

2012 IL App (1st) 093583-U

FIRST DIVISION
FILED: FEBRUARY 14, 2012

No. 1-09-3583

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. 03 CR 3124
)	
RAYMOND DAMPIER,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant failed to present an arguable claim of ineffective assistance of appellate counsel based on failure to raise the issue of trial counsel's failure to investigate and call alibi witnesses where the trial court conducted a posttrial hearing and determined that the witnesses' testimony would not have changed the outcome of the trial and defendant presented no argument as to why this finding constituted an abuse of discretion.

¶ 2 Defendant Raymond Dampier appeals from the order of the circuit court summarily dismissing his postconviction petition. Following a bench trial, defendant was found guilty of first degree murder and sentenced to 63 years' incarceration. Defendant appealed contending that

he was not proven guilty beyond a reasonable doubt. This court affirmed defendant's conviction. *People v. Dampier*, No. 1-07-2008 (2009) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a petition for postconviction relief. In the petition, defendant alleged, *inter alia*, that he was denied the effective assistance of appellate counsel when appellate counsel failed to argue that trial counsel was ineffective for failing to interview certain witnesses. The trial court dismissed defendant's petition without appointing counsel or conducting an evidentiary hearing. Defendant appeals contending the trial court erred when it held that his claim of ineffective assistance of appellate counsel was frivolous and patently without merit. We affirm.

¶ 3 The facts are adequately set forth in our prior order affirming defendant's conviction; therefore, we set forth only those facts necessary for an understanding of this appeal. According to the State's theory of the case, early in the morning of August 11, 2002, defendant rode up to the intersection of Lotus and Monroe in a blue four-door Buick. He briefly spoke with Tremont Miller, the victim, from the car's passenger window. Defendant then exited the car with a handgun and chased the victim through a vacant lot into an alley, where defendant shot him multiple times. Defendant ran back to the Buick.

¶ 4 The state supported its theory of the case through the testimony of several witnesses who saw defendant chase the victim into an alley. None of the witnesses testified that they saw the shooting, but each testified that they heard gunfire. The witnesses included Chicago police officer McCarthy, Douglas Dobbs, Kenyatta Young, Nedra Little, and Darrin McMullen, who, unlike the others, did not identify defendant, but stated only that he saw "a guy" get out of the car and chase the victim.

¶ 5 Defendant testified on his own behalf, admitting that he was a "ranked" gang member who made his living controlling drug sales on the block of Lotus between Adams and Monroe.

Defendant admitted that he used physical violence, "street brawls," to enforce his control of the block, but denied ever using a weapon during the brawls. Defendant admitted fighting with Darrin McMullen and admitted that during one fight he broke McMullen's uncle's leg. However, defendant testified that he never had any trouble with the victim, Tremont Miller and had no reason to kill him. Defendant further testified that Young, Little, and McMullen all knew each other and were friends.

¶ 6 When asked, on cross-examination, where he was the night of the murder, defendant testified that he was in either the home of Freda Murray or Ebony Murray. Defendant further testified that Freda and Ebony were sisters and lived in different apartments in the same building so that it was easy to "run from one house to another."

¶ 7 The parties rested, and defendant, in closing, argued that the State's witnesses had conspired to "put a case on him" in order to remove him from the block and eliminate his control of the drug trade. The trial court found that the State's witnesses were credible, that defendant was not, and rejected defendant's conspiracy theory. The trial court found defendant guilty of first degree murder.

¶ 8 Defendant subsequently filed a complaint with the Attorney Registration and Disciplinary Commission (ARDC) against his trial counsel, Todd Urban. Urban withdrew, citing a conflict, and the public defender was appointed to represent defendant in posttrial proceedings. Posttrial counsel filed a motion for a new trial alleging ineffective assistance of trial counsel based on the failure to investigate and present alibi witnesses. The trial court conducted an evidentiary hearing on the motion.

¶ 9 At the hearing, Freda Murray testified on behalf of defendant. Murray testified that on the night of the murder she worked until midnight and then took a cab to her sister's home to pick up her daughter. Along with others, defendant was present at the apartment. They stayed at the

apartment for approximately 40 minutes, and then moved to Murray's apartment. Defendant stayed at Muarry's apartment for approximately 90 minutes drinking alcohol and talking.

¶ 10 On cross-examination, Murray testified that some time after the murder she moved to Springfield. Murray admitted that after she learned defendant had been charged with the murder she never contacted the police because she never knew what time the murder occurred. Murray also admitted that she had visited defendant in jail five or six times since the murder, but testified that he never told her what time the murder was alleged to have happened or asked her to provide an alibi.

¶ 11 Jessica Boyd testified that in 2002, she lived on the 100 block of South Lotus. From her home Boyd saw a blue car "roll up" and "a guy" jump out of the car and chase the victim into an alley. Boyd heard shots and then ran back into her house. Boyd knew defendant and did not recognize him as the man who jumped form the car. Boyd further testified that the man she saw had a short Afro and that defendant wore his hair in braids that day.

¶ 12 Todd Urban testified for the State. Urban testified that he discussed presenting an alibi defense with defendant before his trial and defendant indicated he did not want to present an alibi. Urban opined that two of the alibi witnesses, Ebony Murray and Linzene Franklin had given statements to the police and/or prosecutors and the statements did not "back up" defendant's alibi. Franklin's statement had defendant "going in and out," and Murray's was unclear on time with defendant coming in some time after 2 a.m. Urban understood that the murder was alleged to have occurred at 1:30 a.m. Urban also reviewed the statement of Jessica Boyd and believed that it paralleled the testimony of Darrin McMullen and would not have helped defendant "even a little bit." Urban further testified that defendant never asked him to present any of these potential witnesses at his trial.

