2012 IL App (1st) 101601-U

No. 1-10-1601

FIFTH DIVISION
June 22, 2012

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TONY WILLIAMS, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 99 CR 6194 (03) Honorable Arthur F. Hill, Jr., Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Joseph Gordon and McBride concurred in the judgment.

ORDER

¶ 1 **HELD:** Counsel's refusal to present a motion to suppress did not constitute ineffective assistance of counsel where counsel believed defendant would give inconsistent and possibly perjured testimony at the hearing.

¶ 2 Tony Williams appeals from the trial court's second stage dismissal of his post-conviction petition. Williams claims that his post-conviction petition makes a substantial showing

that his trial counsel was ineffective because his statements to police were involuntary and, had his attorney presented a motion to suppress statements to the court there is a reasonable probability the trial court would have granted it. Williams also claims his counsel was ineffective for his failure to call Roosevelt Clay as a witness. Williams claims Roosevelt Clay's testimony would have established he was not present at the scene of the robbery and murder. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant-appellant Tony Williams, along with co-defendants Jerry Clay and Roosevelt Clay, were each charged with three counts of first degree murder and one count of armed robbery for an offense which occurred on December 22, 1998. Following a jury trial in the circuit court of Cook County, Williams was convicted of first degree murder and armed robbery and sentenced to concurrent terms of 50 years and 30 years in the Illinois Department of Corrections.

¶ 5 In Williams' direct appeal, we affirmed the convictions but remanded the cause to the trial court for resentencing and a "clear statement of reasons" for disparate sentences with one of his co-defendants. *People v. Williams*, No. 1-01-4305 (2004)(unpublished order under Supreme Court Rule 23).

On remand, the trial court conducted a hearing and then sentenced Williams to the same term of imprisonment. Williams appealed and we vacated his sentences and remanded the cause to the trial court for resentencing to consecutive terms and to correct the mittimus to properly reflect Williams' credit for time spent in presentence custody. *People v. Williams*, No. 1-06-1473 (2008)(unpublished order under Supreme Court Rule 23).

¶ 6 On November 12, 2008, the trial court resentenced Williams to consecutive terms of 50 years and 6 years imprisonment. Williams appealed again and the State Appellate Defender, citing *Anders v. California*, 386 U.S. 738 (1967), sought leave to withdraw from the case because it lacked arguable merit. We granted the appellate defender's motion and affirmed the trial court. *People v. Williams*, No. 1-08-3508 (2010)(unpublished order under Supreme Court Rule 23).

¶ 7 Proceedings in The Trial Court

¶ 8 Prior to trial, Williams' counsel filed a motion to suppress Williams' statements to police. In the motion, Williams claims that his confession was coerced by Chicago police who physically abused him during an interrogation at the Kent County jail, in Grand Rapids, Michigan. At a hearing on the motion, Williams' trial counsel withdrew it after he stated in court that he discovered an inconsistency leading to an "ethical quandary."

Williams' trial counsel expressed his concern to the trial court that if he proceeded to hearing with the motion, it may be a false pleading. At the hearing, Williams' trial counsel stated:

> "I feel compelled not only as a practical matter, but as an officer of the court to withdraw the motions at this time, the reasons being I am now, after discussing – talking again with my client, I'm receiving information which is radically inconsistent with the allegations that were made in the motion.
>
> And I think to proceed on those motions at this time, I would knowingly be presenting something to the court which I have good reason to believe is false.
>
> ***
>
> [T]here's an inconsistency which I – and the motion alleges that the statement was taken – signed in Kent County up in Michigan on a certain date. And that is what the statement indicates; however, my defendant advises me of a different time, different date and different place.

> Approximately seven day – five day difference. I just don't – don't want to be put in a position of possibly offering inconsistent evidence to the Court."

¶ 9 Williams' counsel filed and presented for hearing a second motion to suppress in which Williams alleged he did not understand the wording of the *Miranda* warnings given to him. The second motion was eventually denied by the trial court.

