2014 IL App (1st) 120372-U

No. 1-12-0372

SIXTH DIVISION
May 23, 2014

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. 99 CR 27710
	)	
FRANK BURRELL,	)	The Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Reyes concurred in the judgment.

O R D E R

¶1 *HELD*: Defendant was entitled to third-stage evidentiary review of his *pro se* postconviction petition and his supplemental postconviction petition where he made a substantial showing that his counsel was ineffective for failing to investigate and present an alibi defense.

¶2 Defendant, Frank Burrell, appeals the second-stage dismissal of his petition for relief pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2006)). Defendant contends the trial court erred in dismissing his petition where he made a substantial showing that

his trial attorney was ineffective for failing to investigate and present evidence to support an alibi defense. Based on the following, we reverse and remand for third-stage proceedings.

¶3 FACTS

¶4 Following a bench trial, defendant was convicted of first-degree murder and sentenced to 32 years' imprisonment. His conviction and sentence were affirmed on direct appeal. *People v. Burrell*, 1-03-0689 (May 24, 2005) (unpublished order pursuant to Supreme Court Rule 23).

¶5 The following facts were adduced at trial:

> "On July 7, 1999, Rene Battle was shot and killed while a passenger in a Chevy Tahoe owned and driven by her boyfriend, Marc Davis. The defendant was charged as the assailant with first degree murder and lesser offenses.
>
> * * *
>
> The State's theory at trial was the defendant, the driver of a white Chevy Beretta, pulled alongside Davis's Tahoe and fired two shots, killing Battle. Davis identified the defendant as the shooter, and Jerry Morton and Marshawn Hatcher testified they were with the defendant in the Beretta when the murder occurred. The defendant's theory was the State's witnesses were incredible. The defense maintained Morton and Hatcher were lying at the urging of Davis, the leader of their gang. The defendant did not testify and did not call any witnesses.
>
> Jerry Morton admitted at trial he went by numerous aliases, had several prior convictions, and jumped bail on a narcotics offense in McClain County.
>
> According to Morton, he and Hatcher were with the defendant in the Beretta from about 3 p.m. on July 7, 1999. The three men bought liquor and drove around drinking; Morton and Hatcher also smoked marijuana. At

approximately 10 p.m., the defendant noticed Davis's Tahoe near 51st Street and Blackstone. The defendant sped towards the Tahoe and tried to cut it off. The defendant pulled to the right of Davis's vehicle, rolled down his window, fired two shots, and sped off. The defendant dropped off Morton and Hatcher a block or two away.

Morton's testimony further disclosed that in October 1999, he made a statement memorialized in writing to the police implicating the defendant in Battle's murder. In February 2000, the defendant contacted Morton and asked him to 'change [his] testimony,' but Morton refused.

When Morton made his written statement to the police, he was facing 30 years' imprisonment for numerous narcotics offenses in McClain County. He also faced several charges in Cook County. All charges were dropped 10 days before Morton testified at the defendant's trial. The State asserted they were dropped by both counties because Morton was rendered a quadriplegic in an unrelated shooting several months prior to trial. The defendant's theory was the charges were dropped in exchange for his testimony.

When Marshawn Hatcher testified at the defendant's trial, he had numerous prior convictions and was serving six years for residential burglary. Because Hatcher could not remember any details about Battle's murder, including whether he was present when it occurred, the State substantively introduced two of Hatcher's prior statements--a handwritten statement he made to the police and testimony he gave before the grand jury. Both prior statements implicated the defendant in the murder. The underlying facts were similar to those testified to by

Morton. At trial, Hatcher maintained the prior statements were untrue and prompted by police officers' threats to charge him with Battle's murder.

Marc Davis testified that after he finished bike riding on the lakefront with Battle and his son on July 7, 1999, he was driving near 51st Street and Hyde Park Boulevard. Davis noticed a white, 'small boxy type' vehicle with only one working headlight quickly approaching. When Davis attempted to let the vehicle pass, it cut him off. When the vehicle pulled to the right of Davis's Tahoe, Davis recognized the defendant as the driver of the car and Morton and Hatcher as passengers. The defendant stuck his arm out of his window and fired two shots.

After the shooting, Davis noticed Battle was bleeding profusely and was unresponsive. He drove to a nearby hospital where Battle died.

At the hospital, Davis gave police officers a vague description of the shooter. He did not mention he recognized the defendant, Morton, or Hatcher 'because at that time it was a lot going on [*sic*], and [he] wasn't really sure what route [he] wanted to take.' He also did not mention he knew the offenders to Officer Qualls, whom he described as an 'acquaintance' and who drove Davis around that night in search of the offenders' vehicle. Davis denied being a 'big shot' in a gang, and asserted he had 'no knowledge' of Morton or Hatcher working for him." *People v. Burrell*, 1-06-1788, slip op. at 1-5 (Oct. 14, 2008) (unpublished order pursuant to Supreme Court Rule 23).

