2019 IL App (1st) 170565-U

No. 1-17-0565

Order filed March 22, 2019

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. 03 CR 17652
	)	
TONY ASHE,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge presiding.

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

ORDER

¶ 1 *Held*: The dismissal of the defendant's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 2 Following an evidentiary hearing, the circuit court of Cook County dismissed defendant Tony Ashe's postconviction petition, finding that he failed to make a substantial showing that his constitutional right to the effective assistance of counsel was violated. Defendant appeals,

contending that the dismissal of his petition was against the manifest weight of the evidence. We disagree with defendant and affirm the order of the circuit court.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant was found guilty of first degree murder and two counts of attempted murder in connection with the death of Laura Taylor and the wounding of her companions, Cynthia Hall and Miranda Carmickle. Defendant was sentenced to a total of 90 years in the Illinois Department of Corrections.

¶ 5 Defendant, his cousin Keith Green, and Natalie Aponte were charged with the first degree murder of Ms. Taylor and the attempted murders of Ms. Hall and Ms. Carmickle. Ms. Aponte and Mr. Green pleaded guilty to lesser charges, and each received a sentence of 10 years' imprisonment. Both Ms. Aponte and Mr. Green testified against defendant.

¶ 6 The evidence presented at defendant's jury trial was detailed in this court's order affirming the judgment and sentence of the trial court. See *People v. Ashe*, 409 Ill. App. 3d 1151 (2011) (table) (unpublished order under Supreme Court Rule 23). A summary of the evidence pertinent to this appeal follows below.

¶ 7 Jury Trial

¶ 8 On July 13, 2003, the three female victims were sitting in a green Cadillac parked on North Lakeview Drive. A man approached and fired a shot through the car window and then proceeded to the back of the car and fired a shot through the back window. Ms. Hall stated that the man was wearing surgical gloves and carrying a 9-millimeter gun. Ioan Dragos observed a man wearing dark clothing and a hooded sweatshirt approach a car and fire shots into the passenger-side window and then into the back window. Mikhail Fiksel was standing at the corner

of Lakeview Drive and Arlington Avenue when he heard shots and saw a man dressed in a dark brown warm-up suit walking very quickly away from the scene. He believed the man was African American. None of the witnesses saw the man's face. However, just prior to the shooting, Ms. Hall recognized defendant's black Cadillac parked on the other side of the street.

¶ 9 In 2002, Ms. Carmickle had defendant arrested for beating her. On the day of the shooting, Ms. Aponte told defendant that Ms. Taylor and Ms. Carmickle would be together that evening. The defendant told her to have the women meet her at an address on Lakeview Drive. Mr. Green drove defendant in defendant's black Cadillac to an apartment building on the north side of Chicago. As he parked the black Cadillac, he noticed a green Cadillac in which the victims were seated parked across the street. Defendant put on surgical gloves and removed a 9-millimeter hand gun from the glove compartment. He then went to the trunk of the black Cadillac. Wearing construction goggles and a paper mask, defendant approached and fired into the green Cadillac. He then went to the back of the green Cadillac. Mr. Green lost sight of defendant, but he heard six or seven more shots. When defendant returned, he told Mr. Green that he shot Ms. Carmickle.

¶ 10 Pertinent to the issues raised in this appeal, Mr. Dragos described how the shooter approached the green Cadillac: "[h]e was slow running, like hop, like hopping or something, like he had something wrong with his leg, or like if you have a problem with your leg[.]" Mr. Fiksel described the black male he observed as "[d]efinitely not sprinting. Slow enough for me to see - - almost kind of like a speed walking." Mr. Green testified that following the shots, "I seen [defendant] running down the street towards the [black Cadillac]" He described defendant as "slouched over, but like he was - - kind of like his leg was probably hurting or something."

¶ 11 With Mr. Green driving, defendant and he left the scene. Subsequently they changed places and picked up Ms. Aponte. As they neared defendant's residence, the black Cadillac was pulled over by police. From the trunk, police recovered white latex gloves, one of which had black markings on it, and two weapons, one of which was a 9-millimeter hand gun.