¶ 10 The following evidence was then presented at trial. Witnesses Sonja Boyar and Lisa Francis were employed at the 21st and Ashland Currency Exchange, located at 2023 S. Ashland Ave., in Chicago. On the morning of December 22, 1998, Boyar and Francis observed three men enter the store for some small transactions then linger outside the store. At 10 a.m., an armored truck driven by Terrance Madden and Robert Kaesberg arrived at the currency exchange. Madden exited the vehicle carrying a green-colored bag, called a "cold bag." Inside the bag were keys, paperwork and a tan-colored "lock bag," containing $60,000 in cash.

¶ 11 As Madden approached the door to the currency exchange, one of the three men met him at the door, pulled out a gun, pointed it at Madden's head and shot him in the face. Boyar threw herself onto the floor while Francis called 911. Kaesberg

heard the shot and observed the man leave while carrying the cold bag. The man crossed the street and entered a blue Honda occupied by other people and sped off. Madden died at the scene.

¶ 12 Police recovered a change purse at the scene containing a birth certificate, a social security card, and a pawn receipt all with the name Jerry Clay on them, along with a temporary registration permit for a 1988 Chevy van with the name Theodis Coleman on it and a yellow piece of paper with the name "C-Note" and a telephone number.

¶ 13 Police were able to locate Clay's address through the items in the change purse. Police set up surveillance of Jerry Clay's address. Police officer Fowler testified that during his investigation on the day of the offense, he observed Jerry Clay drive up in a vehicle and enter the house. Later he saw Roosevelt Clay come out of the same house and enter an automobile. Subsequently, Jerry Clay came out of the house and had a conversation with the people in the car that was occupied by Roosevelt Clay and others. Shortly thereafter, police took both Roosevelt and Jerry Clay into custody. Police found $8,100 sewn into the lining of Roosevelt Clay's jacket.

¶ 14 Police later recovered the "cold bag" and "lock bag" taken during the shooting along with a black backpack at an off ramp of the Eisenhower Expressway. In the backpack was a letter

addressed to Veronica Clay. Defendant Williams' fingerprints were recovered from items in the bags.

¶ 15 Witness Patrice Smith, who has a child by defendant Williams, testified that in a telephone conversation, Williams told her that he was involved with the armored truck robbery but did not kill anyone. Smith told police that Williams called her at her friend Margaret Davis's house. Through Davis's phone records, police were able to track the calls from Williams to Grand Rapids, Michigan, where he was arrested by FBI agents.

¶ 16 Chicago police detectives then went to Grand Rapids, informed Williams of his *Miranda* rights and interviewed him.

¶ 17 Chicago police sergeant Dennis Keane testified for the State that he drove to Grand Rapids with two other officers after learning of Williams arrest. Sergeant Keane testified that when he initially questioned Williams after his arrest in Grand Rapids, Williams claimed he had not been in Chicago for four months. Williams initially said he did not know Jerry Clay but eventually admitted that he knew Clay, claiming Jerry Clay had shot him two year earlier. Williams maintained he had not been in Chicago for four months.

¶ 18 Sergeant Keane testified that he informed Williams that his fingerprints were found on documents in the "cold bag" taken from the victim in the currency exchange murder. Williams then

admitted to being in Chicago at the time of the murder.

¶ 19 Williams told police that he went to Veronica Clay's apartment on the day of the shooting but she was not there. Jerry Clay was there and he gave Williams a backpack filled with papers and told him to get rid of it. Williams said he left the apartment to meet a friend for a drink and threw the backpack out of the car window while driving on the expressway.

¶ 20 Sergeant Keane told Williams he did not believe him. Williams then admitted to being in the car at the time of the shooting. Williams claimed that he went to a home at 6640 Wolcott to get a ride home from a girl he knew who lived there. Williams said the Clays and Clyde Williams, who is also known as "C-Note," were all there and they agreed to give him a ride home. They then drove to the currency exchange where the shooting occurred. Williams said that after the shooting they drove to Veronica Clay's apartment where Jerry Clay gave Williams $1,500 and told him to get rid of the backpack.

¶ 21 After Williams gave his oral statement to the detectives, assistant state's attorney (ASA) Michael Falagario arrived in Grand Rapids to take Williams' statement in writing. ASA Falagario advised Williams of his *Miranda* rights, which he waived. According to the statement, Williams knew that Jerry was going to stick up the armored car and he acted as the look out

for the police.

¶ 22 Williams did not present any evidence. The jury found Williams guilty of first degree murder and armed robbery.

