2018 IL App (1st) 153548-U

No. 1-15-3548

Order filed October 11, 2018

Fourth 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. 06 CR 18840
	)	
DARNELL ALLEN,	)	Honorable
	)	Erica L. Reddick,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court did not err in summarily dismissing a postconviction petition claiming ineffective assistance of trial counsel for not calling a particular witness.

¶ 2 Following a bench trial, defendant Darnell Allen was convicted of first degree murder and aggravated discharge of a firearm and sentenced to consecutive prison terms of 50 and 6 years. On direct appeal, we remanded for consideration of defendant's *pro se* posttrial claims of ineffective assistance of trial counsel. *People v. Allen*, No. 1-08-2603 (2011) (unpublished order

under Illinois Supreme Court Rule 23). The trial court appointed new posttrial counsel and denied the resulting posttrial motion following an evidentiary hearing; we affirmed. *People v. Allen*, No. 1-12-1739 (2014) (unpublished order under Illinois Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his 2015 *pro se* postconviction petition, contending that he stated an arguable claim of ineffective assistance of trial counsel. Specifically, he contends that trial counsel failed to investigate and call a witness who would have supported defendant's case at trial, and that this claim is supported by trial counsel's general "incompetence, dishonesty, and neglect" shown by his discipline by the Attorney Registration and Disciplinary Commission (ARDC). For the reasons stated below, we affirm.

¶ 3 Defendant was charged with six counts of first degree murder for allegedly fatally shooting Julius Birdine (Julius), three counts each of attempted first degree murder and aggravated discharge of a firearm for allegedly shooting at Brandi Birdine (Brandi), Phillip Kizer, and Annette Thomas, and two counts of unlawful use of a weapon by a felon (UUWF), all allegedly committed on or about June 25, 2006.

¶ 4 In discovery, the State disclosed as potential "civilian" witnesses Brandi, Kizer, Thomas, Antonio Edmonds, Orlando Ray, Marlena Johnson, and Mattie Lyles.

¶ 5 At the 2008 trial, Brandi (Julius's wife) and Thomas (Brandi's mother) testified that Julius was sitting on the front porch of his home with his dog on the night in question. Defendant and Julius discussed the dog, then defendant left. Orlando Ray arrived at the home and spoke with Julius. Julius and Ray fell into an argument, during which Ray slapped the dog. Defendant returned and joined the argument between Julius and Ray. Thomas urged Julius to come inside rather than argue. Brandi called Kizer to come to the Birdine home to help Julius.

¶ 6 When Kizer arrived, he urged Julius to leave with him. Thomas also urged Julius to leave, pulling him towards Kizer's car and then trying to push him into the car. Thomas and Brandi heard two gunshots as Julius, Thomas, and Kizer were near Kizer's car. Kizer drove away, and Julius and Thomas ran towards the house. Thomas and Brandi heard another shot, and Julius fell to the ground with a gunshot wound to the back. They saw defendant walk over to Julius and stand over him as he fired at least one more shot at Julius. When Brandi yelled, defendant fired a shot at her and she fell to the ground. Neither Thomas nor Brandi saw anyone but defendant holding a gun that night. They each identified defendant as the shooter from a photographic array on the day of the shooting, and from a lineup less than a month after the shooting.

¶ 7 Thomas testified that she did not see where Ray was during the shooting, and did not see defendant leave the scene, as she was focused on Julius and Brandi. When the first shots were fired, Kizer was in the driver's seat of his car. Thomas did not see Julius or Kizer threaten defendant or Ray. However, she also did not see Ray strike the dog, or defendant leave and return, as she was inside then.

¶ 8 Brandi testified that, as Julius was standing near Kizer's car and Kizer was standing next to the driver's door, Julius asked her to bring the dog inside. As she did, she heard the two initial gunshots. When defendant shot Julius on the ground, his gun was aimed at Julius's head. When defendant fired at Brandi, she dropped to the ground but was not shot. She saw defendant walk away from the scene. Brandi admitted that she may have told police that Edmonds slapped the dog. However, she did not know Ray's name then, and Edmonds was there "afterward."