¶6 In 2006, defendant filed a *pro se* postconviction petition, alleging his trial counsel was ineffective for waiving his right to testify and for failing to investigate and present alibi witnesses. In his petition, defendant alleged he was prepared to testify that he did not drive the

vehicle on the date in question, he was not with Morton or Hatcher, he did not possess a handgun, and he did not shoot at Davis' vehicle. Defendant stated that, instead, he was at his part-time job at Filmack Studio until 8:30 p.m. and rode public transportation home. He arrived home around 10 p.m. and tended to his sick child. Defendant said he only left for a short time to borrow a thermometer from his neighbor, Cynthia Page. According to defendant, his friends, Mylan Mitchell and Anthony Wilson, as well as his father, Frank Malcolm, were at defendant's home too. Defendant alleged that seven witnesses, Mitchell, Wilson, Frank, Page, Dino Malcolm, defendant's uncle, Jeanne Malcolm, defendant's grandmother, and David Boone, would have supported his version of the events. In the petition, defendant stated that Frank and Dino were present at trial, but were not called to testify, and that Wilson and Boone were never interviewed by trial counsel. Attached to his petition were affidavits from Boone, Frank, Dino, and Jeanne. Defendant explained that he was unable to secure affidavits from Mitchell, Wilson, and Page because he did not know their whereabouts.

¶7 In his affidavit, dated January 6, 2006, Boone attested that on July 8 or 9, 1999, he was at a store near 53rd and Harper where gang members were known to congregate. Boone saw Davis meet with about 12 men and ask them where they were on July 7. Davis wanted to know "who tried to change him and for them to find out and get up with him and that there ain't going to be any rest until he found out who came at him."

¶8 In his affidavit, dated January 17, 2006, Frank attested that defendant arrived home from work just before 10 p.m. on July 7, 1999, where he remained tending to his sick child. Mitchell and Wilson were at defendant's home as well. According to Frank, he tried several times to contact trial counsel, but was unsuccessful. Frank also wanted to talk to the private investigator hired by trial counsel, but the investigator failed to attend two scheduled meetings. Frank

attested that he was never interviewed by the investigator or trial counsel. Frank attended defendant's trial and was ready to testify, but was never called. According to Frank, when he questioned counsel's failure to call witnesses or present evidence, counsel responded "If you don't like what I'm doing I'll quit." Frank also averred he obtained defendant's time card from Filmack Studios and gave it to Dino to give to trial counsel.

¶9 In his affidavit, dated January 16, 2006, Dino attested that he gave defendant's time card to trial counsel prior to trial. Dino also authorized trial counsel to use defendant's bond money to hire a private investigator. Dino was told by trial counsel that, after the investigator interviewed potential witnesses, counsel would decide whom to call. Dino arranged for two meetings between potential witnesses and the investigator, but the investigator failed to attend both meetings. Trial counsel retained $1000 of the money earmarked for the investigator.

¶10 In her affidavit, dated November 25, 2005, Jeanne attested that in October 1999, detectives came to her home looking to arrest defendant and asking whether he had access to her vehicle, a white Chevy Beretta. Jeanne told them defendant was not there, she had the only keys to the vehicle, and she did not let anyone borrow it. Jeanne also averred it was her habit to run errands on Wednesdays, her day off. On July 7, 1999, a Wednesday, she returned home with the Beretta around 8 p.m. and both of its headlights functioned properly.

¶11 The trial court summarily dismissed the petition, finding it was frivolous and patently without merit where the affidavits attached to the petition were provided by family members and, therefore, were "highly unlikely" to change the circumstances of trial. Defendant appealed. This court reversed, finding defendant's *pro se* petition met the low threshold required at the first stage of postconviction review. *People v. Burrell*, 1-06-1788, slip op. at 18-20. This court stated that "it is not the function of the trial court in addressing whether a *pro se* petition should

proceed to the second stage of proceedings to determine the credibility of the potential defense witnesses or whether their proffered testimony would have defeated the State's case." *Id*. at slip op. at 19. Consequently, we remanded the cause for second-stage proceedings. *Id*.

¶12 On remand, defendant was appointed counsel. Postconviction counsel filed a motion requesting that the trial judge recuse himself, arguing that the court had demonstrated favoritism toward the State's witnesses in its summary dismissal order. The trial court denied the motion to recuse. Postconviction counsel then filed a motion for substitution of judge on the same basis. The State filed a response and defendant filed a reply. The motion was transferred to another judge for consideration and argument. Ultimately, the motion was denied in a written order and the case was returned to the original judge.

