Third Division
April 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	92 CR 8607 (03)
	)	
DARNELL DIXON,	)	Honorable
	)	Dennis Dernbach,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Justices Murphy and Steele concurred in the judgment.

ORDER

Held: In this postconviction proceeding, the trial court correctly held that the defendant, Darnell Dixon, failed to make a substantial showing that he did not receive effective assistance of appellate counsel, even though appellate counsel decided not to argue that Dixon received ineffective assistance of trial counsel. Dixon also failed to overcome the presumption that his postconviction counsel, who filed an appropriate certificate stating that he complied with Supreme Court Rule 651(c), provided the requisite level of assistance with Dixon's postconviction petition.

A jury found the defendant, Darnell Dixon, guilty of home invasion and two murders. The

trial court sentenced Dixon to natural life in prison. In his postconviction petition, Dixon alleged that his appellate counsel provided ineffective assistance because he failed to argue that Dixon received ineffective assistance of trial counsel. After appointing counsel to represent Dixon in postconviction proceedings, the trial court dismissed the petition without hearing evidence.

On appeal, Dixon argues that he made a substantial showing that his appellate counsel should have argued that he received ineffective assistance of trial counsel, and that postconviction counsel failed to fulfill his duties as Dixon's representative in postconviction proceedings. We hold that Dixon would not have achieved any better result if appellate counsel had tried to argue ineffective assistance of trial counsel, because the record shows that Dixon's trial counsel did an excellent job of representing Dixon at trial. Also, Dixon has not met his burden of showing that postconviction counsel failed to provide reasonable representation. Accordingly, we affirm the dismissal of Dixon's postconviction petition.

BACKGROUND

James and Marshan Allen ran a drug business from their apartment on the south side of Chicago. On March 11, 1992, Myron Gaston arranged to go to the Allens' apartment to buy cocaine for resale. Darnell Dixon was visiting the Allens, who lived in the same building as Dixon, when Myron arrived with his friends Jerome DeBerry and Chris Jones. After completing the cocaine purchase, Myron pulled out a gun and pointed it at Marshan. Myron, DeBerry and Jones took some drugs and about $4,000 in cash from the Allens, and then they left to go to the apartment where DeBerry and Myron lived with Myron's brother, Elroy Gaston.

Two days later, Myron, DeBerry and Jones met with James, and they gave James $1,000.

The next day they gave him another $1,000. On the morning of March 16, 1992, the Gastons got a call in which the caller said nothing when Myron picked up the phone. Myron left the apartment to meet with his probation officer and do his community service. When he returned home around 10 a.m., he found a window broken and blood pooling under the front door of his apartment. Once he entered the apartment, he saw the corpses of DeBerry and Elroy, both dead from multiple gunshot wounds.

Police found shotgun shells and nine millimeter cartridge casings in the apartment. The apartment's back door had shotgun holes and an indentation indicating forced entry. After interviewing Marshan, police arrested Dixon and tried to find Eugene Langston. Horace Chandler, a janitor or manager of the apartment building where Myron lived, viewed a lineup in which Dixon and Langston participated. Chandler identified Langston, but not Dixon, as a person he saw walking away from the apartment building around the time of the murders. Chandler later retracted his identification of Langston. Henry Simmons, an assistant State's Attorney, interviewed Dixon and handwrote a statement for Dixon to sign. Although Dixon initialed the statement where Simmons made some corrections, Dixon refused to sign the statement. A grand jury indicted Dixon for the two murders and home invasion.

Dixon's attorney, John Carey, moved to quash the arrest and to bar the prosecution from presenting testimony that Dixon confessed to a police officer and to Simmons. In the course of the hearing on the motion, Carey sought to elicit testimony about the course of the police investigation and the evidence police found that persons not including Dixon committed the murders. The trial judge, Thomas Dwyer, consistently sustained objections to almost all of the testimony Carey sought

to elicit, and told Carey he would need to wait until the end of the hearing to make any offer of proof as to the testimony he sought to present. Carey made extensive notes during the hearing to remind himself of all the testimony the court barred about the course of the investigation leading to Dixon's arrest. Judge Dwyer said, "I perceive, sir, that you are doing things to aggravate me, and you are aggravating me." Carey answered, "If I am going to make a record, I have to make notes as to what's going to go into that record."