¶ 23 While awaiting resentencing after his first appeal, Williams filed a *pro se* post-conviction petition. Subsequently the trial court appointed counsel for him. Williams set forth several claims in his petition. Williams has narrowed his claims in this appeal. Williams alleges he made a substantial showing of ineffective assistance of counsel in his petition because: (1) his attorney failed to present a motion to suppress statements which were allegedly coerced by physical abuse at the hands of police, and (2) Williams' attorney failed to call co-defendant Roosevelt Clay as a witness because Roosevelt could have testified that Roosevelt was not with Jerry Clay and/or Tony Williams on the day of the robbery, and did not commit any crimes with them, thereby disproving the State's theory of the case against Williams.

¶ 24 Attached to the petition is Williams' affidavit in which he attests that his statements to police were coerced and that he signed a written confession after police beat him. Also attached is the affidavit of Roosevelt Clay in which Roosevelt alleges he was not with either Tony Williams and/or Jerry Clay on the date of the robbery. Williams also submitted copies of

medical reports which show that eight days after his arrest, Williams was treated in a hospital emergency room for spitting up blood. The State filed a motion to dismiss. The trial court granted the motion to dismiss on June 2, 2010. Williams then filed this timely appeal.

¶ 25 ANALYSIS

¶ 26 In this appeal, Williams argues that he made a substantial showing in his post-conviction petition that his trial counsel was ineffective because: (1) he did not present a motion to suppress his statements to police, and (2) he did not call Roosevelt Clay to testify in his defense.

¶ 27 The Post-Conviction Hearing Act (the Act) provides a means through which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). Under the Act, "Any person imprisoned in the penitentiary may institute a proceeding ***." 725 ILCS 5/122-1(a) (West 2010).

¶ 28 Proceedings under the Act are commenced by the filing of a petition in the circuit court where the original proceeding took place. 725 ILCS 5/122-1(b) (West 2010). Section 122-2 of the Act requires that a post-conviction petition "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2010). Only those

violations that were not and could not have been challenged during an earlier proceeding are properly raised and considered. *People v. Morgan*, 212 Ill. 2d 148, 153 (2004). The petition is required to have attached affidavits, records or other evidence to support its allegations or state why this evidence is not attached. 725 ILCS 5/122-2 (West 2010).

¶ 29 The Act provides for three stages of post-conviction proceedings in noncapital cases. *Pendleton*, 223 Ill. 2d at 471-72. At the first stage, the trial court has 90 days to review a petition and may summarily dismiss it if the trial court finds the petition frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2)(West 2010).

¶ 30 If the trial court does not dismiss the petition as frivolous or patently without merit within that 90-day period, the petition advances to the second stage and the trial court must docket it for further consideration and appoint an attorney for the defendant if he cannot afford one. 725 ILCS 5/122-2.1(b)(West 2010). At the second stage, the State may file responsive pleadings (*People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001)) or may move to dismiss the petition and the trial court determines whether the petition makes a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If the State moves to dismiss, the trial court may

hold a dismissal hearing but it is not required. *Id.*

¶ 31 If the trial court does not dismiss at the second stage, the proceedings advance to the third stage for an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *Pendleton*, 223 Ill. 2d at 472-73. At an evidentiary hearing, the trial court "may receive proof by affidavits, depositions, oral testimony, or other evidence" and "may order the petitioner brought before the court." 725 ILCS 5/122-6 (West 2010).

¶ 32 This is an appeal from the trial court's second stage dismissal under the Act. At the dismissal stage, all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385. The inquiry into whether a post-conviction petition contains sufficient allegations of constitutional deprivations does not require the circuit court to engage in any fact-finding or credibility determinations. *Id.* The Act contemplates that such determinations will be made at the evidentiary stage, not the dismissal stage, of the litigation. Due to the elimination of all factual issues at the dismissal stage, a motion to dismiss raises the sole issue of whether the petition being attacked is proper as a matter of law. *Id.*

¶ 33 When a trial court grants the State's motion to dismiss or otherwise dismisses the petition, "we generally review the

circuit court's decision using a *de novo* standard." *Pendleton*, 223 Ill. 2d at 473.

