

2015 IL App (2d) 130531-U
No. 2-13-0531
Order filed June 2, 2015

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of De Kalb County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 09-CF-268
)	
BRANDON A. WASHINGTON,)	Honorable
)	John F. McAdams,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court erred in summarily dismissing defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to call certain witnesses: the witnesses' statements to police, the reports of which were sufficient evidence under the Act, indicated that their testimony would have been potentially exonerating, and at the first stage we could not presume that counsel's failure to call them was strategic.

¶ 2 Defendant, Brandon A. Washington, appeals from the summary dismissal of his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), asserting that, because he stated the gist of an ineffective-assistance-of-counsel claim, the court erred in dismissing his petition. Defendant argues that his petition adequately alleged that defense

counsel erred in handling a witness and failing to investigate potential exculpation witnesses. We hold that, by showing the existence of witnesses who did not testify and who contradicted the State's witnesses regarding the offender's race, defendant stated the gist of a claim of ineffective assistance of counsel. We therefore vacate the dismissal of defendant's postconviction petition and remand the matter for further proceedings under the Act.

¶ 3 I. BACKGROUND

¶ 4 The State charged defendant by complaint with attempted first-degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)). A later indictment, as amended, contained four additional counts relating to the same shooting incident.

¶ 5 Defendant had a jury trial. The victim of the shooting, Jason Johnson, testified. Johnson identified defendant as the person who had shot him while Johnson was in a group of people gathered in a parking lot. Defendant said something disrespectful, Johnson tried to deflect it, defendant left, and a few minutes later he returned and shot Johnson in the face. Johnson had seen defendant perhaps twice before the shooting, but did not know him by name. He identified defendant in a photo lineup while in the hospital with the gunshot wound. Johnson had been at a party before he went out and met the group. He had drunk what he described as "two cups" of vodka during the party. When he was shot, the alcohol was affecting him, but he did not think that he was drunk.

¶ 6 Miguel Espinoza testified that a friend had received a text message that there was about to be a fight nearby. He found a group of people, among whom was defendant, whom he knew. He saw defendant lift his right hand and then heard a "pow." People scattered, and he ran away. He later identified defendant in a photo lineup.

¶ 7 A De Kalb police officer testified that, after witnesses had identified defendant in the lineups, the police learned that defendant had been seen in Aurora. When the police approached defendant in Aurora, he attempted to flee on foot.

¶ 8 Jessica Contreras, the mother of defendant's child, testified that on the afternoon after the shooting she went to a laundromat to give defendant's child to defendant's mother, Sophia Thomas. While she was talking with Thomas, defendant came in acting nervous and saying that "the cops" were after him. He said that he had shot and possibly killed someone.

¶ 9 At the end of the session, after Jessica testified, defense counsel told the court that he had been at the scene of the shooting over the lunch break and had realized that Espinoza's testimony contained inaccuracies. He told the court that he had made a mistake in releasing Espinoza from the subpoena. On his request, the State gave him contact information for Espinoza. Counsel said that he would do everything that he could to get Espinoza back into court.

¶ 10 The next day, Jessica's aunt, Martha Contreras, who worked in the laundromat and was present when defendant came in, gave testimony confirming that defendant had said that he had shot someone.

¶ 11 After the State rested, the defense presented the testimony of two witnesses. Thomas testified that, on the afternoon after the shooting, she went to the laundromat with defendant. She was present for all of defendant's conversation with Jessica. She did not hear defendant say that he had shot someone or make any other incriminating statement.

¶ 12 David Mack also testified for defendant. He believed that he had been present at the time and location of the alleged shooting, but he had seen nothing unusual.

¶ 13 The defense rested after the testimony of the two witnesses. Defense counsel told the court that he had failed in his attempt to bring Espinoza back. Defense counsel again

characterized Espinoza's release from the subpoena as "my mistake," and he mentioned that his investigator had found Espinoza, who was unwilling to return. Defense counsel also stated that "Barragan" had called to say that, because she lacked childcare, she could not come to court. The court refused to grant a continuance to allow defendant time to try to bring in either witness.

¶ 14 The jury found defendant guilty of attempted first-degree murder, further finding that defendant personally discharged a firearm and, in doing so, proximately caused great bodily harm. It found him guilty on all other counts as well.

