

2011 IL App (1st) 091434-U

SIXTH DIVISION
November 10, 2011

No. 1-09-1434

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

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 16570
)	
JAVIER BARRIENTOS,)	Honorable
)	Thomas P. Fecarotta, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Cahill and Garcia concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to state a meritorious post-conviction claim that trial counsel rendered ineffective assistance by not calling a trial witness who would have corroborated defendant's exculpatory account. Counsel was not objectively unreasonable for not calling this witness, and his testimony was unlikely to change the result at trial, because he was not only defendant's brother but a participant in the events and because the State's case was founded upon the testimony of a disinterested eyewitness as well as the victim's sister.

¶ 2 Following a bench trial, defendant Javier Barrientos was convicted in 2001 of first degree murder and sentenced to 25 years' imprisonment. We affirmed the judgment on direct appeal.

People v. Barrientos, No. 1-01-2306 (2002) (unpublished order under Supreme Court Rule 23).

Defendant now appeals from the dismissal, upon the State's motion, of his 2003 *pro se* post-conviction petition as supplemented by counsel. He contends that his petition stated a substantial showing that trial counsel rendered ineffective assistance by not calling a trial witness who would have corroborated defendant's exculpatory account of events.

¶ 3 The undisputed evidence at trial was that, in June 2000, defendant fatally stabbed Yazmin Perez once in the abdomen during a scuffle with Yazmin and Fabiana Perez, Yazmin's sister and defendant's girlfriend, at which defendant's brother Rafael Barrientos was present. The State's evidence came primarily from Fabiana and eyewitness Cedrick Johnson: defendant approached Yazmin, walking straight towards her, and Fabiana tried to restrain defendant from attacking Yazmin but Rafael, who had arrived with defendant, pulled Fabiana away just before defendant stabbed Yazmin. Fabiana added that she had been talking with Yazmin when defendant arrived and that Yazmin's hands were in her pockets when defendant stabbed her. Defendant testified that Yazmin was attacking Fabiana when he arrived, then Yazmin came towards him and shoved and threatened him. Yazmin had also threatened defendant on a prior occasion. Because of her violent and threatening approach, and particularly because she had her hands concealed under her shirt as if reaching for something, he stabbed her out of fear. However, a police officer testified in rebuttal that, following his arrest, defendant stated that he approached Yazmin to confront her and that he had been angry at the time. Defendant had not mentioned that Yazmin had shoved him. The court found defendant guilty of first degree murder, rejecting his argument for second degree murder, and sentenced him to 25 years' imprisonment.

¶ 4 On appeal, we found that there was sufficient evidence to convict defendant of first degree murder rather than second degree murder.

¶ 5 In July 2003, defendant filed his *pro se* post-conviction petition, alleging in relevant part ineffective assistance of trial counsel for not investigating or calling Rafael as a trial witness to corroborate defendant's account of events. The petition was supported by Rafael's affidavit that Yazmin was attacking Fabiana when he and defendant arrived, that Yazmin came towards defendant and attacked him, and that Rafael saw Yazmin "reach for something in her waist" just before defendant stabbed her in self-defense. Rafael also averred that trial counsel had told him that he may be called as a witness at trial.

¶ 6 Counsel was appointed for defendant.

¶ 7 The State filed a motion to dismiss and answer, arguing in relevant part that an evidentiary hearing would be appropriate on the ineffective assistance claim to determine what trial counsel knew and decided regarding Rafael's potential testimony.

¶ 8 In March 2007, counsel filed a supplemental petition and response to the motion to dismiss, in relevant part agreeing with the State that an evidentiary hearing should be held on the claim of ineffective assistance regarding Rafael as a potential trial witness. Counsel also filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) averring that she consulted with defendant by mail and telephone, reviewed the record, and filed a supplemental petition.

