

2014 IL App (1st) 120914-U

No. 1-12-0914

May 30, 2014

SIXTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	01 CR 13019
)	
TAMON RUSSELL,)	Honorable
)	Evelyn B. Clay,
Defendant-Appellant.)	Judge Presiding.

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

ORDER

HELD: We reverse the trial court's judgment dismissing defendant's amended postconviction petition at the second stage of the postconviction proceedings and remand for a third-stage evidentiary hearing to determine whether trial counsel was ineffective for allegedly coercing defendant into waiving his constitutional rights to a jury trial or testify on his own behalf.

¶ 1 Defendant Tamon Russell appeals the second-stage dismissal of his amended petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). For the reasons that follow, we reverse and remand.

¶ 2 Following a bench trial, defendant was convicted of first-degree murder for the drive-by shooting death of Joseph Mitchell. He was also convicted of the attempted first-degree murders of Damon Royal and Edward Geddes. Geddes testified he knew defendant from a rival gang. He identified defendant as the shooter at the crime scene, in a photo array, and at a subsequent lineup. Royal testified he knew defendant from the neighborhood and had seen him on at least 50 prior occasions. Royal identified defendant as the shooter at the crime scene and in a photo array.

¶ 3 Defendant was sentenced to 45 years' imprisonment for first-degree murder, which included a 25-year enhancement for personally discharging a firearm that proximately caused Mitchell's death. In addition, defendant was sentenced to concurrent 15-year terms of imprisonment for each attempted murder conviction to be served consecutive to the 45 years for a total of 60 years' imprisonment.

¶ 4 On direct appeal, we granted the Office of the State Appellate Defender's motion for leave to withdraw as appellate counsel pursuant to *Anders v. California*, 386 U.S. 738 (1967), and we affirmed defendant's convictions and sentences. *People v. Russell*, No. 1-05-0717 (2006) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Russell*, 222 Ill. 2d 619 (2007).

¶ 5 Defendant filed a *pro se* postconviction petition. The petition was docketed, and a public defender was appointed to represent defendant. Appointed counsel filed an amended postconviction petition. The amended petition alleged trial counsel had been ineffective for:

preventing defendant from exercising his right to a jury trial; denying defendant his right to testify on his own behalf; and failing to call defendant's mother and sister as alibi witnesses.

¶ 6 The State moved to dismiss the amended postconviction petition. After hearing arguments from both sides, the trial court granted the State's motion to dismiss. This appeal followed.

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

¶ 8 ANALYSIS

¶ 9 In a noncapital case such as this, the Act provides a three-stage process by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). A postconviction proceeding is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Therefore, issues that were decided on direct appeal are barred by *res judicata* and issues that could have been raised, but were not, are forfeited. *Beaman*, 229 Ill. 2d at 71.

¶ 10 Defendant's amended petition was dismissed at the second-stage of the postconviction proceedings. We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 11 On appeal, defendant raises several claims of ineffective assistance of trial counsel. Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This requires not only that a

person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronin*, 466 U.S. 648, 655-56 (1984).

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

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

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

¶ 15 Defendant contends trial counsel provided ineffective assistance by coercing him into waiving his constitutional right to a jury trial (U.S. Const., amend. VI; Ill. Const. 1970, art. I, §§

8, 13). In support of this allegation, defendant submitted his own affidavit and an affidavit from his friend, Sanchez Lackland.

¶ 16 In his affidavit, defendant alleged trial counsel coerced him into waiving his right to a jury trial by advising him to take a bench trial on the grounds that the trial judge owed counsel a favor and that the judge would have information about one of the State's witnesses that a jury would not receive. According to Lackland's affidavit, when he asked trial counsel why counsel waited until the last minute to have a bench trial instead of a jury trial, counsel responded that the judge owed him "one." Lackland alleged that when he asked counsel what that favor was, counsel responded that if Lackland wanted to see the defendant again, to let him do his job.

¶ 17 Defendant contends that the allegations in the affidavits made a substantial showing of a violation of his constitutional right to effective assistance of counsel sufficient to merit a third-stage evidentiary hearing. We agree. At the second stage of the postconviction proceedings, all well-pleaded facts set forth in the petition and supporting affidavits, that are not positively rebutted by the trial record, are to be taken as true. *Pendleton*, 223 Ill. 2d at 473.

¶ 18 Here, the sworn statements in the affidavits submitted by defendant and Lackland were not rebutted by the trial record. The trial court's admonishments to defendant regarding his right to a jury trial and his signed jury waiver did not serve to rebut the sworn statements because "[a]t no time during the admonition did the trial judge ask the defendant whether he had been promised anything in exchange for giving up his right to a jury trial." *People v. Smith*, 326 Ill. App. 3d 831, 848-49 (2001).

¶ 19 The credibility and veracity of the sworn statements should be assessed at a third-stage evidentiary hearing, not at the second stage of the postconviction proceedings. *Pendleton*, 223 Ill. 2d at 473. It is not until the evidentiary hearing that the trial court serves as a trier of fact,

assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts or inconsistencies in the evidence. *People v. Domagala*, 2013 IL 113688, ¶ 34.