¶ 15 The court held that all other convictions merged into the attempted-murder conviction with the personal-discharge-of-a-firearm specification. It denied a posttrial motion from defendant that asserted that it had erred in refusing to excuse certain potential jurors for cause and in barring defense exhibits. Defendant did not file a postsentencing motion, but filed a timely notice of appeal.

¶ 16 On appeal, defendant's sole argument was based on the court's duty to inquire into the validity of *pro se* claims of ineffective assistance of counsel and, in some circumstances, appoint counsel to aid the defendant with such claims. See *People v. Krankel*, 102 Ill. 2d 181 (1984). Defendant argued that the trial court should have given more procedural attention to a pretrial complaint that defendant made about counsel's attention to defendant's case.

¶ 17 We held that the court had satisfied its limited duty to inquire concerning pretrial complaints of ineffective assistance. *People v. Washington*, 2012 IL App (2d) 101287, ¶ 24. We further held that nothing that had occurred required the court, posttrial, to revisit defendant's claims. *Washington*, 2012 IL App (2d) 101287, ¶ 25. We therefore affirmed defendant's attempted-murder conviction. *Washington*, 2012 IL App (2d) 101287, ¶ 28.

¶ 18 Defendant then filed a petition for leave to appeal to Illinois's supreme court. After its denial, he filed a petition under the Act.

¶ 19 His first and only relevant claim was that trial counsel had provided inadequate assistance. He first raised the incident in which counsel described himself as having made a mistake in releasing Espinoza from the subpoena. On this point, defendant's allegations matched what was apparent from the record in the original appeal. Defendant also asserted that counsel had "failed to conduct adequate pre-trial investigation into numerous individuals *** [who said that] the shooter wasn't black [like defendant] but [H]ispanic wearing either a black or green shirt." He objected to counsel's "fail[ure] to subpoena these exculpatory/alibi witnesses."

¶ 20 Included as exhibits were copies of witness statements made to the De Kalb police department. These had all identifying information redacted.

¶ 21 The first witness described herself as having been present at the scene with her husband. A Blazer arrived; people got out of it and started yelling at two black people who were already present. The "black guy in the middle was trying to calm everybody down. Then a [M]exican guy shot the black guy in the face." This witness seems have known the victim by name—although the redaction makes that unclear—and did know one of the bystanders.

¶ 22 The statement of the second witness, a male, appears as a police summary of an interview. There had been a party at the witness's apartment. The victim, known to the witness as "Black," and Francisco Velasquez, known to him as "Frantic," were present. Each of the males present except for Black was a "Deuce". During the party, a person (whose name is redacted) took a gun out of his waistband. After the party, people were hanging around in the parking lot. The witness heard arguing, looked out his bedroom window, and saw a black SUV that had not been there a little earlier when he took his dog out. Black was talking to people in

the SUV, of whom Frantic was one. An argument broke out, but one person (whose name is redacted) was trying to calm everyone down. The witness “saw a Male/Hispanic wearing a black T-shirt walk up to ‘Black’ and shoot him in the face.” He thought that the shooter was a particular person—the statement suggests the person who had shown the gun earlier, but the redactions make that uncertain. However, the witness did not have a clear view of the shooting; he recognized the shooter’s shirt as the same one that the person with the gun had been wearing, but he noted that another person, apparently one present at the party, had also been wearing a black T-shirt.

¶ 23 The statement of the third witness, a female, also appears as a police summary of an interview. She initially denied having seen anything, but, when the interviewing officer asserted that she was lying, she gave more details. The witness said that she usually associated with Latin Kings and the person she was with usually associated with Insane Deuces. This, along with an earlier incident at the same apartment made her uncomfortable about going to a party at that apartment. She went, but later went outside, which was where she was when she saw the shooting. She saw “two male/black subjects standing and talking [and] a group of male/Hispanic subjects drove up in a dark colored SUV.” The two groups started yelling at one another. At least three people got out of the SUV. She knew the driver as “Frantic.” He was dressed in black and green. A “short male/Hispanic wearing a green t-shirt and dark pants” got out from the SUV’s front-passenger door. A “taller male/Hispanic wearing a green shirt and dark pants” also got out. The short male shot the victim in the face. She could describe the victim, but she did not know him. She did not recognize anyone in a photo lineup that included defendant.