¶ 9 In May 2007, the State amended its motion to dismiss, now seeking dismissal of the ineffective assistance claim on the bases that the calling of witnesses at trial is a matter of trial strategy generally not subject to challenge, that Rafael averred that trial counsel had spoken with him, and that Rafael's testimony was unlikely to affect the outcome of trial where Johnson corroborated Fabiana's inculpatory account and the trial court discounted defendant's account.

¶ 10 Defendant responded to the amended motion to dismiss, arguing that the State was equitably estopped from seeking dismissal of the ineffective assistance claim once the State had admitted that an evidentiary hearing on the claim was appropriate. Defendant also argued that

the trial strategy protection is not absolute and that an evidentiary hearing was needed to determine what trial counsel knew of Rafael's potential testimony and why counsel did not call him as a witness. The State replied in support of its amended motion to dismiss that it had leave of the court, without defense objection, to file the amended motion.

¶ 11 The court held a hearing on the motion to dismiss in November 2008. On May 29, 2009, the court granted the motion and dismissed the petition as supplemented, finding that defendant failed to show either prong of an ineffective assistance claim. The court noted that Rafael's affidavit mentioned speaking with trial counsel, so that trial counsel was clearly aware of him as a potential witness. The court also noted that the State's case was particularly supported by the testimony of disinterested eyewitness Johnson and that the trial court found defendant's testimony to not be credible. This appeal timely followed.

¶ 12 On appeal, defendant contends that his petition as supplemented stated a meritorious claim that trial counsel rendered ineffective assistance by not investigating or calling Rafael as a trial witness to corroborate defendant's exculpatory account of events.

¶ 13 A defendant is entitled to post-conviction relief if he shows that he suffered a substantial deprivation of his constitutional rights in the trial proceedings. *People v. Lacy*, 407 Ill. App. 3d 442, 455 (2011). Where a defendant claims that he was denied his right to effective assistance of counsel, he must prove that (1) counsel's actions constituted errors so serious as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) absent these errors, there was a reasonable probability that his trial would have had a different outcome. *Lacy*, 407 Ill. App. 3d at 456-57. For the latter prong, the probability must be sufficient to undermine confidence in the outcome; that is, counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair. *Lacy*, 407 Ill. App. 3d at 457. Trial counsel's

decisions regarding which witnesses to call is a matter of trial strategy, generally immune from claims of ineffective assistance of counsel. *Lacy*, 407 Ill. App. 3d at 466.

¶ 14 When a *pro se* petition is not summarily dismissed and counsel is appointed, the State may move to dismiss the petition as amended or supplemented by counsel. *Lacy*, 407 Ill. App. 3d at 456. Because all well-pleaded facts are to be accepted *arguendo* as true at this stage, fact-finding at a dismissal hearing is inappropriate. *Lacy*, 407 Ill. App. 3d at 456. Our review of the dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. *Lacy*, 407 Ill. App. 3d at 456.

¶ 15 Here, we agree with the circuit court that defendant's petition did not make a substantial showing of ineffective assistance of trial counsel for not calling Rafael at trial where it was not objectively unreasonable to not call Rafael at trial and where Rafael's testimony would be unlikely to affect the outcome of trial. Rafael was not only defendant's brother but a participant in the fatal event, pulling Fabiana away from defendant as she tried to restrain defendant from attacking Yazmin. Conversely, while Fabiana was the sister of victim Yazmin, key points of her inculpatory account were corroborated by Johnson, a disinterested eyewitness. See *Lacy*, 407 Ill. App. 3d at 466-67 (at second stage of post-conviction proceedings, not calling witness at trial was not found to be ineffective assistance where trial counsel had been aware of the witness and she was a relative of the defendant). Here, trial counsel was aware of Rafael as a witness and that he was the brother of the defendant. Under such circumstances, the absence of Rafael's testimony did not render the trial unreliable or fundamentally unfair. Therefore, the circuit court did not err in dismissing defendant's petition as supplemented.

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

¶ 17 Affirmed.