No. 1-09-1814

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).

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.
	)	
	)	Nos. 04 CR 21287
v.	)	04 CR 21288
	)	04 CR 21289
	)	
ROOSEVELT GRANT,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Murphy concurred in the judgment.

O R D E R

HELD: Summary dismissal of defendant's *pro se* postconviction petition was proper where the issue of trial counsel's alleged ineffectiveness for not calling a particular alibi witness to testify could have been, but was not, raised on direct appeal.

Roosevelt Grant appeals from an order that summarily dismissed his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2008). On appeal, he contends that his petition presented an arguable claim that his trial counsel was ineffective for failing to present the testimony of an alibi witness. For the reasons that follow, we affirm.

Following a jury trial, defendant was convicted of armed robbery, possession of a stolen motor vehicle, and aggravated battery, and the trial court sentenced him to concurrent terms of 25, 8, and 4 years' imprisonment, respectively. The underlying facts of the case are set forth in detail in our decision on direct appeal and will not be repeated here except as necessary. In brief, the State presented evidence at trial that defendant robbed a man of his wallet at gunpoint and drove away in a stolen car. A little over an hour later, two police officers approached the stolen car on foot. At the direction of one of the officers, the man in the passenger seat opened his door. While the officer was standing behind the open door, defendant, who was driving, shifted into reverse and accelerated backwards. The officer was dragged for 20 or 30 feet before he broke free of the door and defendant drove away.

After the State rested, the defense indicated to the trial court that it would proceed by way of one stipulation and then rest. In response, the trial court advised defendant of his right to testify and confirmed with him that he had made the choice not to testify on his own behalf. The following discussion ensued:

> "THE COURT: You have heard that your attorneys are going to enter into a stipulation and then we will rest in your case. Do you agree with that decision?
>
> [DEFENDANT]: Yes, sir.
>
> THE COURT: Very well. Just to present that one stipulation.
>
> [DEFENDANT]: Yes.
>
> THE COURT: Very well. All right.
>
> [ASSISTANT STATE'S ATTORNEY]: Judge, may I ask for one further inquiry.
>
> THE COURT: Sure.
>
> [ASSISTANT STATE'S ATTORNEY]: Could the court just make an inquiry that he doesn't seek to call that witness either.
>
> THE COURT: That I have inquired generally as to the decision of the defense and [defendant's] acceptance of those decisions and further than that I think we are fine.
>
> [ASSISTANT STATE'S ATTORNEY]: Okay."

The jury found defendant guilty of armed robbery, possession of a stolen motor vehicle, and aggravated battery, and the trial court entered judgment on the verdict.

Defense counsel filed a posttrial motion for a new trial, and defendant filed a *pro se* "supplemental motion for a new trial." In the *pro se* motion, defendant argued that trial counsel was ineffective for failing to call his uncle, Herbert Graham, as an alibi witness, and that it was very possible the jury would have acquitted him had Graham testified. Attached to the motion was an affidavit executed by Graham, who explained that he and defendant lived together. Graham averred that on the date of the crime, defendant "was at home with me and could not have committed this crime in any way." Graham also averred that he had been interviewed by trial counsel and had been subpoenaed to testify, but was never called as a witness.

At the hearing on the posttrial motions, the trial court denied the attorney-drafted motion and then addressed defendant and his *pro se* motion:

> "THE COURT: [Defendant], it seems to me that -- I asked you on the record when it came to your case whether or not you agreed with your lawyer's decision not to call any witnesses.
>
> [DEFENDANT]: No, you asked me did I want to testify, your Honor.
>
> THE COURT: But I think I also asked you about the witnesses.

> [DEFENDANT]: I am not going to never agree to not calling the only person who knew where I was at, Herbert [Graham]."