The prosecution moved to bar testimony that someone other than Dixon confessed to the murders, and he did not implicate Dixon as an accomplice. Carey argued vehemently that granting the motion would deprive Dixon of a fair trial. Judge Dwyer granted the prosecution's motion *in limine*. After that point in pretrial proceedings, Carey consistently strove to preserve a record of all the rulings he perceived as unfair to Dixon.

At trial, the prosecution relied primarily on the testimony of Detective Michael McDermott and Simmons, who both said that Dixon confessed to them that he took part in the murders. According to both Simmons and Detective McDermott, Dixon, in the police station, told them that after Myron, DeBerry and Jones robbed the Allens, James called Elroy and asked Elroy why Myron had robbed him. A few hours later Dixon called DeBerry and asked him the same question. DeBerry said that his friends in the Gangster Disciples wanted to see proof that DeBerry did not work for James. DeBerry promised to give back everything he, Myron and Jones had taken. Dixon said that he and James also told Langston about the robbery.

According to Simmons and Detective McDermott, Dixon confessed that on March 15, 1992, he and Marshan decided to steal a car to take over to Myron's apartment, where they intended to

break the legs of Myron and Jones. Dixon and Marshan found a gray van near 79th and King Drive and stole it. Marshan, Langston and Dixon took the van over to Myron's apartment the next morning. When Dixon and Langston got to the back door, Langston fired a shotgun blast through the door and kicked the door open. Dixon and Langston entered and Langston fired the shotgun again. Dixon pointed a nine millimeter gun at DeBerry and Elroy, closed his eyes, and fired all the bullets. Dixon, Langston and Marshan drove the stolen van to the area where Marshan left his car. They abandoned the van and Marshan drove them home. The court permitted Simmons to read into evidence the statement Simmons wrote out, even though Dixon refused to sign that statement.

The prosecution presented corroborating evidence that a man who lived a block away from King Drive, near 78th Street, discovered on March 16, 1992, that his gray van had disappeared from the place he parked it on March 15, 1992. Police found the van a few blocks from Myron's apartment on the afternoon of March 16, 1992. Someone had peeled the column, indicating that someone drove the van without keys.

Myron testified that when he gave the Allens money for the cocaine, Dixon counted the money while sitting by the scale the Allens used to weigh drugs. Myron swore that Dixon worked for the Allens.

An Ameritech employee confirmed that a call went from the Allen residence to the Gastons' residence on the morning of March 16, 1992.

Dixon testified that he told McDermott and Simmons about the robbery and he told them he knew nothing about the murders. Although Dixon at one time sold drugs for the Allens, he stopped working with the Allens some time before the robbery. Myron, DeBerry and Jones robbed only the

Allens; they took nothing from Dixon. Simmons brought Dixon a complete handwritten statement and asked Dixon to initial certain changes. Where Simmons had written Dixon's name consistently as Durrell, Dixon initialed the change to correct it to Darnell. Simmons then asked Dixon to sign the statement. Dixon read it and refused to sign it because he knew nothing about the murders.

Carey then called Detective David Friel as a witness. Friel admitted that Dixon participated in a lineup which Horace Chandler viewed. Judge Dwyer held a sidebar in which Judge Dwyer ruled that the evidence Carey elicited from Friel amounted to hearsay. Carey cogently pointed out that he asked nothing about what Chandler said after viewing the lineup. Carey told Judge Dwyer that Carey had spoken to Chandler, who admitted that he saw someone leaving the building around the time of the murders, and he did not see Dixon. Chandler's attorney told Carey that Chandler was willing to testify. Carey tried repeatedly to reach Chandler during the trial, but Carey could not find him.