¶ 20 Therefore, taking the un rebutted statements in the affidavits submitted by defendant and Lackland as true, as we must for purposes of reviewing a second-stage postconviction proceeding (*People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009)), we find that defendant has made a substantial showing of deficient performance by trial counsel under the first prong of the *Strickland* test. Effective trial counsel would not advise a criminal defendant to waive a jury trial by promising he had influence over the trial judge based on the assertion that the judge owed him a favor and would have information about one of the State's witnesses that a jury would not receive. See *Smith*, 326 Ill. App. 3d at 848 ("By allegedly advising defendant that it would be better to take a bench because the judge owed him a favor and would have information not available to the jury, trial counsel would have been acting in a professionally unreasonable manner.").

¶ 21 Turning to *Strickland's* prejudice prong, "we find a reasonable likelihood that defendant would not have waived his right to a jury trial in the absence of the alleged deficient performance and erroneous advice of trial counsel." *Smith*, 326 Ill. App. 3d at 848. Defendant specifically asserts in his affidavit that, but for the representations of trial counsel, he would not have waived his right to a jury trial "at the last minute." As a result, defendant has satisfied the prejudice requirement under *Strickland's* second prong. Accordingly, we find defendant's amended petition should advance to the third stage of the postconviction process for an evidentiary hearing on his claim that trial court was ineffective for allegedly coercing him into waiving his constitutional right to a jury trial.

¶ 22 For similar reasons, we find that defendant's next claim of ineffective assistance of counsel for counsel allegedly coercing defendant into waiving his constitutional right to testify on his own behalf, should also advance to a third-stage evidentiary hearing. A criminal defendant has a constitutional right, implicit in the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, to testify on his own behalf. See *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987). In his affidavit, defendant alleged that when he informed trial counsel that he planned on testifying, counsel told him not to testify because if he did, the State could ask him questions "that will make the judge go back on are [sic] deal." Defendant further alleged that trial counsel instructed him that when the trial judge admonished him about his right to testify, he should tell the judge it was his decision not to testify.

¶ 23 Taking these un rebutted allegations as true, as we must for purposes of reviewing a second-stage postconviction proceeding, we find that defendant has made a substantial showing of deficient performance by trial counsel. Effective counsel would not have coerced defendant into waiving his right to testify under the threat that counsel's deal with the trial judge would be jeopardized if he did not waive the right.

¶ 24 Defendant has also made a substantial showing that he arguably suffered prejudice as a result of trial counsel's alleged deficient performance. This case basically involves the credibility of State witnesses Damon Royal and Edward Geddes and their identification of defendant as the shooter. Royal and Geddes were both long-time gang members with criminal histories. In his affidavit, defendant stated that if he had been called to testify at trial, he would have testified that "he was not a gang member and was at home at the time of the shootings." The defendant's proffered testimony might have affected a jury's assessment of the truthfulness of the State's witnesses and its evaluation of the relative credibility of defendant and these witnesses.

Defendant has adequately alleged that he arguably suffered prejudice as a result of trial counsel's alleged deficient performance. We believe there is a reasonable probability that the results of the trial would have been different but for counsel's alleged deficient performance. We express no opinion regarding the possible outcome of the evidentiary hearing on remand.

¶ 25 Defendant asks us to reassign this case to a different judge of the circuit court upon remand. We decline defendant's invitation. There is no indication in the record that the trial judge was anything but impartial and we can discern no reason why her impartiality should be called into question.

¶ 26 Defendant next contends trial counsel was ineffective for failing to call his mother, Regina Russell, and his sister, Gianna Russell, as alibi witnesses. We must disagree.

¶ 27 Eyewitness testimony established that the shooting occurred at approximately 6:00 p.m., at 8901 South Cottage Grove Avenue, in Chicago, Illinois. The arrest report indicates defendant lived at 7427 South Jeffery, about three and half miles from the crime scene.

¶ 28 In her affidavit, Regina stated that on the day of the shooting, she arrived home around 4:45 p.m., and noticed defendant had not completed his house chores. She called defendant on his cell phone and told him to come home. Regina stated that defendant arrived home around 5:30 p.m., completed his chores and left the house around 6:00 or 6:15 p.m.

¶ 29 Similarly, Gianna stated in her affidavit that on the day of the shooting, she arrived home with her mother around 4:45 p.m., and her mother noticed defendant had not done his chores. Her mother called defendant on his cell phone and told him to come home and do his chores. Gianna stated that defendant came home around 5:30 p.m., and did his chores. Defendant left the house around 6:00 or 6:15 p.m.

¶ 30 The record shows that prior to trial, APD Fox contacted both Regina and Gianna, and considered their potential testimony. Therefore, defendant's actual argument is that counsel erred in choosing not to call his mother and sister as alibi witnesses, not that he failed to investigate them. See *People v. Dean*, 226 Ill. App. 3d 465, 468 (1992); *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003). "Whether to call certain witnesses and whether to present an alibi defense are matters of trial strategy." *People v. Kidd*, 175 Ill. 2d 1, 45 (1996).

