2018 IL App (1st) 153354-U

No. 1-15-3354

Order filed March 23, 2018

Sixth 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. 09 CR 19915
	)	
BILLY ANDERSON,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge, presiding.

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

ORDER

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition is affirmed where defendant failed to raise an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant Billy Anderson appeals the summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erred in dismissing his petition because he presented an arguable claim of ineffective assistance of trial counsel based on his counsel's failure to investigate and

present two alibi witnesses, who would have supported his defense that he was misidentified as the offender. We affirm.

¶ 3 Following a bench trial[1], defendant was convicted of two counts of attempt first degree murder (720 ILCS 5/8-4(a) (West 2012); 720 ILCS 5/9-1 (a)(1)(West 2012)), and sentenced to two consecutive 30-year prison terms. On direct appeal, this court affirmed defendant's conviction over his challenge to the sufficiency of the evidence. See, *People v. Anderson*, 2014 IL App (1st) 122622-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue on appeal. See, *Anderson*, 2014 IL App (1st) 122622-U.

¶ 4 The record shows that on that on September 21, 2009, Barron Hall and his older brother Alphonso Hall[2] were sitting in front of Barron's apartment near the block of 7100 South Ridgeland Avenue. Barron, who was drinking alcohol that evening on the street, recalled the police arriving in the area and telling him to drink inside his apartment and not on the street. Barron went inside, but returned after the police left, to check on his brother, who was arguing with someone. Next, Barron remembered waking up in the hospital after being shot in the head, chest and back. He could not recall the events of that evening right before and after the shooting. As a result of the shooting, Barron was rendered a paraplegic.

¶ 5 Alphonso Hall testified that he was incarcerated because of a pending contempt of court charge for not appearing to testify in the proceedings against defendant. Alphonso explained that he "forgot" about the subpoena. On the date in question, Alphonso went to Barron's apartment to

[1] After a simultaneous jury trial, co-defendant Reginald Owens was convicted of two counts of attempt first degree murder and sentenced to consecutive terms of 30 years' imprisonment. We affirmed on direct appeal. *People v. Owens*, 2014 IL App (1st) 122327-U.

[2] Because Barron and Alphonso Hall share the same last name we refer to these two witnesses by their first names.

visit him. Alphonso "smoked some weed" and, at about 9 p.m., saw a few guys walk up to Barron and tell him that he "had to go" because he was selling drugs in the area. Barron and one of the men walked away and had a conversation. Alphonso testified that it appeared to him that Barron and the other man "didn't see eye to eye." Barron returned and suggested that he and Alphonso go to the liquor store. When they returned, they began drinking in front of Barron's apartment. Alphonso described the area in front of the apartment as being well lit by a security light. At some point, Alphonso saw a crowd gathering across from the apartment building, so he went inside and phoned the police. The crowd dispersed after the police arrived. Alphonso and Barron went inside the apartment for a short time.

¶ 6 When Alphonso and Barron went outside again, Alphonso saw a man and woman looking down from the apartment window two floors above. Alphonso began arguing with the man. Alphonso told the man to "shoot, shoot," explaining that the man said he was a "shooter." Alphonso testified that the man "jumped on the phone and called some guys." During this time, Barron was sitting on the stoop and Alphonso was leaning against the wall of the building. Alphonso then saw two men approach on foot and begin shooting. Alphonso saw Barron get shot in the head and fall back. Alphonso also saw the muzzle flashes and felt the bullets penetrating his body. Alphonso turned and ran into the building and broke through the door of his brother's apartment. Alphonso testified he heard over 10 shots. Alphonso was shot in the chest, liver, groin, stomach and the back of his leg.

¶ 7 At the hospital, Alphonso identified the co-defendant from a photo array, but could not identify anyone else because of the medication he was given for his injuries. In October 2009,

Alphonso viewed two lineups and identified defendant and the co-defendant as the persons who shot him and Barron. Alphonso also identified defendant in court.

¶ 8 On cross-examination, Alphonso testified that defendant and the co-defendant were wearing hooded sweatshirts, but did not have their hoods over their heads when they committed the shooting.

¶ 9 Vivian Pettigrew, who resided in a studio apartment located at on South Ridgeland, testified that, on the night of the shooting, she was awoken at approximately 10 p.m. by someone yelling "shoot, shoot." Pettigrew looked outside her window and saw Alphonso and Barron across the street. Alphonso was arguing with someone, who was looking out of the third floor window. Pettigrew saw two men in an alley, lined up next to each other, crouching against the wall. Both men were wearing hooded sweatshirts and holding guns in their hands. Pettigrew was able to see their faces and recognized them from the neighborhood. She saw the men run to where Alphonso and Barron were standing and, when they were about a foot away from the brothers, they began shooting. Pettigrew testified that defendant shot Barron and the co-defendant shot Alphonso. Defendant and the co-defendant then fled the scene.