Judge Dwyer said that Carey "conveyed to this jury that Mr. Chandler did not make a lineup identification[.]" Judge Dwyer decided to permit the prosecution to present hearsay evidence that Chandler said, out of court, that he recognized Langston as a man he saw leaving the apartment building. Judge Dwyer foreclosed the defense from presenting further hearsay evidence that Chandler later retracted the identification. Carey argued that no hearsay should go into evidence. Judge Dwyer said he would either allow the prosecution to present its hearsay evidence without permitting the evidence that Chandler retracted the identification, or he would strike Friel's testimony about the lineup. Carey persisted in arguing that the court should not permit any hearsay evidence. Judge Dwyer decided to permit only hearsay evidence that Chandler said he recognized Langston, without permitting hearsay evidence that Chandler retracted that identification. On cross-

examination, Detective Friel testified that Chandler identified Langston, but not Dixon, as a person he saw outside the apartment building near the time of the murders.

In closing argument, the prosecutor did not refer to Detective Friel's testimony. The jury found Dixon guilty of home invasion and the murders of DeBerry and Elroy. On June 24, 1994, the trial court sentenced Dixon to natural life in prison.

On the direct appeal, appellate counsel argued that the trial court erred by disallowing evidence that another person confessed to the murders, and by allowing into evidence the statement Dixon refused to sign. Appellate counsel did not argue that Dixon received ineffective assistance of trial counsel. This court affirmed the convictions and sentences in an order dated December 11, 1996.

Dixon filed a postconviction petition on July 25, 2000. He argued, *inter alia*, that both trial and appellate counsel provided him ineffective assistance. On November 3, 2000, the trial court entered an order dismissing the petition as frivolous and patently without merit. This court, on appeal, held that the trial court failed to dismiss the petition within the time established by statute for such a dismissal. This court reversed the dismissal and remanded for further proceedings in accord with sections 122-4 through 122-6 of the Post-Conviction Hearing Act. 725 ILCS 5/122-4 through 122-6 (West 2000).

On remand, postconviction counsel reviewed the record and the postconviction petition and wrote to Dixon:

> "I observe that you had excellent trial representation[.] *** From what I can preliminarily observe, the problem with your trial was a trial court who frustrated the

> attempts of your attorney."

In a separate letter written after postconviction counsel completed his review of materials, he wrote to Dixon,

> "I have decided that I am not going to file a supplemental petition in your case. The reason for this is based on my assessment that all of your issues are either: contradicted by my further investigations, are not supported by the law, or are insufficient to establish the relief that you request due to a lack of prejudice."

While postconviction counsel said he disagreed with the ruling that excluded a third party's confession to the crime, he noted that *res judicata* foreclosed any further review of the issue. Postconviction counsel further argued that the testimony that Chandler identified Langston had no prejudicial effect, especially because accountability for Langston had no significant bearing on Dixon's conviction. The evidence against Dixon showed that the murders occurred in the course of a home invasion in which Dixon acted as a principal, making him guilty of felony murder as a principal. Postconviction counsel filed an appropriate certificate pursuant to Supreme Court Rule 651(c) (Ill. Sup. Ct. R. 651(c) (eff. Dec. 1, 1984)), on December 13, 2006.

Dixon elected to file his own supplemental postconviction petition. He enlarged on his arguments about ineffective assistance of trial and appellate counsel, and he presented an affidavit explaining why he did not file his postconviction petition until July 2000, more than three years after this court affirmed his conviction on direct appeal.

At a hearing on the postconviction petition, in January 2008, postconviction counsel told the court that testimony from Chandler would not help Dixon. At a later hearing, the same attorney told

the court he would try to locate Chandler and determine whether an affidavit from Chandler might help Dixon. At a hearing on July 24, 2008, the transcript shows that postconviction counsel said,

> "I spoken [*sic*] to Mr. Chandler. And my investigations with him are complete, and I wouldn't be presenting anything additional with him. But Mr. Dixon wants [Horace] Chandler's court reported statement ***. I have exhausted my possibilities of getting the court reported statement[.]"