¶ 34 In order to prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness, and (2) counsel's deficient performance prejudiced the defense because without those errors, there was a reasonable probability his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382 (2007); *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 446 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Mistakes in strategy or tactics alone do not normally amount to ineffective assistance of counsel nor does the fact that another attorney may have handled things differently. *Ward*, 371 Ill. App. 3d at 434 (citing *People v. Palmer*, 162 Ill. 2d 465, 476 (1994)).

¶ 35 Because a defendant's failure to satisfy either prong of the *Strickland* test will defeat an ineffective assistance of counsel claim, we are not required to "address both components of the inquiry if defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. It is the defendant's burden to

affirmatively prove prejudice. *Strickland*, 466 U.S. at 693.

¶ 36 Williams claims the allegations in his petition along with an attached medical report, constitute a substantial showing that his confession was involuntary and that the representation provided by his trial attorney was ineffective because he failed to present a motion to suppress based upon the alleged physical abuse.

¶ 37 However, the record shows that Williams' trial counsel actually filed a motion to suppress Williams' statements based upon allegations of physical abuse, but counsel withdrew the motion after discovering an inconsistency leading to a stated "ethical quandary." Counsel stated there were inconsistencies between the police reports, his client's custodial statement, and the statements that Williams had made to him.

¶ 38 We note that in his petition, Williams did not deny that he met with his trial counsel to prepare for the motion to suppress. Williams also did not deny that his counsel learned that Williams was prepared to give testimony at the hearing concerning the dates, times and places of his interrogation and alleged physical abuse which were not consistent with the allegations in the motion. Moreover, Williams does not suggest his counsel was unreasonable in his belief that he would have presented inconsistent testimony or false pleading based on the

additional information he received in police reports or that counsel's reliance on the additional information to conclude Williams was preparing to testify falsely, was unreasonable.

¶ 39 Under *Strickland*, a defendant must show his attorney's actions constituted errors so serious as to fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-94. Courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 446 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). The Supreme Court has stated that the sixth amendment right of a criminal defendant to assistance of counsel is not violated when an attorney refuses to cooperate with the defendant in presenting perjured testimony at trial. *People v. Flores*, 128 Ill. 2d 66, 107 (1989)(citing *Nix v. Whiteside*, 475 U.S. 157, 173 (1986)).

¶ 40 Here, trial counsel made a conscious decision not to proceed at the hearing on a motion to suppress where counsel believed defendant would give testimony which was inconsistent with the allegations contained in the motion. Counsel made the decision that it would not help his client to present testimony which was at best inconsistent and which counsel believed could be possibly perjurious. The decision not to proceed with the motion was a matter of strategy and professional responsibility.

Matters of trial strategy or tactics alone do not normally amount to ineffective assistance of counsel nor does the fact that another attorney may have handled things differently. Counsel's strategic choices are virtually unchallengeable. *Ward*, 371 Ill. App. 3d at 434 (citing *Palmer*, 162 Ill. 2d at 476). As a result, we cannot say Williams' trial counsel was ineffective for withdrawing the motion. Since we have found that Williams did not meet his burden of establishing ineffective assistance of counsel in respect to the motion to suppress under the first prong of the *Strickland* test, there is no need to provide an analysis under the second prong. *Strickland*, 466 U.S. at 697.

¶ 41 Next, Williams claims his trial counsel was ineffective for failing to call Roosevelt Clay to testify in his defense. Attached to Williams post-conviction petition was an affidavit from Roosevelt Clay, who attested that he was indicted along with Williams for armed robbery and first degree murder. Roosevelt was found guilty of felony murder. Roosevelt attested that on the day of the shooting he was not with Jerry Clay or Tony Williams and he did not commit any crimes with his co-defendants.

¶ 42 Roosevelt Clay attested that he was coerced by police into making statements against Jerry Clay and Tony Williams. Roosevelt also attested that he is willing to testify to the statements in his affidavit. Roosevelt signed the affidavit well

after Williams' trial had ended.