¶ 10 After the shooting, Pettigrew was too afraid to sleep and did not go outside even when the police arrived. Pettigrew went to work the next day and then spoke to her pastor later in the afternoon. Both Pettigrew and her pastor went to Area 2 detective's division. Pettigrew, who had written the co-defendant's license plate number on a piece of paper, gave the paper to police. Pettigrew testified that she wrote the number down because of the co-defendant's erratic driving in the neighborhood. When Pettigrew arrived home from Area 2, she saw the co-defendant across the street from her home and called the police. Pettigrew watched as the police

interviewed the co-defendant, but did not arrest him. Later, Pettigrew identified defendant in a lineup and also in court as one of the gunmen. Pettigrew testified she was relocated by the State's Attorney's office because she feared for her safety.

¶ 11 Police recovered ten, 9 millimeter shell casings from the scene as well as bullet fragments from the wall outside of 7109 South Ridgeland. The shell casings were sent for ballistics testing and it was determined that the shell casings were fired from two different weapons.

¶ 12 Defense counsel informed the court that defendant did not wish to testify and that he would be resting. The court asked defendant, "do you also understand Mr. Goldberg (trial counsel) is resting, which means there will be no witnesses called in this matter?" Defendant responded, "[Y]es sir." The court further inquired, "[D]o you agree with that decision?" Defendant replied, "[Y]es sir." Defendant rested without presenting evidence.

¶ 13 Defendant was found guilty of the attempt first degree murder of Barron and Alphonso Hall. Prior to sentencing, defendant filed a *pro se* motion for a new trial, alleging, in part, that his trial counsel was ineffective for failing to present an alibi defense and call his girlfriend Brandi Wheeler as an alibi witness. On April 12, 2012, trial counsel filed a motion to withdraw due to defendant's allegations of ineffectiveness. Counsel responded to defendant's allegation regarding failing to call witnesses claiming that he "interviewed all possible witnesses including [defendant's] girlfriend (Brandi Wheeler), who could add nothing to the whereabouts of Mr. Anderson at the time of this offense and indicated that she had been drinking that day." The court allowed trial counsel to withdraw and appointed the public defender's office to represent defendant on his motion for a new trial. The public defender's office filed a second motion for a new trial.

¶ 14 The court, pursuant to *People v Krankel,* 102 Ill. 2d 181 (1984), conducted a hearing on defendant's posttrial claims of ineffective assistance of counsel. At the *Krankel* hearing, trial counsel testified that defendant solicited him at Cook County Jail while counsel was visiting another client. Counsel agreed to represent defendant and began his investigation into defendant's case. During his investigation, counsel went to the crime scene several times and spoke to defendant's family members as well as defendant's girlfriend "Brandi." Counsel also spoke to defendant several times prior to trial and attempted to interview Pettigrew, but she "refused" to speak to him. Counsel attempted to contact a witness, Franklin Glaspar, who was provided by defendant, but Glaspar would "never come forward." Counsel explained that Glaspar eventually provided an affidavit alleging "I have no knowledge whatsoever, directly or indirectly of [defendant] being involved in any shooting or shooting." Counsel testified that he had conversations with defendant regarding presenting a defense and that "it was never mentioned to me at any time possible alibi witnesses[.]" Counsel explained that he developed a strategy that "this case boiled down to an identification of a single witness in this case who we believed had—I believed had limited opportunity to observe, were shown photographs that I believed were suggestive and I don't believe our—my strategy was to attack her credibility to observe, her credibility and the physical proximity of her to where this was going on to show that it was not possible to have seen what she said she saw but it was an identification case."

¶ 15 Defendant testified at the *Krankel* hearing that he provided counsel with his alibi "to where I was at previous the night of what took place and the crime. And he told me that—I gave him the numbers and the names of the people that I was with at the particular time. And he told

me that he didn't want to go to with my defense because he felt that he could impeach the State witnesses."

¶ 16 The court denied defendant's motion for a new trial. In doing so, the court noted that it did "not believe that any of these specific allegations raised in this motion or anything that was testified by this defendant does in fact give rise to ineffective assistance of counsel claim here." The court pointed out that "the decision whether or not to call witnesses, whether or not to present particular defenses are in fact decisions that are made by the attorney. Those are strategic decisions. Obviously, they should be done with consultation of the defendant but the defendant alone does not control those decisions." The court found trial counsel's testimony to be credible and on the issue regarding presenting an alibi defense, the court stated that "there was no request to—for an alibi defense to be investigated in this matter."