¶ 9 Phillip Kizer also testified. When he arrived at the Birdine home, Julius was in a "heated" argument with defendant and another man. Kizer did not join the argument but urged Julius to leave. The argument escalated with an exchange of insults, and Julius punched the man with defendant hard enough that he fell briefly. Julius was not holding anything and remarked that he did not need a gun because he had his fists. Defendant and the other man began walking away in different directions, and Kizer believed the incident was over. Kizer walked towards his car. Julius also walked towards the car and asked Brandi to bring the dog inside. Kizer was in the driver's seat when either Julius or Thomas opened the passenger door, but it closed before Julius could enter the car. Kizer noticed defendant approaching and drove away. As he left, he heard multiple gunshots, including two shots striking his car. Kizer testified that police photographs accurately depicted the damage to his car from two bullets.

¶ 10 Kizer identified defendant as the shooter from a photographic array on the day of the shooting, and again from a lineup less than a month later. Kizer denied having a gun that night, placing his hand into a pocket or behind his back as if to draw a gun, or threatening defendant. He admitted to an armed robbery conviction but said that his "firearm days [are] way behind me." He did not see Julius hold a gun or place a hand into one of his pockets or behind his back as if to draw a gun. He saw only defendant hold a gun that night.

¶ 11 The parties stipulated that a medical examiner would testify that Julius died of gunshot wounds: one in the back and one in the head, with neither showing signs of close-range firing.

¶ 12 Police detective Lorenzo Sandoval testified to the separate photographic array identifications of defendant by Brandi, Kizer, and Thomas on the day of the shooting. Brandi's account to Sandoval did not mention Julius punching anyone and attributed the slap of the dog to

Edmonds rather than Ray. After defendant was arrested in mid-July, Brandi, Kizer, and Thomas separately viewed a lineup from which each identified defendant.

¶ 13 Trial counsel Raymond Prusak asked the court if he could call defendant as a witness the next day so he could "visit him and talk to him and go over *** a videotape and transcript, stuff like that." The court denied a continuance but offered a 30-minute recess. Counsel asked for "ten minutes." After a "[s]hort [p]ause" as the record states, counsel told the court that he was ready.

¶ 14 Defendant testified that he was walking to a store on the night in question when he met Ray, a long-time friend, talking to Julius about dogs. Defendant knew Julius and had never argued with him, though Julius had "tried to scare [defendant] with his dog" previously. Julius and Ray were conversing, not arguing, and defendant did not see Ray slap Julius's dog. Defendant walked away but returned a short time later. Kizer then arrived by car. Defendant did not know him. Kizer exited his car with his hand in his back pocket as if reaching for a gun. However, defendant did not see a gun then, nor did Kizer claim he had a gun.

¶ 15 Once Kizer arrived, Julius became aggressive, using threatening language. Kizer did not urge Julius to leave with him. Defendant decided to leave and to urge Ray to leave. Defendant had a gun, loaded with only three bullets, but did not want a confrontation. Julius shoved and punched Ray. Once Ray got up after being briefly knocked down, he went towards his car and drove away. Julius then insulted defendant and told Kizer to "air his ass out." Defendant took this to be an instruction to shoot him. Kizer was standing next to his car and holding a semi-automatic pistol pointed at defendant. Defendant fired a single warning shot at Kizer's car and then fled on foot. As he fled, Kizer fired at him three or four times and he fired two shots back. After getting away, defendant discarded his gun. He denied standing over Julius and shooting at

him as he was on the ground, and denied shooting at Brandi. When he was interviewed by police after his arrest, he mentioned Julius's "air his ass out" remark.

¶ 16 Detective Sandoval testified in rebuttal that defendant gave a postarrest statement in which he did not mention Julius telling Kizer to "air his ass out." The statement was not offered into evidence. The parties stipulated that the police found no spent shell casings at the scene.

¶ 17 Following closing arguments, the court found defendant guilty of first degree murder, aggravated discharge towards Brandi and Kizer, and UUWF. The court found that the forensic evidence of at least four shots – two to Julius, and two to Kizer's car – contradicted defendant's account that he fired only three shots as he had only three bullets. The court found that close-range firing is within 18 inches so the absence of close-range firing evidence for the head shot did not contradict the evidence that defendant stood over Julius as he shot him in the head.