¶ 12 In his opening statement, defense counsel told the jury that at the time of the shooting, defendant was at a park. While still at the park, he was picked up by Mr. Green and Ms. Aponte. However, defendant called no witnesses and did not testify on his own behalf.

¶ 13 Postconviction Proceedings

¶ 14 Following the affirmance of his convictions and sentences by this court, the defendant filed a petition for postconviction relief asserting a claim of ineffective assistance of counsel. Defendant claimed defense counsel was ineffective in that he failed to call an alibi witness, failed to introduce medical testimony that defendant was physically disabled and did not allow defendant to testify in his own behalf. The defendant supported his petition with his own affidavit, averring in part that he was with Absalom Thompson[1] at the time of the shooting and that he had informed defense counsel that he had an alibi witness. He further averred that he had doctors who could have testified to his disability. Defendant attached the affidavit of Mr. Thompson, in which Mr. Thompson averred that he would have testified he was with defendant in Washington Park at the time of the shooting and that defendant was physically disabled. Also attached to the petition were defendant's medical records and an affidavit from Dr. R.L. Adair in which the doctor confirmed defendant's physical disabilities.

[1] Mr. Thompson was referred to as "Mr. Thomas" in this court's Rule 23 order reversing the summary dismissal of his postconviction petition. *Ashe*, 2014 IL App (1st) 123485-U.

¶ 15 The circuit court summarily dismissed the petition as frivolous and without merit. On appeal to this court, we determined that defendant's claim of ineffective assistance of counsel had an arguable basis in law and fact for failing to call Mr. Thompson as a witness in support of defendant's alibi. The case was reversed and remanded for further proceedings. *People v. Ashe*, 2014 IL App (1st) 123485-U.

¶ 16 Third-Stage Evidentiary Hearing

¶ 17 On June 9, 2016, the circuit court held a third-stage evidentiary hearing on defendant's claims of ineffective assistance of counsel for failing to call an alibi witness to testify and failing to call medical personnel to testify as to defendant's disability at the time of the shooting.[2] The evidence presented at the hearing is set forth below.

¶ 18 For Defendant

¶ 19 On direct examination, Dr. Roy Adair testified that he practiced medicine in the areas of physical medicine and rehabilitation. He saw defendant in 2001 when defendant was admitted to Christ Hospital for treatment of a gunshot wound to his chest and spine. Dr. Adair was requested to perform a rehabilitation evaluation because defendant was experiencing leg weakness and mobility problems. Defendant had poliomyelitis as a child, which left him with residual left leg weakness. Dr. Adair treated defendant for a week and a half. When defendant left the hospital, he was ambulatory but required the use of crutches on both sides. The doctor last saw defendant in May 2001. If defendant were able to run in 2003, the time of the shooting, it would not be a normal sprint, rather a lurching motion.

[2] Defendant's claim that defense counsel prevented him from testifying on his own behalf is not raised in this appeal.

¶ 20 On cross-examination, Dr. Adair testified that he did not see defendant following his release from the hospital in May 2001. The doctor knew defendant had physical therapy sessions until the end of June 2001. Dr. Adair confirmed that defendant could run or speed walk in 2003. On redirect, the doctor explained it would be an abnormal speed walk.

¶ 21 On direct examination, defendant testified that at his trial for the murder of Ms. Taylor, he was represented by two attorneys, Sam Adam Jr. and Tony Thedford. Prior to trial, defendant met with his attorneys on multiple occasions for 30 minutes to an hour. Defendant gave the attorneys names of persons he wanted called in his defense: Christina Tawana James and Absalom Thompson. Defendant told the attorneys that Mr. Thompson would testify that at the time of the shooting he was at Washington Park with defendant discussing the purchase of defendant's van.

