different if her motion to suppress had been granted. *Domagala*, 2013 IL 113688 ¶ 35 ("the 'substantial showing' of a constitutional violation that must be made at the second stage (*Edwards*, 197 Ill. 2d at 246) is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if proven* at an evidentiary hearing, would entitle petitioner to relief". (Emphasis in original.)) Without her confession, there were still several eyewitnesses who testified that they saw defendant stab the victim while the victim was unarmed. Accordingly, we find that defendant did not make a substantial showing that a constitutional violation occurred, and the trial court properly dismissed her second stage postconviction petition.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.