¶ 18 The court noted Detective Sandoval's testimony that defendant did not mention the "air his ass out" remark. It found that Julius telling Kizer to "air his ass out" presupposes that Julius knew that Kizer "arrived on the scene with something suitable for airing his ass out." However, the court found no evidence that Julius knew Kizer had a gun. Noting that a defendant must make an initial showing of self-defense, the court found defendant not credible. It found him not guilty of any count of attempted murder and not guilty of aggravated discharge towards Thomas.

¶ 19 Trial counsel filed a posttrial motion challenging the sufficiency of the evidence. The court denied the motion, finding that "[n]othing is there to suggest self-defense."

¶ 20 Defendant mailed the court a *pro se* posttrial motion alleging that trial counsel failed to (1) challenge the State's failure to disclose defendant's statement claiming self-defense, (2) visit him or review discovery material with him until counsel received more money, (3) call certain

unnamed witnesses for the defense who were attending trial, or (4) "devote full effort" to his case. However, the court told defendant that it does not read *ex parte* correspondence. Trial counsel did not adopt the *pro se* motion but stood on counsel's already-denied motion and offered to withdraw if defendant wished to present his motion. The court told defendant that it would excuse counsel if defendant wanted to argue his motion. Defendant withdrew his motion.

¶ 21 Following a sentencing hearing, the court merged counts and sentenced defendant to 50 years' imprisonment for one count of first degree murder, consecutive to 6 years for one count of aggravated discharge and concurrent to 6 years for the other aggravated discharge count.

¶ 22 On appeal, defendant contended in relevant part that the trial court failed to inquire into his *pro se* claims of ineffectiveness. *Allen*, No. 1-08-2603, at 8-10. Noting that a defendant need only present his *pro se* claims to the court to trigger a preliminary inquiry, and trial counsel still represents a defendant during such an inquiry, we remanded for such an inquiry. *Id.* at 11-13.

¶ 23 On remand, the court appointed new counsel, who filed a posttrial motion in 2011 alleging ineffective assistance by trial counsel Prusak. The motion noted that the ARDC suspended Prusak from practicing law in November 2008 on findings that he provided ineffective assistance, neglected several cases, and "committed serious misconduct in nine criminal cases." The motion alleged that Prusak did not review discovery materials with defendant, did not communicate with him except briefly before or after court appearances, and did not prepare him to testify. The motion alleged that Prusak did not call Ray as a witness to corroborate defendant's account, and failed to impeach Detective Sandoval's rebuttal testimony with defendant's statement that Julius threatened him.

¶ 24 Attached to the motion was the 2008 ARDC decision against Prusak, whereby he was suspended from the practice of law for six months and subject to probation for the balance of a three-year period. The decision described neglect and misconduct from May 2002 to June 2006 in representing various clients in criminal cases, but not defendant. Also attached was the log of defendant's jail visitors from July 2006 to August 2008, which did not list Prusak as a visitor.

¶ 25 The court held an evidentiary hearing on the posttrial motion. Defendant testified that Prusak never visited him in jail, never discussed his case with him by telephone, and all of their conversations were brief and took place in the courtroom lockup. Prusak did not show defendant any discovery materials or the videotape of his statement, did not advise him of what witnesses would be called or what they would testify to, and did not discuss with him what his trial testimony would be. Defendant stated he identified Ray as a possible witness to Prusak. Defendant was confronted with his trial testimony that Ray left before Kizer drew a gun, but testified at the hearing that "I can't really say he did [or] didn't." He was "quite sure that [Ray saw] the whole-shoot out," though "Ray was driving away before the shooting started."

¶ 26 Orlando Ray testified that, as defendant and Julius argued, Kizer drew a gun before defendant began shooting. Ray told police about Kizer's gun. Before trial, Prusak spoke with Ray in two telephone calls, including one asking Ray to come to his office to discuss defendant's case. Ray did not attend defendant's trial. He spoke with defendant once before trial by telephone. Ray struck Julius's dog, and Julius struck Ray. Ray told police that he heard gunshots while on the ground after Julius struck him but did not see anyone fire a gun that night.

