2012 IL App (1st) 100178-U

FIRST DIVISION
January 17, 2012

No. 1-10-0178

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 03 CR 23709
DARNELL WILSON,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Kevin M. Sheehan,
	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.

Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Dismissal of the defendant's postconviction petition at the first stage was proper: (1) failure of defense counsel to call alibi witnesses did not provide an arguable legal basis for the defendant's ineffective assistance of counsel claim, and (2) the affidavit of the defendant's witness recanting his trial testimony did not provide an arguable legal basis for his claim of actual innocence.

¶ 2 Shortly after 1 p.m. on June 26, 2003, a shooting incident occurred resulting in the deaths of George Holliday and Lesley Coppage and the wounding of Melvin Jefferson. The shootings stemmed from a rivalry between the residents of the Harold Ickes housing project (Ickes) and the former residents of the Prairie Courts housing project (Prairie Courts), who had been relocated to Ickes. Defendant Darnell Wilson, his brother, Donald Wilson, and four other men were charged by indictment with first degree murder, attempted first degree murder and aggravated battery with a firearm.[1] Following a bench trial, defendant Wilson was found guilty of the murders of Messrs. Holliday and Coppage and the aggravated battery with a firearm of Mr. Jefferson. The trial court sentenced defendant Wilson to natural life imprisonment for the murders and a concurrent term of six years for aggravated battery with a firearm. On direct appeal to this court, we affirmed his convictions and sentences. See *People v. Wilson*, No. 1-06-1347 (2008) (unpublished order under Supreme Court Rule 23).

¶ 3 On September 22, 2009, defendant Wilson filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122.1 *et seq.* (West 2008) (the Act)). In the petition, he alleged that his defense counsel was ineffective for failing to interview and call three witnesses who could have provided alibi testimony on his behalf. In support of his ineffective assistance of counsel claim, defendant Wilson attached the affidavits of two friends, Darrian Williams and Arthur Muldrow, and his mother, Brenda Wilson.

¶ 4 According to their affidavits, on June 25, 2003, Messrs. Williams and Muldrow were with defendant Wilson, drinking alcohol and talking about their childhoods. By 3 a.m. on June 26,

[1]The five codefendants are not parties to this appeal.

2003, all three men were heavily intoxicated. Since defendant Wilson's ability to walk was adversely affected by the alcohol, Messrs. Williams and Muldrow escorted him to his mother's apartment. Both Mr. Williams and Mr. Muldrow averred that they spoke to defense counsel before and during the trial to offer their testimony on defendant Wilson's behalf and furnished him with their telephone numbers and addresses. However, defense counsel never called them as witnesses.

¶ 5 In her affidavit, Ms. Wilson averred that defendant Wilson returned to her apartment around 3 a.m. on June 26, 2003, and that he was asleep until shortly after 1 p.m. on that date. She further averred that she informed defense counsel that she could verify defendant Wilson's whereabouts on the day of the murders, but he refused to call her as a witness.

¶ 6 Defendant Wilson also set forth a claim of actual innocence in his petition. In support of this claim, he attached the affidavit of Corey Strothers.[2] In his affidavit, Mr. Strothers averred his trial testimony, in which he identified defendant Wilson as the man he saw running after the shooting, was false. He further averred that his false testimony resulted from threats by Mr. Jefferson and Eddie Jackson to harm his children.

¶ 7 On December 4, 2009, the circuit court dismissed the petition as frivolous and patently without merit. Defendant Wilson appeals.

¶ 8 ANALYSIS

[2]While the name on the affidavit is "Strother," we will use "Strothers," the spelling found in the trial court record.

¶ 9 I. Standard of Review

¶ 10 We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 11 II. Discussion

¶ 12 In determining whether a postconviction petition is frivolous or patently without merit, the question before the court is whether the petition has no arguable basis in law or fact, meaning whether it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 17. As our review is *de novo* , "[w]e are free to substitute our own judgment for that of the circuit court in order to formulate the legally correct answer." *People v. Newbolds*, 364 Ill. App. 3d 672, 675 (2006).

¶ 13 A. *Ineffective Assistance of Defense Counsel*

¶ 14 We apply the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), to a defendant's claim that he received the ineffective assistance of counsel. *Hodges*, 234 Ill. 2d at 17. Under *Strickland*, "a defendant must show both that counsel's performance 'fell below an objective standard of reasonableness' and that the deficient performance prejudiced the defense." *Hodges*, 234 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 687-88). At the first stage of postconviction proceedings, a petition may not be summarily dismissed if " (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 15 Defendant Wilson claims it is at least arguable that defense counsel's performance fell below an objective standard of reasonableness because counsel failed to call three witnesses who

would have provided alibi testimony on his behalf. We disagree.