¶13 Following discovery, postconviction counsel filed a supplemental petition and a Supreme Court Rule 651(c) certificate. The supplemental postconviction petition alleged trial counsel was ineffective for pressuring defendant to waive his right to a jury trial and for failing to investigate and present an alibi defense. Attached thereto were two affidavits, one from Robert Mack, owner-operator of Filmack Studios where defendant had been employed, and one from defendant, along with defendant's employee time card from Filmack Studios.

¶14 In his affidavit, Mack attested that his employee records, which were kept in the regular course of business, indicated that on the date in question, July 7, 1999, defendant worked as a janitor from 6:25 p.m. until 8:45 p.m. Mack attested that Burrell was free to leave when he finished his work and, therefore, defendant may have left slightly earlier than 8:45 p.m. As far as Mack knew, Burrell's handwriting appeared on his time card for the date. Defendant customarily "signed out" when he left and "punched in" when he arrived. Mack attested that he provided defendant's father, Frank, with a copy of the time card. Mack was not contacted by

defendant's attorney, but he would have testified on defendant's behalf had he been contacted. Mack would have testified that defendant was at work on the date in question at the times provided.

¶15 In his affidavit, defendant attested that he informed his attorney that he was at work on the date of the shooting and went home after work. Defendant told his attorney that he had his time card in his possession. According to the affidavit, defendant's trial attorney advised him that defendant's "background may be an issue if you testify. They are going to use it to discredit you." Defendant responded that "he did not care." During the course of trial, defendant asked his counsel when witnesses would be called on his behalf. Trial counsel responded, "Relax. I've got this covered." Defendant attested that he "always expected that an alibi defense would be presented. [He] also expected that David Boone would be called to rebut the testimony of Marc Davis regarding [the] identification of [defendant] on the day of the shooting." According to his affidavit, defendant was assured by his trial counsel that defendant would win his bench trial. Trial counsel said he was friends with the trial judge.

¶16 The State filed a motion to dismiss defendant's petition. Following arguments on the motion, the trial court dismissed defendant's petition. In concluding defendant failed to make a substantial showing of a violation of his constitutional rights, the trial court stated that defendant's contention related to his jury waiver was fatally undermined by the admonitions he made in court and his execution of the jury waiver. The trial court also found defendant failed to satisfy the *Strickland* standard for his claims of ineffective assistance of trial and appellate counsel. This appeal followed.

¶17 DECISION

¶18 Defendant contends this court should remand his postconviction petition for a third-stage evidentiary hearing because he made a substantial showing that his right to effective assistance of counsel was violated where trial counsel failed to investigate and present alibi evidence.

¶19 At the second stage of postconviction proceedings, counsel may be appointed for the defendant. 725 ILCS 5/122-4 (West 2006). After counsel has made any necessary amendments to the petition, the State may move to dismiss a petition or an amended petition. 725 ILCS 5/122-5 (West 2006). If the motion is denied, the State must answer the petition and the proceeding advances to the third stage of review wherein a hearing is held allowing the defendant to present evidence in support of the petition. 725 ILCS 5/122-6 (West 2006). Throughout second and third stage review, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). During the second stage of review, all well-pleaded facts not positively rebutted by the trial record are taken as true. *Id*. The trial court does not engage in fact-finding or make credibility determinations at the second stage of review. *People v. Coleman*, 183 Ill. 2d 366, 385. Fact-finding and credibility determinations are made at the evidentiary stage, which is the third stage of review. *Id*. We review the second-stage dismissal of a postconviction petition *de novo*. *Id*. at 387-88.

¶20 Defendant argues he is entitled to a third-stage evidentiary hearing to develop testimony from the five witnesses who provided affidavits in support of his alibi defense and to consider the time card attached to his petition. According to defendant, the witnesses and the time card demonstrate that he worked on the date of the incident and then returned home at the time of the shooting, which directly contradicts the trial testimony of the State's witnesses.

¶21 To present a successful claim of ineffective assistance of trial counsel, a defendant must allege facts demonstrating that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome of the trial, *i.e.*, that the defense counsel's deficient performance rendered the result of trial unreliable or the proceeding fundamentally unfair. *Id*. at 694. A defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984).