Following this exchange, the trial court asked defense counsel for input on the motion. Counsel stated that on numerous occasions, she and her partner had discussed with defendant the possibility of not presenting an alibi defense, and that defendant was in agreement with their decision on the matter. Defendant, in contrast, maintained that his lawyers never talked with him about foregoing an alibi defense. He acknowledged that he had waived his right to testify, but asserted that he did so because his lawyers told him he would not have to take the stand since the jury would know from his uncle's testimony that he was at home during the relevant time period. Defendant stated, "Then I sit there, wait for my uncle to be called, my witness who knew where I was at, at the time to be called, and my lawyer sits there and say, 'The defense rests.' Why would the defense rest?"

Again, the trial court asked defense counsel for input. Noting that whether to present an alibi defense is a matter of trial strategy, counsel stated as follows:

> "We discussed it, both myself and [my partner], at length with [defendant], and your Honor also inquired of him on the day of trial before we rested. And it

> was again his decision, or he agreed with our decision not to present that alibi. We believed at the time and still do that that was the best approach. We had issues with the alibi and we made that strategic decision as his attorneys."

The trial court denied defendant's *pro se* motion for a new trial and proceeded to sentencing. For his convictions for armed robbery, possession of a stolen motor vehicle, and aggravated battery, the trial court sentenced defendant to concurrent terms of 25, 8, and 4 years' imprisonment, respectively. On direct appeal, defendant contended that the evidence was insufficient to convict him of aggravated battery and that his sentence for armed robbery was excessive. We affirmed. *People v. Grant*, No. 1-06-2070 (2009) (unpublished order under Supreme Court Rule 23).

In 2009, defendant filed a *pro se* petition for postconviction relief. Among other things, defendant claimed trial counsel was ineffective for failing to call Graham as an alibi witness even though counsel knew of Graham's potential testimony, the defense had subpoenaed him, and he was present in the courthouse during trial. According to defendant, counsel did not consult with him about not presenting Graham's testimony. Defendant asserted in his petition that counsel's failure prejudiced him because Graham was his only potential alibi witness and the result of the trial would have been different had the jury heard Graham's testimony.

Defendant attached to his petition a supporting affidavit executed by Graham. In his affidavit, Graham averred that during the time span of the incident, he and defendant, who resided together, were at home eating dinner, talking, and watching television. Graham also averred that he informed trial counsel of these facts, appeared in court pursuant to a subpoena, and waited in the courthouse to be called as a witness, but was never called to testify. In a separate, self-executed affidavit, defendant averred that at trial, he neither knew nor understood that he was waiving his right to present witnesses in his defense when he was questioned by the trial court on the matter.

The trial court summarily dismissed the petition, finding it frivolous and patently without merit.

On appeal, defendant contends that the trial court erred in summarily dismissing his petition because his claim of ineffectiveness has an arguable basis in fact and law. Defendant argues that because identification was at issue in the case and the State's eyewitnesses had problems with memory, credibility, and opportunity to view the offender, counsel's failure to present an available alibi witness constituted arguably deficient performance that arguably prejudiced him. According to defendant's argument, had counsel offered an alibi defense as an alternative narrative to the one presented by the State, the jury could have chosen to believe Graham over the State's witnesses and concluded that he was mistakenly identified.

The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2008)) provides a mechanism by which defendants may assert that their convictions were the result of a substantial denial of their constitutional rights. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). A postconviction proceeding is a collateral attack on the defendant's conviction or sentence, the purpose of which is to allow an investigation into constitutional issues that were not, and could not have been, determined on direct appeal. *People v. Gale*, 376 Ill. App. 3d 344, 349 (2007). Accordingly, issues that were considered on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been, but were not, considered in the earlier proceedings are deemed procedurally defaulted. *Ligon*, 239 Ill. 2d at 103.