¶ 22 Defendant testified further that a few weeks prior to his jury trial,[3] defendant was present when attorney Thedford had a telephone conversation with Mr. Thompson about testifying at defendant's trial. Defendant knew it was Mr. Thompson because he spoke with him on the telephone before attorney Thedford spoke with him. In the telephone conversation, attorney Thedford discussed with Mr. Thompson what his testimony would be. Although defendant anticipated that Mr. Thompson would testify at his trial, Mr. Thompson was not subpoenaed and did not testify.

¶ 23 Defendant testified further that during his jury trial, he asked attorney Thedford why Mr. Thompson did not testify. The attorney told him he had not talked to Mr. Thompson and

[3] Defendant's first jury trial ended in a mistrial when the defendant did not appear for trial, having been hospitalized for injuries received in an accident. The references to defendant's trial will be to his second jury trial.

explained that the last time he spoke with Mr. Thompson he wanted to get a date to meet that did not interfere with Mr. Thompson's work. When defendant called Mr. Thompson to ask him where he was, Mr. Thompson told him attorney Thedford never contacted him. Defendant maintained that at his sentencing hearing, he told the trial court that he received ineffective assistance of counsel because his attorneys failed to call witnesses in his defense.

¶ 24 Defendant testified that in 2003, he walked with the assistance of leg braces and "blood tightening pantyhose." At various times, he used crutches, a cane, a walker, an ankle brace and a leg brace. Defendant further testified that he could not walk let alone run in 2003 and could not have walked at a fast pace. Prior to trial, he provided his attorneys with the facts of his alibi.

¶ 25 On cross-examination, defendant described his relationship with Mr. Thompson as "like a brother, a good friend." Mr. Thompson sometimes drove a cab for him. Defendant knew where to reach Mr. Thompson.

¶ 26 Defendant testified that the conversation between Mr. Thompson and attorney Thedford took place in a hallway outside a courtroom during the second jury trial. Defendant called Mr. Thompson on a cell phone and spoke to him first before giving the cell phone to attorney Thedford. Defendant did not hear what Mr. Thompson told the attorney. When attorney Thedford finished the call, he told defendant that he had to arrange for Mr. Thompson to take off work to meet with him. Defendant acknowledged that Mr. Thompson knew he had been convicted in 2008. He further acknowledged that it was not until 2012 that Mr. Thompson gave postconviction counsel an affidavit confirming defendant's alibi and disability.

¶ 27 On redirect examination, defendant identified a picture of Mr. Thompson. He had learned that Mr. Thompson died in 2015, and confirmed the fact of his death when he spoke with his family members. Defendant rested.

¶ 28 For the State

¶ 29 Attorney Thedford testified that he met with defendant multiple times. Most of the time the meetings were at his office though there were some brief meetings at the courthouse. Defendant told the attorney he was in Washington Park at the time of the 2003 shooting. While several people were present in the park at the same time, defendant specifically named Mr. Thompson. When attorney Thedford took over the case from the public defender, he received a file containing Mr. Thompson's telephone number and a notation of "alibi" by his name. Attorney Thedford could not reach Mr. Thompson at the telephone number he had for him, and he did not have an address for him. According to the attorney, defendant told him that he would try to find Mr. Thompson to bring him to the attorney's office. While attorney Thedford believed defendant spoke to Mr. Thompson on several occasions, he still was unable to find him. Attorney Thedford did not recall having a telephone conversation with Mr. Thompson.

¶ 30 Attorney Thedford testified further that an individual by the name of "Weatherspoon," was listed as having been at Washington Park the night of the shooting, but the attorney was not given any follow-up information about this individual. There was no cell phone number for another individual named "Christina." Attorney Thedford explained that the focus was always on having Mr. Thompson testify for defendant.