¶22 In reviewing an ineffective assistance claim, a court must ascertain whether, based on the circumstances, a counsel's assistance was reasonable. *Strickland*, 466 U.S. at 688, 695. The defendant must overcome the strong presumption that his attorney's conduct constituted sound trial strategy and fell within the wide range of reasonable professional assistance. *Id*. at 689. The reviewing court must also keep in mind that a defendant is entitled to competent, not perfect, representation and counsel's performance is to be judged based on the totality of conduct, not from isolated incidents. *People v. Morris*, 335 Ill. App. 3d at 70, 78.

¶23 Generally, a counsel's decision whether to present a witness is a strategic choice not challengeable on ineffectiveness grounds. *People v. Brown*, 336 Ill. App. 3d 711, 718 (2002). However, a counsel's strategic choices are unchallengeable only after a thorough investigation of the law and facts relevant to the particular case. *Id*.

> "Whether a defense counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. [Citation.] Attorneys have an

> obligation to explore all readily available sources of evidence that might benefit their clients. [Citations.] Defense counsel has a professional obligation, both legal and ethical, to explore and investigate a client's alibi defense. It is fundamental that this obligation necessarily requires discussion by defense counsel with the client regarding the alibi defense. Failure to conduct investigation and develop a defense has been found to be ineffective assistance. [Citation.] Failure to present available witnesses to corroborate a defense has been found to be ineffective assistance. [Citation.]" *Id.* at 79.

¶24 Here, defendant alleged that he informed trial counsel of his alibi defense, yet trial counsel failed to assert an alibi defense in any of the pretrial discovery responses as required by Supreme Court Rule 413(d). Trial counsel's knowledge of some of the alibi witnesses is confirmed by the record where he listed Wilson, Mitchell, and Malcolm as potential witnesses in discovery responses. Despite the State's allegation to the contrary, the record does not provide trial counsel's reasoning for not presenting the alibi defense. Defendant's affidavit states that trial counsel advised *him* not to testify because of his criminal background; however, the affidavit does not provide a record of any discussion regarding the alibi defense *per se* or the investigation of the other witnesses. The State repeatedly argues that trial counsel decided against presenting the alibi defense for "sound strategic reasons." The record, however, fails to support the State's conclusion. Trial counsel may have done so, but the record does not reflect the nature of the decision either way. See *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999).

¶25 Defendant did not provide affidavits from Mitchell or Wilson, his friends whom he claimed were with him at his home at the time of the offense. Defendant explained

that he was unable to obtain their affidavits because he could not locate them. See 725 ILCS 5/122-2 (West 2006) (a postconviction petition shall have attached thereto affidavits, records, or other supporting evidence, or shall state why the same are not attached). Defendant, however, did provide Malcolm's affidavit, in which Malcolm attested that he knew of defendant's whereabouts on the date in question, namely, that defendant arrived home just before 10 p.m. after working and tended to the needs of his sick daughter for the remainder of the night. Malcolm attested that he attempted to contact trial counsel several times to inform him of the exculpatory evidence and was present and available to testify at trial. Trial counsel never interviewed Malcolm. The State makes much of the fact that, in the affidavit, Malcolm states he "knew [his] son's whereabouts" instead of expressly stating that he was at home with defendant at the time in question. According to the State, Malcolm cannot support the alibi defense. We disagree. It is possible Malcolm could support an alibi defense, but we caution that such fact finding must be left to the trial court. Whether Malcolm was present at defendant's home and can verify the alibi defense are questions of fact that should be resolved at the evidentiary stage. See *Coleman*, 183 Ill. 2d at 385. Notwithstanding, we can think of no apparent strategic reason for trial counsel to not at least interview Malcolm.

¶26 Moreover, we question why trial counsel failed to investigate defendant's allegation that he was working on the night in question, which would have directly contradicted the trial testimony of Harris and Hatcher. To his amended postconviction petition, defendant attached Robert Mack's affidavit along with defendant's time card from the date in question. Mack attested that he employed defendant at Filmack Studios and that he would have been willing to testify that his records showed defendant worked

on the night of the shooting. The time card attached to the petition was for the week in question and contained an entry for "W," seemingly for Wednesday, July 7, 1999, showing defendant clocked in at 6:25 p.m. and left around 8:45 p.m. Although, as the State points out, the time card does not provide an alibi for the exact time of the shooting, this evidence does support defendant's version of the events. The record provides no rationale for trial counsel's failure to investigate the whereabouts of defendant throughout the date in question. We can think of no reasonable purpose to exclude testimony that would have directly contradicted two of the three witnesses offered by the State.