¶ 24 The court dismissed defendant’s petition as patently without merit. It ruled that all claims were barred because defendant could have raised them in the original appeal. As to the

first claim, it ruled that the claim was also without substantive merit. It concluded that defense counsel's choice not to call the witnesses fell within the presumption of sound trial strategy applicable in ineffective-assistance claims. The court also ruled that defendant could have prevailed only if he had provided affidavits from the witnesses he claimed counsel ought to have called. Defendant filed a timely notice of appeal.

¶ 25

II. ANALYSIS

¶ 26 On appeal, defendant argues that he set out an ineffective-assistance-of-counsel claim sufficient to avoid first-stage dismissal. In particular, he argues that the record shows that counsel mishandled Espinoza's testimony, failing to prepare sufficiently to recognize that Espinoza's testimony was inconsistent with the geometry of the crime scene and further to do anything to recall Espinoza to press him on the point. Concerning the witnesses who described the shooter as "Hispanic" or "Mexican," defendant asserts that counsel was ineffective for failing to take steps to put on those witnesses' testimony. We agree that defendant stated the gist of an ineffective-assistance-of-counsel claim. For the purposes of considering whether first-stage dismissal was proper, the police reports sufficiently supported defendant's claim that counsel was ineffective for failing to call witnesses who would contradict the State's evidence of the shooter's identity. We note that we express no opinion as to whether the reports (or affidavits from the same witnesses) will support a second-stage finding that defendant made a substantial showing of a constitutional violation. See *People v. Douglas Tate*, 2012 IL 112214, ¶ 26 (noting that whether a defendant has made a substantial showing of a constitutional violation is a second-stage issue).

¶ 27 "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be *** dismissed [at the first stage] as frivolous or patently without

merit only if the petition has no arguable basis either in law or in fact.” *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). In a postconviction petition, “[i]ssues decided on direct appeal are barred by *res judicata*; issues that could have been raised, but were not, are forfeited.” *People v. Beaman*, 229 Ill. 2d 56, 71 (2008).

“An ineffective assistance claim based on what the record discloses counsel did, in fact, do is subject to the usual procedural default rule. [Citation.] ‘But a claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation.’ [Citation.] Thus, [the supreme] court has ‘repeatedly noted that a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense.’ [Citation.]” *Douglas Tate*, 2012 IL 112214, ¶ 14.

We review *de novo* a first-stage dismissal. *Hodges*, 234 Ill. 2d at 9.

¶ 28 To state a claim of ineffective assistance of counsel, a defendant must satisfy both prongs of the standard stated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Specifically, a defendant must show (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced him or her in that a reasonable probability exists that, but for counsel’s deficient performance, the proceeding would have had a different result. *Strickland*, 466 U.S. at 687, 694. “In demonstrating, under the first *Strickland* prong, that his 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). Further, a defendant must show “that counsel’s performance was objectively unreasonable under prevailing professional norms.” *People v. Cathey*, 2012 IL 111746, ¶ 23.

¶ 29 We examine the part of defendant's claim that is based on new evidence; we determine that, as to that part of the claim, defendant stated the gist of a claim that counsel's performance was objectively unreasonable. The heart of defendant's claim is that counsel failed to call witnesses who would testify that the shooter was a person who did not look like defendant. We conclude that, on the facts before us, counsel's decision not to call any of the three exculpation witnesses whose statements defendant included with his petition is not within the presumption of sound trial strategy. This is so because presenting such testimony would have avoided the impression that all of the eyewitness evidence was consistently against defendant. For the same reason, we conclude that a reasonable probability exists that, had counsel put on the witnesses, the jury would have reached a different result.

¶ 30 As an initial matter, the State argues that because defendant relied on police reports, rather than affidavits of the witnesses, his argument lacks sufficient corroboration. We disagree.

¶ 31 The Act explicitly states that "other evidence" is sufficient to support a petition: "The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). Further, the purpose of the affidavit requirement is to attest to the proposed witness's expected testimony. "In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *People v. Harris*, 224 Ill. 2d 115, 142 (2007) (quoting *People v. Enis*, 194 Ill. 2d 361, 380 (2000)). Here, however, based on the reports, we know how the witnesses would have testified at trial, or at least we know that, had their testimony been inconsistent with the reports, they would have been subject to impeachment. We

further note that the redaction of the reports, which made them anonymous, provides an obvious reason why affidavits were not attached.