¶ 31 Attorney Thedford believed that Mr. Thompson worked for defendant, but he needed to interview him to determine what kind of witness he would be. Attorney Thedford acknowledged

that at the time of opening statements, he still had not spoken to Mr. Thompson. While in his opening statement attorney Adam told the jury that defendant was in Washington Park the night of the shooting, attorney Thedford explained it had not yet been decided whether defendant would testify, and the attorneys had not determined whether they would employ an alibi defense. Based on the evidence at trial, the attorneys' strategy changed, and defendant decided not to testify.

¶ 32 Attorney Thedford testified that he subpoenaed Dr. Gary Melotti who had performed surgery on defendant following his injury in the 2001 shooting. Dr. Melotti's testimony was intended to establish defendant's subsequent disability. However, the attorney learned that the doctor could not testify as to any ongoing disability that would have affected defendant at the time of the shooting in 2003. Attorney Thedford then planned to establish defendant's ongoing disability through the testimony of defendant and other witnesses, such as Ms. Aponte who had assisted defendant with his rehabilitation during the two years prior to the 2003 shooting. While defendant did not mention Dr. Adair, attorney Thedford admitted he was aware that defendant had other physicians and that their names were in the medical records he had in his possession.

¶ 33 On cross-examination, attorney Thedford acknowledged that an alibi defense was listed in the first answer to discovery, but he was not aware if it was listed in the amended answer.[4] Attorney Adam made the opening statement for the defense and told the jury defendant was somewhere else at the time of the shooting.

[4] The record reflects that an alibi defense was first listed in the amended answer.

¶ 34 Attorney Thedford and defendant discussed at length what Mr. Thompson's testimony would establish. Defendant never told the attorney that Mr. Thompson worked for the park district.

¶ 35 Attorney Thedford knew that defendant had gone through rehabilitation after he was shot in 2001. In light of the testimony of Messrs. Dragos, Fiksel and Green, describing defendant's movements before and after the shooting, it was important to establish that in 2003, defendant's disability prevented him moving as they described. Attorney Thedford witnessed defendant's limp at his office and in the courtroom. While Dr. Melotti could not testify to the extent of defendant's disability in 2003, attorney Thedford believed he established the level of defendant's disability in 2003 through the testimony of Ms. Aponte.

¶ 36 Attorney Thedford acknowledged that he did not hire an investigator to find Mr. Thompson. While he had no independent recollection, based on the record, the attorney acknowledged that at defendant's sentencing hearing, defendant alleged he received ineffective assistance of counsel and that attorney Adam was willing to stipulate to that fact. Attorney Thedford further acknowledged that the record reflected that he joined in attorney Adam's attempt to add an ineffective assistance of counsel claim to defendant's posttrial motion.

¶ 37 On redirect examination, attorney Thedford explained that he did not hire an investigator because defendant told him he could bring Mr. Thompson to the attorney's office.

¶ 38 Questioned by the circuit court, attorney Thedford testified that while Dr. Melotti could give his opinion on what capabilities a patient with defendant's disability would have two years after surgery, the doctor could not say specifically what defendant could or could not do because some patients have more mobility than others. Attorney Thedford believed that attorney Adam's

acknowledgement that he was ineffective was a response to something defendant stated in his allocution to the trial court and with which attorney Thedford also agreed. Questioned further by the prosecutor, attorney Thedford stated that he did not believe he had provided ineffective assistance of counsel.

¶ 39 Admitted into evidence was the May 23, 2012, affidavit of Mr. Thompson in which he averred in pertinent part as follows. If called as a witness, Mr. Thompson would have testified that on July 13, 2003, he was with defendant in Washington Park "during the time of 11:30 pm to 12:00 am – 12:05 am July 14, 2003." He would have testified further that on July 13, 2003, defendant "need[ed] a cane or other support to help him walk and [defendant] was physically unable to have done what was said of him on the night of July 13, 2003." Finally, Mr. Thompson would have testified as to how and for how long he had known defendant and to the type of person and friend he was.