¶27 Furthermore, based on the record before us, we cannot surmise whether trial counsel made a strategic decision not to investigate and call David Boone as a witness or whether trial counsel was ineffective for failing to do so. Taking the affidavit as true, which we must, Boone averred that he overheard Davis, the State's primary witness, within two days of the shooting warning a group of 12 people that there would not "be any rest" until he discovered who "came at him" and "tried to change him." In other words, Boone overheard Davis attempting to learn the identity of the shooter. The trial evidence demonstrated that Davis did not identify defendant as the shooter immediately after the occurrence. Rather, Davis reported to the officer, with whom he had a relationship, that he was unable to recognize the shooter. Davis testified at trial that he initially withheld the identity of the shooter because he did not yet know how he wanted to handle the situation. Instead, Davis provided a vague description of the perpetrator. Then, nearly one month later, Davis identified defendant as the shooter to the police. Considering Boone's affidavit in light of Davis' trial testimony, we can think of no rational reason for trial counsel's failure to, at a minimum, investigate Boone's allegation.

Davis' statement included in Boone's affidavit would not have qualified as a hearsay exception because Davis testified at trial. See *People v. Munoz*, 398 Ill. App. 3d 455, 479 (2010) (state-of-mind exception to hearsay rule only available if the declarant is unavailable to testify). However, if trial counsel had investigated Boone's allegation, then Davis could have been cross-examined on the subject. Trial counsel's failure to investigate Boone resulted in a potential missed opportunity to further challenge Davis' credibility.

¶28 As to Dino and Jeanne, both attested that they were willing and available to testify on defendant's behalf, yet trial counsel failed to interview them. Dino attested that he informed trial counsel about potential alibi witnesses and authorized trial counsel to hire a private investigator with defendant's bond money. The investigator never interviewed any witnesses despite the fact that Dino arranged two meetings, which were attended by himself, Malcolm, Jeanne, Boone, and Ann Thomas. According to Dino's affidavit, trial counsel retained $1000 of the money issued for purposes of the private investigator. Jeanne attested that she owned a white Chevy Beretta and was the only person to drive the car on the date in question. While neither Dino nor Jeanne attested to defendant's whereabouts at the time in question, both demonstrated that trial counsel failed to investigate information that may have supported defendant's version of the events. In fact, Dino attested that trial counsel rejected efforts made by defendant's family to investigate witnesses on defendant's behalf. Again, based on the record before us, we see no rationale for trial counsel's failure to investigate Dino and Jeanne.

¶29 Our conclusion is supported by *Tate*, 305 Ill. App. 3d 607, a case cited by defendant. In *Tate*, the defendant filed a postconviction petition alleging his trial counsel was ineffective for

failing to call three alibi witnesses. *Id*. at 610. The court observed that "counsel may be deemed ineffective for failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." *Id*. at 612. On appeal, this court held the defendant was entitled to a third-stage evidentiary hearing because the affidavits of the potential witnesses, considered as true, supported the defendant's theory that he was misidentified and "there was no apparent strategic reason for not calling them to testify." *Id*. The *Tate* court recognized that defendant's attorney may have decided that the alibi witnesses would not testify truthfully or be persuasive because of their close relationship to the defendant; however, as a matter of law, the record did not reveal the counsel's reasoning. *Id*.

¶30 More recently, in *People v. Cleveland*, 2012 IL App (1st) 101631, this court remanded the cause for an evidentiary hearing on defendant's postconviction petition claiming ineffective assistance for failing to call alibi witnesses who were ready and willing to testify on the defendant's behalf. *Id*. at ¶60-61. We found the record failed to reveal any reasonable strategy "that may have been employed by counsel in calling no witnesses and presenting no evidence." *Id*. at ¶60. Instead, this court concluded that the defendant made a substantial showing of a constitutional violation by trial counsel's failure to investigate fully the possible testimony of exculpatory witnesses when, according to their affidavits, the witnesses presented themselves and could have provided an alibi for the defendant. *Id*. at ¶60-61.

¶31 Ultimately, we find that trial counsel's failure to investigate undermined defendant's ability to present an alibi defense. We, therefore, conclude that defendant made a substantial showing that he received ineffective assistance of counsel. Consequently, we remand this cause to the trial court for a third-stage evidentiary hearing.

¶32 As a final matter, we reject defendant's request to order the substitution of judge on remand. "[T]he judge who presided over the criminal trial should hear the postconviction petition unless it is shown that the judge is substantially prejudiced." *People v. Harvey*, 379 Ill. App. 3d 518, 522. Defendant has failed to demonstrate that the trial judge was substantially prejudiced; therefore, there is no valid basis upon which to order a substitution of judge.

¶33 CONCLUSION

¶34 We reverse the decision of the trial court dismissing defendant's *pro se* postconviction petition and supplemental postconviction petition. We remand this case to the trial court for a third-stage evidentiary hearing.

¶35 Reversed; remanded.