The State moved to dismiss the postconviction petition as untimely. At the hearing on the motion, held on October 15, 2008, postconviction counsel said,

> "I did make attempts to find *** Chandler, and wasn't able to secure any information from him.
>
> * * *
>
> *** Eugene Langston's case fell apart when the State's witness who ID'd Mr. Langston, an individual named [Horace] Chandler, the person that I just referenced who I wasn't able to find, retracted his identification of Mr. Langston."

Although the court found the petition untimely, the court addressed all of Dixon's arguments on their merits. The court specifically held that Dixon had effective assistance of trial and appellate counsel. Dixon now appeals.

ANALYSIS

Ineffective Assistance of Appellate Counsel

On appeal, Dixon argues first that the trial court should have heard evidence on Dixon's postconviction petition because Dixon made a substantial showing that his counsel for the direct

appeal provided ineffective assistance when appellate counsel failed to argue that Dixon received ineffective assistance of trial counsel. Dixon contends that Carey, his trial counsel, denied him effective assistance of counsel when Carey did not agree to strike Detective Friel's testimony and when trial counsel failed to present Chandler as a witness to testify that he had retracted his identification of Langston as a person he had seen near the crime scene.

The trial court in postconviction proceedings must hold an evidentiary hearing only if the petitioner makes a substantial showing of a constitutional violation. See *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). "A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and that counsel's decision prejudiced defendant. If the underlying issue is not meritorious, then defendant has suffered no prejudice." *People v. Enis*, 194 Ill. 2d 361, 377 (2000). Thus, for Dixon's argument to succeed, he must show a reasonable probability that this court would have reversed his conviction if appellate counsel had argued that Dixon received ineffective assistance of trial counsel. See *Enis*, 194 Ill. 2d at 376-77.

For a claim of ineffective assistance of trial counsel to succeed, the defendant must satisfy the *Strickland* test:

> "a defendant must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. [Citations.] A reasonable probability is a probability sufficient to undermine confidence in the

> outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. [Citations.] There is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Enis*, 194 Ill. 2d at 376-77.

Carey put Detective Friel on the witness stand to testify that Chandler viewed a lineup in which Dixon participated. After trial counsel completed his examination of Detective Friel, Judge Dwyer held a sidebar in which Judge Dwyer protested that the testimony might lead jurors to infer that Chandler did not identify Dixon in the lineup.

Carey persuasively argued that the court regularly allows, as non-hearsay, evidence that can lead jurors to make similar inferences against defendants. For example, in this case the court permitted a police officer to testify that he interviewed Marshan, and after the interview police arrested Dixon and tried to find Langston. Jurors could infer that Marshan implicated Dixon and Langston in the murders. Because Marshan did not testify, Dixon had no opportunity to rebut the inference. But the evidence does not count as hearsay, because prosecutors never asked the officer what Marshan said. "Testimony describing the progress of the investigation is admissible even if it suggests that a nontestifying witness implicated the defendant." *People v. Simms,* 143 Ill. 2d 154, 174 (1991). Carey, here, only asked the court to apply the same principle to non-hearsay evidence from which jurors might draw an inference favorable to the defense.

Judge Dwyer refused to apply the law in the way Carey requested. Instead, Judge Dwyer decided to permit the prosecution to introduce hearsay evidence to rebut, to some extent, the

inference favorable to the defense. See 725 ILCS 5/115-12 (West 1994) (the court may admit hearsay identification evidence only if declarant testifies at trial and submits to cross-examination); See *People v. Tisdel*, 201 Ill. 2d 210 (2002). Thus, on cross-examination, the prosecution elicited Detective Friel's testimony that Chandler, out of court, identified Langston as a man he saw near the murder scene on the day of the murder. Judge Dwyer foreclosed defense counsel from eliciting further hearsay that Chandler later retracted the identification.

Before Judge Dwyer finally decided to permit hearsay favorable to the prosecution, Judge Dwyer at one point in the argument said that he would either permit the hearsay or he would strike Detective Friel's testimony. Dixon argues that Carey acted incompetently when he failed to agree immediately to have the court strike Detective Friel's testimony.