¶ 27 Raymond Prusak testified that he did not tell defendant about the ARDC investigation. Prusak was a recovering alcoholic and addict when he represented defendant, was not under the

influence of drugs or alcohol during this case, and his recovery program included random testing that he passed during this case. Prusak was surprised at the lack of documentation that he visited defendant in jail, but also uncertain whether he did visit defendant in jail. Before trial, he spoke with defendant "numerous" times in the courtroom lockup, for 3-5 minutes in some instances and 20-30 minutes in others. Prusak discussed trial witnesses with defendant. While he did not show defendant unredacted police reports or his recorded statement, he showed him relevant portions of the reports and read the transcript of the statement to him "many times." Prusak impressed upon him the need to be aware of what he had said previously, and Prusak opined that his testimony was "almost dead-on" with his statement.

¶ 28 Prusak was aware of Ray as a possible witness, including his account that he heard but did not see gunshots, and defendant's account that Ray left before any gunshots. He could not recall if he sought Ray as a witness or if Ray contacted him. However, he believed that Ray would have been a poor defense witness because his testimony would have contradicted defendant's testimony that Ray fled the scene before any shots. Regarding Detective Sandoval's testimony that defendant never mentioned a threat by Julius, Prusak acknowledged that defendant told police of Julius's remark that he would "shoot up the neighborhood" or "the block." Prusak was prepared for defendant's trial, including reviewing the discovery. While he was aware that the State would introduce evidence that defendant fired at Julius's head as he was on the ground, he believed that a self-defense argument at a bench trial "was the best chance we had." If he had not been prepared for trial, he would have requested a continuance.

¶ 29 Michael Clarke, the assistant State's Attorney from defendant's trial, testified that Prusak did not appear to be under the influence of drugs or alcohol at any time during this case. Prusak

presented a self-defense theory and cross-examined the State's witnesses consistently with that theory. Defendant's trial testimony was "substantially consistent" with his statement, so that Clarke was able to impeach him only on two points. Each time Prusak appeared in court, Clarke saw him go back to the lockup before and after court to speak with his clients.

¶ 30 Following arguments, the court denied the posttrial motion. It found that the ARDC decision finding Prusak ineffective and neglectful in other cases did not prove his ineffectiveness here. The court found that Prusak argued self-defense, properly examined witnesses, and made timely objections. It found that Prusak discussed defendant's case with him, noting defendant's testimony that he told Prusak about Ray as a possible witness, and Prusak's testimony that he reviewed a transcript of defendant's statement with him and probably discussed defendant's testimony with him.

¶ 31 As to calling Ray as a witness, the court noted Prusak's testimony that he did not call Ray as a matter of trial strategy. The court found that Ray would have contradicted defendant: Ray testified that he saw a man other than defendant holding a gun before defendant fired, but defendant testified at trial that Ray left before the shooting. Lastly, Detective Sandoval's testimony could not be impeached with defendant's statement as it would be extrinsic evidence. Moreover, defendant was not prejudiced because (1) Prusak elicited from defendant that he told police about the "air his ass out" remark, (2) defendant's statement referred to a different remark by Julius not aimed at defendant particularly, and (3) the trial court expressly relied on the physical evidence in finding defendant not credible.

¶ 32 Defendant appealed, contending that posttrial counsel was ineffective for not impeaching Prusak's testimony that he was prepared for trial and had prepared defendant for trial with

Prusak's mid-trial request for a continuance to consult with defendant. *Allen*, No. 1-12-1739, ¶¶ 15, 17. We affirmed. We found that the record did not show that Prusak's trial examination of defendant was deficient or that defendant was unprepared to testify at trial. *Id.* ¶ 18. We also found that Prusak's desire to consult with defendant before his possible testimony did not prove that Prusak had not consulted with him earlier. *Id.* ¶ 19. We found that defendant was not prejudiced because the posttrial motion did not allege that defendant felt unprepared to testify, and because defendant failed to show how more consultation with trial counsel would have changed the outcome of trial. *Id.* ¶ 20.

¶ 33 Defendant filed his *pro se* postconviction petition at issue here in July 2015. In relevant part, he claimed that Prusak was ineffective for not calling Orlando Ray and Antonio Edmonds as a trial witness, posttrial counsel was ineffective for not calling Edmonds as a witness in the posttrial evidentiary hearing, and Prusak's ineffectiveness was shown by his further ARDC discipline.