¶ 40 Circuit Court's Ruling

¶ 41 The circuit court ruled that defendant failed to establish ineffective assistance of trial counsel. The court found attorney Thedford to be a credible witness. From the evidence at the hearing, the court determined that the decision not to call Mr. Thompson as a witness and not to call medical experts were matters of trial strategy and did not establish deficient performance on the part of trial counsel. The court further found that, in any event, there was no prejudice to defendant in light of the evidence at trial.

¶ 42 The circuit court dismissed defendant's postconviction petition. Defendant timely appeals.

¶ 43 ANALYSIS

¶ 44 The sole issue on appeal is whether the trial court's denial of defendant's postconviction petition was against the manifest weight of the evidence.

¶ 45 I. Standard of Review

¶ 46 The circuit court's ruling on a postconviction petition following an evidentiary hearing must be affirmed unless it is manifestly erroneous. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. The court commits manifest error when the error is clear, plain, evident and indisputable. *Jones*, 2012 IL App (1st) 093180, ¶ 49. For the ruling to be manifestly erroneous, the reviewing court must find that the court's decision is not based on the evidence, is arbitrary and is unreasonable. *Jones*, 2012 IL App (1st) 093180, ¶ 49. The reviewing court affords substantial deference to the court's ruling on a postconviction hearing following an evidentiary hearing. *Jones*, 2012 IL App (1st) 093180, ¶ 49.

¶ 47 " '[T]he reviewing court does not retry the defendant, and the trier of fact remains responsible for making determinations regarding the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence.' " *People v. Christian*, 2016 IL App (1st) 140030, ¶ 111 (quoting *People v. Ross*, 229 Ill. 2d 255, 272 (2008)). At a third-stage evidentiary hearing, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 48 II. Discussion

¶ 49 Defendant asserts that trial counsel's failure to call an alibi witness and a medical expert deprived of him of his constitutional right to the effective assistance of counsel. This court

applies the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) to determine whether a defendant has been denied his right to the effective assistance of counsel.

¶ 50 In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced by counsel's substandard performance. *People v. Hall*, 217 Ill. 2d 324, 335 (2005). "The performance prong is satisfied if 'counsel's performance was objectively unreasonable under prevailing professional norms,' and the prejudice prong is satisfied if there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' (Internal quotations marks omitted.)" *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11 (quoting *People v. Petrenko*, 237 Ill. 2d 490, 496-97 (2010)). A defendant must prove both counsel's deficient performance and the resulting prejudice or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 51 Under the deficiency prong, counsel is afforded wide latitude when making tactical decisions. *People v. Cunningham*, 376 Ill. App. 3d 298, 301 (2007). There is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166 (2006). The presumption will give way if no reasonably effective criminal defense attorney would engage in similar conduct under the same circumstances. *People v. Fletcher*, 335 Ill. App. 3d 447, 453 (2002).

¶ 52 Strategic decisions, such as which witnesses to call and what evidence to present, are trial counsel's to make. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003). Those decisions are generally immune from ineffective assistance of counsel claims, unless the chosen trial strategy

is so unsound that counsel fails to conduct any meaningful adversarial testing. *Deloney*, 341 Ill. App. 3d at 634. Defendant's claims of attorney error fall within the range of trial strategy.

¶ 53 1. Alibi Testimony

¶ 54 Defendant contends that the circuit court's determination that trial counsel was not ineffective for failing to call his alibi witness, Mr. Thompson, was against the manifest weight of the evidence. Defendant maintains that a competent attorney would have interviewed and disclosed an alibi witness before trial, whereas attorney Thedford did not hire an investigator, did not issue a subpoena for or specifically request that defendant bring Mr. Thompson to meet with him.

¶ 55 "[C]ounsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999). Defendant's testimony, that he informed his attorneys that Mr. Thompson could provide an alibi for him, placing defendant in Washington Park at the time of the 2003 shooting, was not disputed. The question in this case is whether the evidence established that attorney Thedford's failure to secure Mr. Thompson's presence at defendant's trial was ineffective assistance of counsel since it deprived defendant of his alibi defense.