¶ 17 On August 24, 2015, defendant filed the *pro se* petition for postconviction relief at bar, alleging that he was denied his Sixth Amendment right to effective assistance of trial counsel and his Fourteenth Amendment right to due process. Defendant argued that he informed trial counsel of two witnesses, Brandi Wheeler and her mother Patricia Wheeler, who would have been able to "corroborate his whereabouts during the commission of the crime." Defendant attached two affidavits from Brandi and Patricia Wheeler each averring that on September 21, 2009, from 9 p.m. to 10 a.m., defendant was at 6700 South Chappel Avenue. Defendant also argued that trial counsel "never made any attempt before trial was set to interview [Vivian Pettigrew]." Defendant also claimed that he was actually innocent of the crime and attached two affidavits from Robert McGhee and Barry Wilson averring that defendant did not commit the shooting on September 21, 2009.

¶ 18 On September 29, 2015, the trial court summarily dismissed the petition in a written order. The court initially found that defendant's claims were procedurally barred and precluded from consideration for failing to raise the issues on direct appeal. Nevertheless, the court considered the claims raised and ultimately found that the petition was frivolous and patently without merit. With respect to defendant's argument that his counsel was ineffective for failing to call alibi witnesses, the court noted that defendant failed "to show that counsel's decision not to call these witnesses fell below an objective standard of reasonableness" or prejudiced defendant where the affidavits of his alibi witnesses, Brandi and Patricia Wheeler, would not change the outcome of petitioner's trial.

¶ 19 Defendant appeals, arguing that the trial court erred in summarily dismissing his petition at the first-stage of postconviction proceedings because his petition "states the gist of a claim of ineffective assistance of counsel" based on trial counsel's and post-trial counsel's failure to present defendant's girlfriend, Brandi Wheeler, and her mother, Patricia Wheeler, as alibi witnesses.

¶ 20 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides that the circuit court adjudicates a petition for postconviction relief in three distinct stages. *People v. Hodges,* 234 Ill. 2d 1, 10 (2009). At the first stage, a trial court may dismiss a petition only if it is " ' frivolous or is patently without merit. ' " *People v Cotto,* 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is frivolous or patently without merit if it " 'has no arguable basis *** in law or fact.' " *People v. Papaleo,* 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges,* 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges,* 234

Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo,* 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17) (2009)). A postconviction petition may be summarily dismissed as frivolous and patently without merit based on both forfeiture and *res judicata*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams,* 2015 IL App (1st) 131359, ¶ 28; *Hodges*, 234 Ill. 2d at 9.

¶ 21 In his petition, defendant alleged that his trial counsel was ineffective for failing to investigate and present alibi witnesses. Initially, we find defendant's claim of counsel's ineffectiveness to be forfeited as this argument could have been raised on direct appeal. The record shows that, defendant filed a *pro se* posttrial motion raising this claim of ineffectiveness. The trial court conducted a *Krankel* hearing. At the hearing, defendant testified that he provided counsel with his alibi witnesses and their contact information. Counsel testified that he was not given an alibi by defendant and thought the best defense was to attack the credibility of the State's witness Vivian Pettigrew and her ability to observe defendant as the perpetrator of the crime. Counsel also testified that he spoke to defendant's alleged alibi witness Brandi Wheeler, but she did not provide him with an alibi. In denying defendant's posttrial motion, the court found that there was no request made by defendant for an alibi in this case and that trial counsel was not ineffective. Given this record, defendant could have raised counsel's alleged failure to investigate alibi witnesses on direct appeal. Therefore, because counsel's alleged ineffectiveness for failing to investigate alibi witnesses was ascertainable from the record and could have been raised and determined on direct appeal, the issue is forfeited. See *People v. Brown*, 2017 IL App

(1st) 150203, ¶ 23 (citing *People v. Johnson*, 352 Ill. App. 3d 442, 448 (2004)). Thus, defendant's postconviction petition was properly dismissed as being frivolous and patently without merit. See *Blair*, 215 Ill. 2d at 436 (where forfeiture precludes defendant from obtaining relief, claim is "necessarily 'frivolous and patently without merit' ").