¶ 43 In support of his claim that his trial counsel was ineffective for failing to call Roosevelt Clay as a witness, Williams cites *People v. Makiel*, 358 Ill. App. 3d 102 (2005). In *Makiel*, the defendant Daniel Makiel was convicted of murder and armed robbery. Defendants Sam Illich and Todd Hlinko were also arrested and charged in the same incident. Illich was acquitted in a separate trial which took place eight months before defendant's trial. *Id.* at 110. The key witness against defendant Todd Hlinko testified he committed the robbery with two other people, Sam Illich and Defendant. Makiel claimed in his post-conviction petition that his trial counsel was ineffective for failing to contact or present Sam Illich as a defense witness. *Makiel*, 358 Ill. App. 3d at 104-06. Illich stated in an affidavit that he was not with defendant or Todd Hlinko on the night of the shooting, in direct contradiction to Hlinko's testimony. *Id.* Illich's affidavit would have directly contradicted the State's key witness against defendant. *Id.* at 107.

¶ 44 The trial court dismissed Makiel's petition reasoning that Makiel's trial counsel would have had access to the transcripts of Illich's trial. The transcripts contained statements Illich made to police after his arrest. Illich's

statements were published at his trial. The statements placed Illich, Hlinko and defendant at the scene of the robbery at the time of the murder. *Id.* The trial court determined that since Makiel's trial counsel would have had access to the transcripts of Illich's trial, he would, thus, be aware that Illich's statements to police contradicted Illich's proposed trial testimony. Therefore, the court determined counsel's decision not to call Illich was trial strategy.

¶ 45 Illich's statement to police after his arrest was not part of the record at Makiel's trial. We found the trial court erred because in reaching its conclusion that defense counsel's decision not to call Illich was trial strategy, the trial court relied on the Illich's trial transcript which was not in the record. In the dismissal stage, the State may not introduce evidentiary materials not in the record to support a motion to dismiss and the trial court may not dismiss a petition based on facts outside the record. *Id.* at 111. Therefore, we found a third stage evidentiary hearing was necessary to resolve the allegations raised in defendant's petition. *Id.*

¶ 46 This case can be distinguished from *Makiel*. In *Makiel*, Illich's trial took place eight months before Makiel's trial and Illich was therefore available to be subpoenaed as a witness at defendants’s subsequent trial. In contrast, Roosevelt

Clay was tried jointly with Williams and he could claim his Fifth Amendment privilege against self-incrimination. Roosevelt Clay's affidavit did not state that he would have waived his Fifth Amendment rights to testify on behalf of Williams nor is there anything in the record to indicate Roosevelt Clay would have waived his Fifth Amendment rights and testify for Williams at his trial. It would have been improper for Williams' attorney to call Roosevelt to the stand to force him to assert that privilege. *People v. Human*, 331 Ill. App. 3d 809, 820 (2002).

¶ 47 However, assuming Roosevelt would have waived his rights against self-incrimination, counsel would not have called him as a witness because Roosevelt's proffered testimony is contradicted by evidence in the record. In Tony Williams' statement to police, he admits being with Roosevelt Clay on the day of the shooting, therefore, defendant Williams' own statements to police contradict Roosevelt Clay's statement that he was not with Williams on the date of the offense.

¶ 48 Roosevelt Clay also stated in his affidavit he was not with Jerry Clay. Police officer Fowler testified that during his investigation on the day of the offense, he observed Jerry Clay drive up in a vehicle and enter a house. Later he saw Roosevelt Clay come out of the same house and enter an automobile. Subsequently, Jerry Clay came out of the house and had a

conversation with the people in the car that was occupied by Roosevelt Clay and others.

¶ 49 If Roosevelt Clay had testified at trial that he was not with Jerry Clay on the day of the offense, Roosevelt's testimony would have been contradicted by Officer Fowler, because Fowler testified he saw Roosevelt and Jerry Clay together on the date of the offense shortly before they were both arrested. Trial counsel undoubtedly determined Roosevelt Clay's proferred testimony would be a detriment to Williams' defense because Clay's testimony is contradicted by other evidence in the record -- Williams' own statement and the testimony of Officer Fowler.

¶ 50 "We must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 446 U.S. at 689; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). We cannot say defendant has met his burden here to establish deficient performance of counsel as required by the first prong of the *Strickland* test. Therefore, we need not conduct an analysis under the second prong of the *Strickland* test, since we found Williams failed to meet his burden under the first prong. *Strickland*, 466 U.S. at 697.

¶ 51 CONCLUSION

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

1-10-1601

¶ 53 Affirmed.