¶ 56 Defendant relies heavily on *Tate*. However, *Tate* does not support defendant's argument in that it is distinguishable on the grounds we discuss below.

¶ 57 In *Tate*, the reviewing court rejected the State's argument that defense counsel's failure to call witnesses who would have confirmed that Tate was having a telephone conversation with one of them at the time of the shooting was trial strategy. The court determined that taking all of

Tate's allegations as true, he was entitled to an evidentiary hearing as to whether defense counsel's failure to call alibi witnesses known to him was ineffective assistance, explaining as follows:

> "Although counsel may have determined that the witnesses would not testify truthfully or would not be persuasive due to their close relationship with defendant, we cannot say as a matter of law that was counsel's reasoning. [Citation.] The record does not reflect whether counsel made a professional reasonable tactical decision not to call the witnesses or whether, as defendant maintains, counsel failed to call them as the result of incompetence. Once evidence is heard on the issue, the circuit court will be in a better position to determine whether defendant received ineffective assistance of counsel. [Citation.]" *Tate*, 305 Ill. App. 3d at 612.

¶ 58 Unlike the posture of the present case, *Tate* was an appeal from a second-stage dismissal of a postconviction petition. We note that in reversing the summary dismissal in the present case, we relied on the decision in *Tate* in determining that defendant was entitled to further proceedings on his postconviction petition. See *Ashe*, 2014 IL App (1st) 123485-U, ¶¶ 30-31. Defendant has now received the evidentiary hearing on his allegations of ineffective assistance.

¶ 59 Factually *Tate* is distinguishable. In that case, both witnesses shared their information with defense counsel and were available but never called to testify. *Tate*, 305 Ill. App. 3d at 610. Even with those facts, the reviewing court in *Tate* still did not find as a matter of law that counsel was ineffective but remanded for an evidentiary hearing. In the present case, attorney Thedford testified that he never interviewed Mr. Thompson because he was unable to contact him. The evidence at the third-stage hearing was conflicting. On the one hand, attorney Thedford testified

that both his and defendant's efforts to locate Mr. Thompson were unsuccessful. On the other hand, defendant testified that he could reach Mr. Thompson by telephone and talked to him on the telephone several times prior to the trial. In addition, unlike the alibi witnesses in *Tate*, in his affidavit, Mr. Thompson did not aver that he was available in 2008 to testify at defendant's trial.

¶ 60 We believe that the evidence and the reasonable inferences therefrom support the trial court's determination that trial counsel was not ineffective for failing to locate and interview Mr. Thompson. Attorney Thedford admitted that he did not hire an investigator or subpoena Mr. Thompson, relying on defendant's ability to produce his alibi witness based on defendant's relationship and access to him. The attorney's reliance was not unreasonable under the circumstances. Defendant had been released on bond prior to his trial in 2008. Despite his testimony that Mr. Thompson and he were close friends, had a working relationship, and that he was able to contact him, defendant never brought or persuaded Mr. Thompson to attend the multiple meetings he had with attorney Thedford. Defendant acknowledged Mr. Thompson was aware that defendant was arrested and later convicted of murder in 2008, but he did not provide an affidavit until 2012.

¶ 61 In addition, defendant was present when the list of potential witnesses was read prior to jury selection but made no objection to the absence of Mr. Thompson's name on the list. Defendant maintained that during his jury trial, he raised an issue with attorney Thedford regarding Mr. Thompson's absence from the witness list. However, at his sentencing hearing, defendant made a lengthy statement detailing all the reasons he was wrongly convicted but never mentioned his alibi or the failure of his attorneys to call Mr. Thompson as a witness. The

"admission" of ineffective assistance by defense counsels at the sentencing hearing was unrelated to the failure to provide alibi testimony.