¶ 32 We start by addressing the first prong of the *Strickland* standard. Generally, counsel's choice of which witnesses to call is a matter of trial strategy and so unassailable. *People v. Pena*, 2014 IL App 1st 120586, ¶ 33. Nevertheless, a proper claim of ineffectiveness can be based on a failure to present exculpatory evidence, such as a failure to call witnesses who could support an otherwise uncorroborated defense theory. *E.g.*, *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 26.

¶ 33 Here, the existence of the police reports implies that defense counsel knew of three witnesses who would identify someone other than defendant as the shooter, yet allowed the State to put forward a case that incorrectly implied unanimity among those witnesses who could describe the shooter's race and identity. Indeed, although counsel challenged the testimony of individual prosecution witnesses, the State's overall narrative was essentially unchallenged. This is so even considering that counsel presented the testimony of Thomas and Mack. Those witnesses were barely exculpatory and were weak enough to suggest that no real defense was possible. They merely testified that, when they were where State witnesses had placed defendant, they had not seen or heard the things to which the State's witnesses testified. On the other hand, accepting the police reports as indicative of the potential defense witnesses' testimony, counsel could have forcefully challenged the identification of defendant as the shooter.

¶ 34 We note that, in reviewing a first-stage dismissal, we need not consider whether counsel's choice of witnesses had a strategic basis. At this stage, the test is merely whether it is *arguable* that counsel's performance fell below an objective standard of reasonableness.

Douglas Tate, 2012 IL 112214, ¶ 22. Because of that reduced burden, defendant need not here establish that no possible strategic reason could have justified counsel's choice. Indeed, an analysis of what counsel's reasons might have been is an inquiry suited to second-stage proceedings, in which both parties will have counsel. *Douglas Tate*, 2012 IL 112214, ¶ 22.

¶ 35 On this point, the facts here are similar to those in *People v. Grover Tate*, 305 Ill. App. 3d 607 (1999). In that case, the defendant argued that counsel had been ineffective for failing to call three witnesses who each provided an affidavit indicating an alibi for the defendant. *Grover Tate*, 305 Ill. App. 3d at 610. The State argued that, because counsel had interviewed at least two of the witnesses, it should be presumed that counsel's decision was strategic. *Grover Tate*, 305 Ill. App. 3d at 612. The appellate court rejected that argument, holding that, precisely because the record did not reveal counsel's reasoning, that determination should be made only after a full hearing. *Grover Tate*, 305 Ill. App. 3d at 612. Similarly, in *Douglas Tate*, the defendant alleged that "counsel was ineffective for failing to investigate and call *** two alibi witnesses and two occurrence witnesses whose affidavits were attached to the petition." *Douglas Tate*, 2012 IL 112214, ¶ 17. The State argued, for instance, that one witness's hypothetical testimony potentially would have had a damaging net effect. *Douglas Tate*, 2012 IL 112214, ¶ 21. The court dismissed this reasoning: "The State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced." *Douglas Tate*, 2012 IL 112214, ¶ 22.

¶ 36 We also hold that defendant showed the gist of the prejudice portion of his claim. The identity evidence here was limited to identifications by two eyewitnesses, one of whom admitted he had drunk "two cups" of vodka. These identifications had moderate corroboration in

defendant's inculpatory statement at the laundromat and weak corroboration in his fleeing police in Aurora. Given the well-known frailties of eyewitness testimony, we cannot deem the State's evidence to be overwhelming. We think it entirely possible that evidence pointing to a Hispanic male as the shooter might have been enough to create reasonable doubt of defendant's guilt in the minds of the jury members. We therefore conclude that, based solely on the part of defendant's claim relating to the police reports, defendant has made the gist of a showing of ineffective assistance of counsel.

¶ 37

III. CONCLUSION

¶ 38 For the reasons stated, we vacate the dismissal of defendant's petition and remand the matter for further proceedings under the Act. We need not address defendant's additional claims, as on remand the entire petition must be docketed for second-stage proceedings. See generally *People v. Rivera*, 198 Ill. 2d 364 (2001).

¶ 39 Vacated and remanded.