¶ 13 Following argument from the parties, the trial court denied defendant's motion for a new trial. In announcing its ruling, the trial court found that Freda Murray was not a credible witness. The court further found that Urban made good strategic decisions when he decided not to call the witnesses defendant identified in his motion for a new trial. The court concluded:

"But finally, the Court will make the specific finding that even if these witnesses were called at the time of the trial, it would not in any – it would not in even come close to changing the trial court's decision, the trier of fact's decision. It would not had [*sic*] changed my decision in any way, shape, or form. The decision would had [*sic*] been the same."

¶ 14 Defendant appealed, arguing only that he was not proven guilty beyond a reasonable doubt. This court affirmed defendant's conviction. *Dampier*, No. 1-07-2008. Defendant subsequently filed a postconviction petition raising numerous contentions of error, including the allegation that Urban rendered ineffective assistance of counsel and that appellate counsel was ineffective for failing to raise Urban's ineffectiveness on appeal. The trial court summarily dismissed defendant's petition and this appeal follows. On appeal, defendant argues only that his ineffective assistance of counsel claims had merit.

¶ 15 A petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a remedy for criminal defendants whose federal or state constitutional rights have been violated at trial or during sentencing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004) citing *People v. Towns*, 182 Ill. 2d 491, 502 (1998). However, a postconviction petition is not a substitute for a criminal appeal; issues that were raised and decided on direct appeal are *res judicata* and issues that could have been raised, but were not, are procedurally defaulted. See *Williams*, 209 Ill. 2d at 233. Procedural default, however, does not bar relief when the default

stems from the ineffective assistance of appellate counsel. *Id.* We review the first-stage summary dismissal of a postconviction petition, *de novo*. *People v. Douglas*, 2011 IL App (1st) 093188, ¶ 20, citing *People v. Hodges*, 234 Ill. 3d 1, 9 (2009).

¶ 16 The State raises two procedural challenges to defendant's petition. First the State argues that defendant's claim for relief is barred by *res judicata*. The State, however is incorrect. *Res judicata* does not apply because defendant did not litigate the issue of trial counsel's effectiveness on direct appeal. See *Williams*, 209 Ill. 2d at 233. The issue is procedurally defaulted by defendant's failure to raise it on appeal; however, that does not bar relief because defendant alleges that the failure to raise the issue was, itself, ineffective. *Id.* Second, the State argues that defendant's claim fails because he did not include affidavits from the witnesses trial counsel allegedly failed to interview. Ordinarily, this argument would have merit. However, there is no need for affidavits in this case because the proposed testimony is fully and adequately set forth in the record. Accordingly, we reject the State's procedural objections and turn to the merits of defendant's claim of ineffective assistance of appellate counsel.

¶ 17 Claims of ineffective assistance of appellate counsel are judged by the same standard as claims of ineffective assistance of counsel generally, the familiar two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Golden*, 229 Ill. 2d 277, 283 (2008). A petitioner must show that appellate counsel's performance fell below an objectively reasonable standard and that this failure prejudiced defendant, *i.e.*, there is a reasonable probability that, absent counsel's error, the appeal would have been successful. *Id.* A defendant must meet both prongs of the *Strickland* standard and a reviewing court need not consider the performance prong if the prejudice prong is lacking. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 27. The failure to raise a nonmeritorious issue on appeal results in no prejudice to a defendant. *Id.* at ¶ 28.

¶ 18 The question is whether, based on the record as it existed at the time of defendant's direct appeal, he would have been entitled to relief based on his claim of ineffective assistance of trial counsel, or, more accurately, whether the trial court properly denied his motion for a new trial on that basis. Although the parties fail to acknowledge that this shift in focus requires a similar shift in the standard of review, we must review the record in this case in light of the standard of review which we would have applied had defendant raised the issue in his direct appeal.

Defendant must do more than just present an arguable claim that he was denied the effective assistance of counsel, for he has already received the evidentiary hearing ordinarily sought in a postconviction petition. Instead, defendant was required to present an arguable claim that the trial court committed a clear abuse of discretion when it denied his motion for a new trial. See *People v. Abdullah*, 336 Ill. App. 3d 940, 949-50 (2002) citing *People v. Dixon*, 256 Ill. App. 3d 771, 778 (1993).

¶ 19 Defendant acknowledges that the trial court rejected defendant's ineffective assistance of counsel claim during the posttrial hearing. However, defendant argues that these claims were "ripe for challenge on appeal," and that "[i]t is arguable that the testimony of Boyd and Freda Murray would have changed the outcome of the trial." These arguments simply fail to recognize the burden defendant faces. He is required to establish not simply that the issue was ripe for review, but must meet the higher burden of showing that a reasonable probability exists that had the claim been raised the appeal would have been successful. Defendant cannot meet this burden. The trial court made clear findings that defendant's witnesses at the posttrial hearing were not credible and that their testimony would not have changed the outcome of the trial. Defendant has not shown how this finding constituted an abuse of discretion. The trial court was in a better position to view the witnesses and weigh their credibility and we must give significant deference to its findings. See *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Accordingly,

we cannot find that the trial court's denial of defendant's posttrial motion was a clear abuse of discretion. Therefore, defendant cannot establish prejudice as a result of appellate counsel's failure to raise the issue, and his postconviction petition raising that claim was patently without merit.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.