"[D]ecisions concerning whether to call certain witnesses on a defendant's behalf are matters of trial strategy, reserved to the discretion of trial counsel. [Citations.] Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence [citation], and are, therefore, generally immune from claims of ineffective assistance of counsel [citation]." *Enis*, 194 Ill. 2d at 378. Here, Carey needed to weigh the benefit from Detective Friel's testimony about the lineup against the detriment to the defense from Detective Friel's testimony to hearsay from Chandler. Carey carefully preserved a record showing arguable instances of Judge Dwyer's unfairness to Dixon, so Carey also needed to consider whether he could preserve further error if he agreed that the court should strike Detective Friel's testimony. We cannot say that Carey's decision not to ask the court to strike Detective Friel's testimony shows incompetence. Moreover, the hearsay testimony about Chandler's identification of Langston probably had little effect on the outcome of

the trial, as the prosecution never used that identification in argument, and Langston and other associates of the Allens could have committed the murders without Dixon's involvement. Placing Langston at the scene bore little relevance to the case against Dixon.

Next, Dixon contends that Carey acted incompetently when he failed to present Chandler to testify that he could not identify Langston. Carey told Judge Dwyer that he had interviewed Chandler, but he had not found him during the last three days of trial, even though Chandler's attorney had told Carey that Chandler would testify at Dixon's trial.

We cannot say that Carey acted incompetently when he relied on a representation by Chandler's attorney that Chandler would testify. See *Walton v. State*, 847 So. 2d 438, 459 (Fla. 2003) (defense counsel did not provide ineffective assistance where counsel relied on representations by an assistant State's Attorney about the availability of witnesses); *United States v. Eisen*, 974 F.2d 246, 265 (2d Cir. 1992) (defense counsel not ineffective where counsel relied on representation by co-defendant's counsel about delivery of a document). When Chandler failed to appear, Carey faced a strategic choice: Carey could seek a continuance in the hope that he might find Chandler and obtain useful testimony from him, or Carey could rest the defense case and argue that Dixon did not confess to the crimes, and apart from the supposed confession, the prosecutor presented no evidence tying Dixon to the murders. Carey chose to rest the case for the defense.

Dixon argues that all competent counsel would have sought a continuance, on the last day of trial, to obtain Chandler's testimony. The trial court has discretion to grant or deny a motion for a brief continuance after the trial has begun. *People v. Dotson*, 263 Ill. App. 3d 571, 577 (1994). The trial court should consider the diligence of the party seeking the continuance, the materiality of

the evidence, and whether the parties would have a fair trial without the evidence. *Dotson*, 263 Ill. App. 3d at 577-78. Here, the evidence concerned the peripheral issue of whether a witness saw someone else, not Dixon, near the murder scene near the time of the murders. The course of pretrial hearings and the trial, including the discussion of Detective Friel's testimony, strongly indicated that Judge Dwyer would likely have regarded a motion for a continuance as a further effort to aggravate the court, and Judge Dwyer would almost certainly have denied the motion. Trial counsel does not act incompetently when he chooses not to file a futile motion. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005). Moreover, in view of Carey's inability to reach Chandler in the last three days of trial, counsel had no assurance that he could find Chandler and bring him into court with only a brief continuance. Considering all of the circumstances of the case, we find that Carey made a reasonable strategic decision not to request a continuance to find Chandler.

Reading the record as a whole, we agree with the assessment of postconviction counsel: trial counsel, Carey, provided excellent representation for Dixon, and Carey presented Dixon's case as well as he could in view of both the evidence and the rulings of the trial judge. We see no likelihood that appellate counsel would have achieved a better result if appellate counsel had argued that Dixon received ineffective assistance of trial counsel. Accordingly, we find that Dixon has not substantially shown that he received ineffective assistance of appellate counsel.

Supreme Court Rule 651(c)

Next, Dixon argues that his postconviction counsel failed to comply with Supreme Court Rule 651(c). Rule 651(c) provides:

"The record filed in [postconviction] court shall contain a showing, which

> may be made by the certificate of petitioner's attorney, that the attorney has consulted with petitioner either by mail or in person to ascertain his contentions of deprivation of constitutional right, has examined the record of proceedings at the trial, and has made any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of petitioner's contentions." Ill. Sup. Ct. R. 651(c) (eff. Dec. 1, 1984).