¶ 34 Attached to the petition was defendant's affidavit that, in relevant part, he mentioned to Prusak before trial "two witnesses who were willing to speak with him and testify on my behalf." Also attached was Edmond's 2015 affidavit that he was standing near the scene talking to a friend when he heard seven or eight gunshots followed by defendant running away. Also attached was a 2010 ARDC decision suspending Prusak from the practice of law for two and one-half years. The decision reflected that Prusak failed two drug screenings in 2010 and failed to report the results to the ARDC, both being violations of his 2008 probation.

¶ 35 In October 2015, the circuit court summarily dismissed the petition. The court found that the claim regarding Ray as a witness, and the claim regarding Prusak's ARDC discipline, were

barred as *res judicata* for having been raised in the posttrial evidentiary hearing. Regarding Edmonds as a witness, the court noted that Edmonds was not averring to seeing anyone holding a gun or shooting at defendant but merely to seeing defendant running after hearing gunshots. As Edmonds's account would not substantiate defendant's self-defense theory, it was strategically sound for trial counsel not to call him as a witness, and defendant was not prejudiced by counsel not calling him.

¶ 36 On appeal, defendant contends that his petition stated an arguably meritorious claim that trial counsel was ineffective for not calling Antonio Edmonds as a witness, and that his claim is supported by counsel's "incompetence, dishonesty, and neglect" shown by his ARDC discipline.

¶ 37 A postconviction petition may be summarily dismissed within 90 days of filing if "the court determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). It may be summarily dismissed if it has no arguable basis in law or fact because it relies on an indisputably meritless legal theory or a fanciful factual allegation. *People v. Boykins*, 2017 IL 121365, ¶ 9. At this first stage, well-pled factual allegations are accepted as true unless contradicted by the record. *People v. Brown*, 2017 IL 121681, ¶ 27; *Boykins*, 2017 IL 121365, ¶ 9. However, issues raised and decided on direct appeal are barred as *res judicata*, and issues that could have been raised but were not are forfeited. *People v. Tate*, 2012 IL 112214, ¶ 8. We review a postconviction petition's summary dismissal *de novo*. *Boykins*, 2017 IL 121365, ¶ 9.

¶ 38 A defendant's claim that counsel failed to render effective assistance is governed by a two-pronged test whereby the defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced by that performance. *Brown*, 2017 IL 121681, ¶ 25. Prejudice is a reasonable probability of a different

outcome absent counsel's performance at issue. *Id*. ¶ 26. A postconviction petition alleging ineffective assistance may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness and (2) the defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19. Whether counsel's performance was the result of a sound trial strategy is not an appropriate consideration at the first stage. *Id*. ¶¶ 21-22. Generally, an ineffective assistance claim based on what counsel did on the record is subject to forfeiture while a claim based on what counsel ought to have done is not. *Id*. ¶ 14.

¶ 39 Here, as a threshold matter, we decline to consider trial counsel Prusak's ARDC discipline as reinforcement of the ineffectiveness claim for not calling Edmonds as a witness. The record of the direct appeal following the posttrial evidentiary motion included the grounds for the 2008 ARDC discipline. In that appeal, we rejected the proposition that Prusak's trial performance or preparation of defendant for trial were generally deficient. "Our examination of the record has not found that the direct examination of defendant by his trial counsel was deficient or that defendant's trial testimony gave any indication that he had not been prepared to testify." *Allen*, No. 1-12-1739, ¶ 18. That conclusion is not changed by Prusak incurring further discipline for misconduct in 2010, well after defendant's trial. The ineffectiveness claim regarding Edmonds shall rise or fall on its own arguable merits or lack thereof.

¶ 40 Turning to those merits, Edmonds averred that he saw defendant fleeing after hearing multiple gunshots. Defendant correctly notes that Edmonds's account that he was running away is consistent with defendant's trial testimony that he was fleeing, and contrary to Brandi's testimony that he walked away. However, as the circuit court noted in summarily dismissing the petition, Edmonds does not aver to having seen anyone holding a gun or shooting at defendant

that night. Considering a trial with Edmonds's account added to the existing trial evidence, we do not consider the discrepancy between walking and running noted by defendant to be so significant as to rise to the level of an arguable reasonable probability of a different trial outcome. In sum, we find no arguable prejudice from Prusak not calling Edmonds as a trial witness, and defendant's ineffective assistance claim therefore fails.

¶ 41 Accordingly, the judgment of the circuit court is affirmed.

¶ 42 Affirmed.