¶ 22 In reaching this conclusion, we agree with the State that defendant's attempts to avoid forfeiture by claiming the Wheeler affidavits were not part of the trial record are without merit. Although the affidavits themselves were not part of the trial record, the allegations therein that defendant was with the Wheelers on the night of the murder was readily ascertainable from the record. As mentioned, at the *Krankel* hearing defendant testified that he provided counsel with his alibi and that counsel essentially ignored his defense.

¶ 23 That said, even if not forfeited, defendant's claim of ineffectiveness is meritless. To prevail on a claim of ineffective assistance of counsel, "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.' " *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting *Strickland v. Washington*, 466 U.S. 688, 694 (1984)). At the first stage of postconviction proceedings, a petition that alleges 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." *People v. Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. 2d at 17.

¶ 24 Under the first *Strickland* prong, in order to demonstrate that counsel's performance was deficient, a defendant must overcome a strong presumption that, under the circumstances,

counsel's conduct might be considered sound trial strategy. *People v. Houston*, 226 Ill. 2d 135, 144 (2007). A strong presumption exists that trial counsel acted effectively in investigating a case. *Domagala*, 2013 IL 113688, ¶ 38. Counsel is not ineffective for eschewing further investigation where circumstances known to counsel at the time of the investigation do not demonstrate a need for further investigation. *Brown*, 2017 IL App (1st) 150203, ¶ 29. Moreover, decisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel. See *People v. Enis*, 194 Ill. 2d 361, 378 (2000). "Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence and are, therefore, generally immune from claims of ineffective assistance of counsel." *Id.* (citing *People v. Reid*, 179 Ill. 2d 297, 310 (1997)). Hence, these strategic decisions will not support an ineffective assistance of counsel claim unless the "strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Reid*, 179 Ill. 2d at 310.

¶ 25 Here, the record shows that, during his investigation, counsel went to the crime scene several times and spoke to defendant's family members as well as defendant's girlfriend "Brandi." According to counsel, Brandi did not provide him with an alibi. In his written response to defendant's motion for a new trial, counsel averred that "Wheeler could add nothing to the whereabouts of [defendant] at the time of this offense and indicated that she had been drinking that day." Counsel also spoke to defendant several times prior to trial regarding presenting a defense. Counsel stated that "it was never mentioned to me at any time possible alibi witnesses[.]" This is corroborated by the record which shows that, after counsel informed the court that defendant did not wish to testify and that he would be resting, the court asked defendant, "do you also understand Mr. Goldberg (trial counsel) is resting, which means there

will be no witnesses called in this matter?" Defendant responded, "[Y]es sir." The court further inquired, "[D]o you agree with that decision?" Defendant replied, "[Y]es sir." Accordingly, counsel could not have presented the alibi witnesses.

¶ 26 Instead, counsel strategically chose to attack the credibility of the State's primary eyewitness, Pettigrew, who identified defendant as the shooter. Specifically, counsel focused on her ability to observe defendant under circumstances permitting a positive identification. To this end, counsel effectively cross-examined Pettigrew in an attempt to discredit her observations. Given that Pettigrew's testimony was of significant importance to the State's case, counsel's decision to attempt to discredit her testimony was a matter of reasonable trial strategy that cannot support a claim of ineffective assistance of counsel. *Brown*, 2017 IL App (1st) 150203, ¶ 31; *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002) (matters of trial strategy are generally immune from claims of ineffective assistance of counsel). As such, defendant's petition failed to make an arguable constitutional claim that counsel's performance fell below an objective standard of reasonableness by failing to present the alleged alibi witnesses. Thus, it had no arguable basis in law or fact and was properly dismissed as frivolous and patently without merit. See *Brown*, 2017 IL App (1st) 150203, ¶ 31; *Hodges*, 234 Ill. 2d at 11-12.

¶ 27 We also reject defendant's attempts to have his posttrial counsel found ineffective for not fully exploring the alibi defense and presenting the matter at the *Krankel* hearing. Defendant is raising this issue for the first time on appeal and it was not in his postconviction petition. It has been held that "any issues to be reviewed must be presented in the petition filed in the circuit court." See *People v. Jones,* 211 Ill. 2d 140, 148 (2004) (citing 725 ILCS 5/122-1(b) (West 1998)); *People v. McNeal*, 194 Ill. 2d 135, 148-49 (2000); *People v. Davis*, 156 Ill. 2d 149, 159

(1993). Thus, "a defendant may not raise an issue for the first time while the matter is on review." *Jones*, 211 Ill. 2d at 148. This allegation was not presented in defendant's postconviction petition and as such is not properly before this court.

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

¶ 29 Affirmed.