¶ 31 Defense trial counsel could have decided, as a matter of trial tactics, not to call the defendant's mother and sister as alibi witnesses because as family members, the jury might not find their testimony credible. See *Dean*, 226 Ill. App. 3d at 468 (defense counsel not ineffective for failing to call potential alibi witnesses where they may have been related to codefendant and thus their credibility may have carried little weight); *People v. Flores*, 128 Ill. 2d 66, 106-07 (1989) (defense counsel not ineffective for failing to call potential alibi witnesses where they were related to defendant and counsel reasonably could have concluded that their testimony was unreliable). The trier of fact is not required to accept alibi testimony over positive identification of an accused, particularly where the alibi testimony is provided by biased witnesses. *People v. Mullen*, 313 Ill. App. 3d 718, 729 (2000).

¶ 32 Defendant maintains defense counsel failed to conduct a thorough investigation of the case because he failed to subpoena phone records that would have corroborated the time line of his alibi witnesses. We believe the phone records would have been of little value to petitioner's alibi. At best, the phone records would have corroborated the witnesses' proposed testimony that defendant's mother called him on his cell phone at around 4:45 p.m. However, the shooting did not occur until approximately one hour and 15 minutes after the alleged phone call. Thus, even if the cell phone records showed that Regina called defendant around 4:45 p.m., this does not

establish defendant's whereabouts at the time of the shooting, some 75 minutes after the phone call. Under these circumstances, and given the fact that the proposed alibi witnesses were related to defendant as mother and sister, we cannot say that defense counsel's decision not to call them was so unreasonable or prejudicial as to result in ineffective assistance of counsel.

¶ 33 Defendant finally contends the trial court erred in dismissing his amended postconviction because it presented newly discovered evidence supporting a claim of actual innocence in the form of an affidavit from Tyrone Brewer, Jr., attesting that a man named Wesley Ray, aka "Skip," was the shooter. We must reject this contention.

¶ 34 In order for a defendant to obtain postconviction relief under the theory of newly discovered evidence, defendant must establish that the evidence is "newly discovered" in that: (1) it was not available at defendant's original trial and could not have been discovered sooner through diligence; (2) it is material and noncumulative; and (3) it is of such conclusive character that it would probably change the result on retrial. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004); *People v. Anderson*, 375 Ill. App. 3d 990, 1006 (2007).

¶ 35 Defendant fails to establish that the evidence contained in Brewer's affidavit was of such a conclusive character that it would probably change the outcome on retrial. In his affidavit, Brewer stated that when he was at the Menard Correctional Center, he told a group of people, which included defendant, about a shooting he had seen "one day in 01" at 89th and Cottage where this "dude" started shooting. Brewer stated that defendant pulled him aside and told him about his situation. Brewer told defendant he recognized the shooter as Wesley Ray, aka "Skip," and that the shooting occurred on May 4, 2001, at around 5:30 to 6:00 p.m. Defendant asked Brewer if he would be willing to sign an affidavit for him.

¶ 36 Significantly, in his affidavit, Brewer never states that defendant was not present during the drive-by shooting. In *People v. Edwards*, 2012 IL 111711, ¶ 38, our supreme court addressed a situation where a defendant submitted an affidavit of a codefendant named Eddie Coleman to support his claim of actual innocence. In rejecting defendant's claim, the court stated: "Though Eddie averred petitioner 'had nothing to do with this shooting' and was neither 'a part [of nor] took part in this crime,' Eddie critically does not assert that petitioner was not *present* when the shooting took place." *Id.* at ¶ 39 (emphasis in original). As a result, the court held that such evidence was not of such conclusive character that it would probably change the result on retrial. *Id.* at ¶ 40.

¶ 37 Similarly, the evidence contained in Brewer's affidavit was not of such a conclusive character that it would probably change the result on retrial. Moreover, the trial court was presented with evidence of defendant's guilt through the identification testimony of Damon Royal and Edward Geddes. As mentioned, Geddes testified he knew petitioner from a rival gang. He identified petitioner as the shooter at the crime scene, in a photo array, and in a lineup. Royal testified he knew petitioner from the neighborhood and had seen him on at least 50 prior occasions. Royal identified petitioner as the shooter at the crime scene and in a photo array. Under these circumstances, we conclude that the trial court did not err in finding that Brewer's affidavit was not sufficiently conclusive to support petitioner's claim of actual innocence based on newly discovered evidence.

¶ 38 For the foregoing reasons, we reverse the trial court's judgment dismissing defendant's amended postconviction petition at the second stage and remand for a third-stage evidentiary hearing to determine whether trial counsel was ineffective for allegedly coercing defendant into waiving his constitutional rights to a jury trial or testifying on his own behalf.

No. 1-12-0914

¶ 39 Reversed and remanded.