Here, postconviction counsel filed the appropriate Rule 651(c) certificate, explaining that he did not amend Dixon's petition because that petition adequately set forth all of Dixon's claims. When postconviction counsel files a certificate in accord with Rule 651(c), this court presumes that postconviction counsel has provided adequate representation for the petitioner. *People v. Rossi*, 387 Ill. App. 3d 1054, 1060 (2009). The petitioner must overcome that presumption by presenting evidence that postconviction counsel failed to fulfill the requirements of the rule. *People v. Perkins*, 229 Ill. 2d 34, 52 (2008).

Dixon argues that postconviction counsel should have amended his petition to better present his claim that he did not act with culpable negligence when he delayed filing his postconviction petition until July 2000. Dixon compares this case to *People v. Turner*, 187 Ill. 2d 406 (1999), where the court held that the defendant showed that he suffered prejudice due to his counsel's failure to amend his postconviction petition to allege ineffective assistance of appellate counsel. The *Turner* court reasoned that the defendant suffered prejudice when the trial court dismissed the postconviction petition, finding all claims waived, without reaching their merits, when postconviction counsel could have overcome the bar of waiver by amending the petition to raise the same claims as proof that the defendant did not receive the effective assistance of appellate counsel.

Turner, 187 Ill. 2d at 412-13.

While the trial court here found the petition untimely, the court reviewed all of Dixon's claims on their merits and found that Dixon failed to make a substantial showing of constitutional violations. We do not see how the failure to amend Dixon's petition had any bearing on the trial court's review of his claims. *Turner* does not require reversal here for further evidence of timeliness.

Dixon does not suggest any constitutional claims beyond those presented in his postconviction petition that postconviction counsel could have presented had counsel amended his petition. For his claim that postconviction counsel failed to comply with Rule 651(c), Dixon argues that inconsistencies in postconviction counsel's statements to the court prove that the attorney did not adequately investigate Dixon's claims. See *People v. Ramey* , 393 Ill. App. 3d 661, 667 (2009) (Rule 651(c) imposes on counsel a duty to investigate the petitioner's claims). After postconviction counsel filed his Rule 651(c) certificate, he indicated that he had not yet located Chandler. The transcript of a hearing on July 24, 2008, shows that postconviction counsel said he "spoken [*sic*] to Mr. Chandler" and decided not to present an affidavit or any further evidence from Chandler. On October 15, 2008, the same attorney referred to Chandler as "the person that *** I wasn't able to find."

While we agree with Dixon that postconviction counsel's statements appear somewhat inconsistent, we agree with postconviction counsel's assessment that Chandler's testimony would not significantly help Dixon or alter the result of the case. At most, Chandler could say he saw a man leaving the apartment building near the time of the murders, and he could not identify that man as either Dixon or Langston. The evidence at trial and in pretrial hearings shows that Chandler could

not connect the man he saw to the murders, apart from the proximity in time and place, and Chandler certainly could not exonerate men he did not see, including Dixon. Chandler could refute the hearsay the prosecution presented, when Detective Friel testified that Chandler identified Langston as a person he saw. But Chandler's testimony would not significantly alter the credibility of the testimony from McDermott and Simmons, who swore that Dixon confessed to them that he participated in the home invasion and shot at DeBerry and Elroy. Dixon has not overcome the presumption, based on the Rule 651(c) certificate, that postconviction counsel provided adequate representation for the constitutional claims Dixon sought to advance in his postconviction petition.

CONCLUSION

Dixon has not substantially shown that appellate counsel provided ineffective assistance when appellate counsel chose not to argue that Dixon's trial counsel, Carey, offered constitutionally insufficient representation. Neither has Dixon shown that postconviction counsel failed to comply with Supreme Court Rule 651(c). Accordingly, we affirm the dismissal of his postconviction petition.

Affirmed.