¶ 16 In reviewing defense counsel's performance under the first prong of the *Strickland* test, there is a strong presumption that counsel's performance fell within the wide range of reasonable professional assistance. *People v. Berrier*, 362 Ill. App. 3d 1153, 1166 (2006). In scrutinizing counsel's performance, a reviewing court must be highly deferential and careful not to judge the performance utilizing the benefit of hindsight. *People v. Deloney*, 341 Ill. App. 3d 621, 634 (2003).

¶ 17 Decisions concerning which witnesses to call at trial and what evidence to present are for defense counsel to make and, as matters of trial strategy, are generally immune from ineffective assistance of counsel claims. *Deloney*, 341 Ill. App. 3d at 634. Counsel's representation is not rendered incompetent even where a mistake in trial strategy or in judgment is made by counsel. *People v. Palmer*, 162 Ill. 2d 465, 476 (1994). "In fact, counsel's strategic choices are virtually unchallengeable." *Palmer*, 162 Ill. 2d at 476. "The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel fails to conduct any meaningful adversarial testing." *Deloney*, 341 Ill. App. 3d at 634.

¶ 18 In his opening statement, defense counsel outlined his trial strategy. The evidence would show that because defendant Wilson once lived at Prairie Courts, the Ickes faction mistakenly believed that he was member of the Prairie Courts faction, resulting in his misidentification. Defense counsel stated further as follows:

> "You're going to hear witnesses whose credibility you're going to have to question, Judge. And I would suggest by all of the evidence that you'll have plenty of reasonable

doubts as to the credibility of the witnesses.

I might add, Judge, that you're not going to have physical evidence, you're not going to have *** forensic evidence, you're not going to have statements. All you're going to have is that witnesses were members of the Ickes faction and *** misperceived that Darnell Wilson was somehow involved in the shooting, which he was not involved in."

¶ 19 Defense counsel's failure to call Messrs. Williams and Muldrow as witnesses was not objectively unreasonable. Their testimony would only have established that defendant Wilson was at home by 3 a.m. on June 26, 2003. Nothing in their affidavits established defendant Wilson's whereabouts at 1 p.m. on June 26, 2003, the time of the shooting. Therefore, defense counsel's decision not to call two witnesses who could not testify as to defendant Wilson's whereabouts at the time of the shooting did not satisfy the deficiency prong of the *Strickland* test. See *People v. Brown*, 371 Ill. App. 3d 972, 982 (2007) (even when taken as true, testimony in an affidavit was not unequivocally exculpatory where it did not account for defendant's whereabouts at the critical time period and contradicted the testimony of another witness).

¶ 20 According to her affidavit, Ms. Wilson informed defense counsel that she could testify as to defendant Wilson's whereabouts at the time of the shooting. Therefore, defense counsel was aware that she could provide defendant Wilson with an alibi. Where a possible alibi is disclosed to defense counsel, in accordance with *Strickland*, the court defers to counsel's judgment not to present the testimony. *Brown*, 371 Ill. App. 3d at 981. Moreover, defense counsel would have been justified in concluding that, as his mother, her alibi testimony on defendant Wilson's behalf would have carried little weight at trial. See *People v. Lacy*, 407 Ill. App. 3d 442, 466 (2011).

¶ 21 In view of the number of witnesses who placed defendant Wilson at the scene of the shooting with a gun in his hand, defense counsel's strategy was to emphasize the evidence that no one actually saw the defendant shooting at the victims and to discredit the witnesses by emphasising the rivalry between the residents of Ickes and the former residents of Prairie Courts, that resulted in his misidentification. The proposed alibi testimony would not have furthered defense counsel's trial strategy, where two of the witnesses could not testify as to his whereabouts at the time of the shooting and the other witness was his mother.

¶ 22 We conclude that the failure to call the alibi witnesses did not satisfy the deficiency prong of the *Strickland* test. Thus, there was no arguable legal basis for defendant Wilson's ineffective assistance of counsel claim.

¶ 23 B. *Actual Innocence*

¶ 24 A postconviction petition may allege a claim of actual innocence based on newly discovered evidence. *People v. Morgan*, 212 Ill. 2d 148, 154 (2004). In determining whether the circuit court erred in summarily dismissing defendant Wilson's claim of actual innocence, again the question before us is whether the claim is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 17. The procedure for a successful assertion of a claim of actual innocence is set forth below.