Here, defendant's claim concerning trial counsel's failure to call Graham as an alibi witness is based on facts that are contained in the trial court record. Defendant raised the issue that counsel was ineffective for not presenting Graham's alibi testimony in his *pro se* motion for a new trial, to which he attached an affidavit executed by Graham. In that affidavit, Graham averred that defendant was with him at home during the relevant time period, that he was interviewed by counsel and subpoenaed to testify, and that he was not called to testify. The trial court asked counsel for input on the merits of defendant's argument. Counsel responded that she and her partner spoke with defendant at length about not calling Graham to testify and that defendant agreed with their decision not to present Graham's testimony. Counsel stated, "We had issues with the alibi and we made that strategic decision as his attorneys." The factual basis for defendant's claim of ineffective assistance appears in the trial record. Thus, we find the record below was sufficent for defendant to raise the ineffectiveness claim on direct appeal. Therefore, we hold that defendant's failure to raise the issue results in forfeiture.

Defendant argues that he could not have raised this claim on direct appeal because it rests on Graham's postconviction affidavit, which is a document outside the trial record. He acknowledges that he attached a "similar" affidavit executed by Graham to his *pro se* motion for a new trial. Nevertheless, defendant insists that he could not have raised a straight ineffectiveness claim on direct appeal for the following three reasons.

First, defendant asserts that when a defendant raises a claim of ineffectiveness in posttrial proceedings, the issue on direct appeal is whether the trial court conducted an adequate inquiry into the defendant's allegations, while the issue on appeal from the summary dismissal of a postconviction petition is whether counsel's actions were arguably unreasonable and prejudicial. Defendant argues that in the instant case, because the trial court listened to his posttrial complaints, "this was not a direct-appeal issue," but rather, an issue for collateral review. We disagree. The determination of what constitutes an adequate inquiry is intrinsically tied to whether counsel's actions were unreasonable. As this court has observed, "How can one evaluate whether counsel is ineffective without analyzing whether counsel's performance was deficient?" *People v. Dickerson*, 393 Ill. App. 3d 531, 535 (2009). The issues on direct appeal and postconviction review are not so different so as to have precluded defendant from raising the issue on direct appeal.

Second, defendant argues that because the record does not reveal counsel's reasoning for the decision not to present Graham's testimony, the claim is better suited for postconviction review. We are not persuaded by this argument because, during the hearing on the defendant's posttrial ineffective assistance motion, defense counsel explained why the alibi witness was not called: (1)"[w]e had issues with the alibi and we made a strategic decision as his attorneys;" and (2) "he (the defendant) agreed with our decision not to present that alibi." Regardless of counsel's motives, the decision whether to call a particular witness belongs to counsel, is properly a matter of trial strategy, and typically will not support a claim of ineffectiveness. *People v. Stanley*, 397 Ill. App. 3d 598, 613-14 (2009), citing *People v. Patterson*, 217 Ill. 2d 407, 442 (2005).

Third, defendant argues that the veracity of counsel's unsworn statement that she and her partner discussed the alibi with defendant, as well as his own sworn allegation that counsel's statement was a lie, must be tested by postconviction proceedings. In support of this argument, counsel cites *People v. Haynes*, 331 Ill. App. 3d 482, 485 (2002), for the proposition that counsel's self-serving claims must be tested in a postconviction evidentiary hearing. However, *Haynes* does not stand for this proposition. Instead, *Haynes* stands for the proposition that where a defendant's assertions, if true, strongly suggest possible neglect, the record must be consulted by the trial judge, but if the trial court finds the defendant's claims pertain to trial strategy, the posttrial motion should be denied. *Haynes*, 331 Ill. App. 3d at 485. Here, defense counsel made a strategic decision and did not neglect the defendant's case. Therefore defendant's reliance on *Haynes* is misplaced.

Defendant's arguments do not change the fact that at the time he filed his direct appeal, he knew of Graham's potential alibi testimony and counsel's decision not to present Graham as a witness. While Graham's postconviction affidavit adds a few details that were not included in his posttrial affidavit, the substance of the two affidavits is the same. Defendant could have raised the instant allegation of ineffectiveness on direct appeal but did not. Accordingly, the contention is forfeited. *Gale*, 376 Ill. App. 3d at 349.

For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

Affirmed.