¶ 62 The cases relied on by defendant are distinguishable on their facts and/or the issue presented. In *People v. Geer*, 79 Ill. 2d 103 (1980), defense counsel failed to investigate a prosecution witness to determine what she would testify to and then declined an opportunity to interview the witness prior to her testimony. In *People v. Skinner*, 220 Ill. App. 3d 479 (1991), defense counsel was ineffective for failing to call as witnesses Skinner's parents to contradict police testimony that defendant told them he lived in the residence he was accused of burglarizing. The reviewing court further found counsel's reason for not calling the parents was not sound trial strategy in light of Skinner's own testimony that he did not reside in the residence, which left his defense uncorroborated. *Skinner*, 220 Ill. App. 3d at 485-86. In *People v. O'Banner*, 215 Ill. App. 3d 778 (1991), the reviewing court ordered a new trial based on the cumulative effect of the trial errors, including ineffective assistance of counsel, improper argument by the prosecution and improper cross-examination by the prosecution. *O'Banner*, 215 Ill. App. 3d at 796. Like *Tate*, *People v. Morris*, 335 Ill. App. 3d 70 (2002), was an appeal from a dismissal at the second-stage of postconviction proceedings and was reversed for an evidentiary hearing.

¶ 63 At the third-stage evidentiary hearing, credibility and weight of the evidence determinations are the province of the trial court. *Christian*, 2016 IL App (1st) 140030, ¶ 111. The trial court's determination, that trial counsel's failure to locate Mr. Thompson to testify for defendant did not constitute deficient performance in his representation of defendant, was not

against the manifest weight of the evidence. Therefore, the failure to locate Mr. Thompson and present his alibi testimony at trial did not constitute ineffective assistance of counsel.

¶ 64 2. Failure to Call Medical Experts

¶ 65 Defendant contends that the circuit court's determination that trial counsel's failure to produce expert medical evidence to corroborate defendant's disability was sound trial strategy. He maintains that medical testimony as to the extent of his disability at the time of the 2003 shooting was critical because Messrs. Dragos, Fiksel and Green testified that defendant was running in a stooped over or crouched position or at least, speed walking to and from the scene of the shooting.

¶ 66 The evidence supports the trial court's determination that trial counsel's decision not to present expert medical testimony was protected under *Strickland* as sound trial strategy. Attorney Thedford testified that the plan was to call Dr. Melotti who operated on defendant following the 2001 shooting. However, Dr. Melotti had not treated defendant since 2001and could not provide any specific testimony relevant to the extent of defendant's disability at the time of the shooting in 2003. Even defendant's witness, Dr. Adair, admitted that by 2003, it was possible that defendant could run and speed walk. Attorney Thedford explained that it was this less than equivocal testimony that the defense sought to avoid by not calling Dr. Melotti. "[I]t is sound trial strategy to not call a witness where the testimony would only hurt the defense." *Skinner*, 220 Ill. App. 3d at 486.

¶ 67 That maxim is particularly true in this case where Mr. Dragos testified the shooter "was slow running, like hop, like hopping or something, like he had something wrong with his leg or like if you have a problem with your leg;" Mr. Fiksel described the shooter as "almost kind of

like a speed walking," away from the scene; and Mr. Green testified that defendant was running back toward the black Cadillac, "slouched over, but like he was - - kind of like his leg was probably hurting or something[.]" The lack of definitive medical testimony would only have added credence to Messrs' Dragos', Fiksel's and Green's testimony describing defendant's movements to and from the green Cadillac.

¶ 68 The trial court's determination that trial counsel's decision not to present expert medical testimony relating to defendant's disability was a matter of sound trial strategy was not against the manifest weight of the evidence. Therefore, the decision did not constitute ineffective assistance of counsel.

¶ 69 CONCLUSION

¶ 70 The dismissal of defendant's postconviction petition following a full evidentiary hearing was strongly supported by the admissible evidence and was legally proper. Defendant failed to meet his burden of demonstrating he had received ineffective assistance of counsel. Therefore, we affirm the circuit court's order dismissing his postconviction petition.

¶ 71 The judgment of the circuit court is affirmed.

¶ 72 Affirmed.