> "To win relief under that theory, the evidence adduced by the defendant must first be 'newly discovered.' That means it must be evidence that was not available at defendant's original trial and that the defendant could not have discovered sooner through diligence. The evidence must also be material and noncumulative. In addition, it must be of such

conclusive character that it would probably change the result on retrial." *Morgan*, 212 Ill. 2d at 154.

¶ 25 In support of his claim of actual innocence, defendant Wilson submitted an affidavit from Corey Strothers. At trial, Mr. Strothers identified defendant Wilson as the man he saw running parallel to him down an adjacent fire lane minutes after the shooting. Mr. Strothers further testified that he saw nothing but a towel in defendant Wilson's hand. In his affidavit, Mr. Strothers averred that:

"I never saw Darnell Wilson running the back lane after the shooting ***. The same night of the shooting, several guys that hung out on 22nd and State Street in the Harold Ickes Projects came to my apartment ***with guns in their hands threatening me to sign false statement on Darnell and Donald Wilson. The two people that came into my apartment with guns were *** Eddie Jackson and ***Melvin Jefferson *** they told me that since they did not know who was responsible for the killing of their two friends *** Leslie Coppage and ***George Holliday that everybody that were friends with them was coming together to put forth people names that were formal residents of Prairie Courts Housing Projects, who they assumed were responsible for the killings *** even if they were not involved. I did not want to make any false statement against Darnell and Donald but [Mr. Jackson and Mr. Jefferson] told me they already had a story made up for [co-defendants, Youngblood and Poole] and they needed me to make up a story on them since they were formal resident of the Prairie Courts Projects. Everyone else were saying that people from the Prairie Courts were responsible for killing their friends and if I did

not make up a story as well, they threatened to do harm to my children, so I complied, but only for the safety of my children."

¶ 26 Even if we were to determine that defendant Wilson could not have discovered the reason for Mr. Strothers's false testimony at trial earlier, the Strothers affidavit is not material to the issue of whether defendant Wilson was actually present at the scene. Mr. Strothers stated only that he did not see defendant Wilson at the scene; he did not state that defendant Wilson was not there, and his proposed testimony did not corroborate defendant Wilson's claim that he was at his mother's apartment at the time of the shooting. Such testimony would be cumulative to what had already been presented as neither George Lawson nor William Chambers testified to seeing defendant Wilson in the area of the shooting. See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) ("Evidence is considered cumulative when it adds nothing to what was already before the jury").

¶ 27 Further, the newly offered evidence would not be of such a conclusive character that it would probably change the result on retrial. Mr. Strothers could only testify that he did not see defendant Wilson at the scene of the shooting. Messrs. Jefferson and Jackson testified that they saw defendant Wilson running and firing the gun in his hand. Witness Anthony Hardy testified that he heard gunfire after which defendant Wilson ran passed him with a gun in his hand.

¶ 28 Evidence that merely impeaches the testimony of a State's witness is an insufficient basis for granting a new trial. *Ortiz*, 235 Ill. 2d at 335 (citing *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997)). According to Mr. Strothers's affidavit, no one knew the identity of the shooters. His false testimony against defendant Wilson was the result of threats by Messrs. Jefferson and

Jackson, who were going to name codefendants Youngblood and Poole. However, he did not state in his affidavit that Messrs. Jefferson and Jackson were going to name defendant Wilson. In a retrial of this case, Mr. Strothers's testimony that Messrs. Jefferson and Jackson wanted him to falsely name defendant Wilson would merely impeach their testimony and would not change the result on retrial.

¶ 29 Defendant Wilson's reliance on *People v. Sparks*, 393 Ill. App. 3d 878 (2009), is misplaced. There the reviewing court found that the defendant's actual innocence claim had an arguable basis in fact and law, based on an eyewitness who would testify that the deceased was the aggressor in the fatal encounter with the defendant. The eyewitness had been threatened by the deceased's companion not to come forward with her evidence. Since the defendant and the deceased's companion presented conflicting versions of the incident, the court found that it was at least arguable that the testimony of an uninvolved eyewitness would have changed the outcome of the trial. Unlike the proposed eyewitness testimony in *Sparks*, it is not arguable that Mr. Strothers's proposed testimony that he did not see defendant Wilson immediately after the shooting would change the result in this case. The fact that Mr. Strothers did not see defendant Wilson would not conclusively establish that defendant Wilson was not present at the scene or did not participate in the shooting. Since defendant Wilson failed to satisfy the evidentiary requirements set forth in *Morgan*, there was no arguable legal basis for defendant Wilson's claim of actual innocence.

¶ 30 As there was no arguable legal basis for defendant Wilson's ineffective assistance of counsel claim or his actual innocence claim, the summary dismissal of defendant Wilson's

postconviction petition was proper.

¶ 31 Affirmed.