2017 IL App (1st) 151023-U

SECOND DIVISION
January 31, 2017

No. 1-15-1023

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. 04 CR 1554
	)	
JAMAL TAYLOR,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HYMAN delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant has failed to make a substantial showing that he was denied the effective assistance of trial counsel when he cannot establish how he was prejudiced by counsel's failure to present the testimony of certain witnesses and failed to provide the affidavits of other proposed witnesses. The circuit court did not err in denying defendant's *pro se* motions to supplement the motion to reconsider and to vacate the judgment and reopen postconviction proceedings because these filings raised new claims.

¶ 2 Defendant Jamal Taylor appeals from the dismissal of his petition for relief under the Post-Conviction Hearing Act. In his opening brief, Taylor contends that the circuit court erred in denying him relief when the court improperly "engaged in significant and extreme fact-finding" to determine that certain witnesses' testimony would not have altered the outcome of Taylor's trial. In an amended reply brief filed after this court permitted Taylor to proceed *pro se*, Taylor contends that the testimony of certain occurrence witnesses would "perfect and bolster" his alibi, impeach the State's witnesses and "set forth a sequental [*sic*] chronology of events that precisely established" Taylor's whereabouts on the day of the offense.

¶ 3 Taylor also contends that he was denied the effective assistance of trial counsel because counsel failed to perfect the impeachment of a witness at trial. Taylor finally raises a *pro se* claim of actual innocence based on newly discovered evidence.

¶ 4 We affirm. Taylor cannot show how he was prejudiced by his counsel's failure to prepare the trial witness. As to the individuals who Taylor claims could have testified contrary to the version of events given by an eye-witness at trial, none of the individuals was present at the shooting and to conclude that their testimony would have caused the trial court to discount the three witnesses who were there, and identified Taylor as the shooter, injects speculation. Finally, as to the new evidence, it must support a preexisting claim in the petition, and the new evidence is unrelated to any preexisting claim raised in Taylor's *pro se* postconviction petition, supplemental petitions, or amendments. In addition, Taylor's claims of actual innocence were never considered by the circuit court, and he cannot now raise them on appeal.

¶ 5 Background

¶ 6 After a bench trial, the circuit court found Taylor guilty of first degree murder and two counts of attempted murder. The circuit court sentenced Taylor to 55 years in prison for the murder conviction and to 28 years in prison for each of the attempted murder convictions, all sentences to run consecutively. Taylor's convictions and sentences were affirmed on direct appeal. See *People v. Taylor*, No. 1-07-0027 (2008) (unpublished order under Supreme Court Rule 23).

¶ 7 In 2009, Taylor filed a *pro se* petition for postconviction relief alleging that he was denied due process when the State knowingly used at trial the perjured testimony of witnesses Anthony Hocker and Claude Bowman and when trial counsel failed to present the testimony of Rose Roddy, Charnell Harris, Ruby Taylor (Taylor's mother), Taylor's parole officer, and a police officer who allegedly ticketed Taylor on December 10, 2003, the day of the shooting. Attached to the petition were the supporting affidavits of Roddy, Bowman, and Harris, as well as certain police reports and records from AMS Correctional Services. See Post-Conviction Hearing Act (the Act), 725 ILCS 5/122-1 *et seq*. (West 2008).

¶ 8 Roddy's affidavit stated that trial counsel put her "on the stand" without interviewing her first, never asked her what her testimony would be, and never discussed with her the "abuse and threats" she received from the police who forced her to sign "false statements" against Taylor. Bowman's affidavit stated that the police threatened and beat him for three days to coerce him into making statements that were false, and he was not with Taylor on the day of the shooting. Harris's affidavit stated (i) she picked Taylor up at his mother's house between 11:15 and 11:30 a.m. on December 10, (ii) they were pulled over and ticketed by a Chicago police officer around 11: 50 a.m., and (iii) were together until 1 p.m. when Taylor's ride picked him up. Harris further

stated that she told trial counsel the "same thing," and that counsel told her that he would "get in contact" but never did.

¶ 9 Taylor then filed a *pro se* motion to amend his postconviction petition, and later filed a *pro se* motion to supplement the postconviction petition. In support of the motion, he attached the affidavit of his mother, stating that Taylor arrived at her home between 8 and 9 a.m. on December 10, came to her workplace between 11:15 and 11:30 a.m. to drop off her house keys, and left there after 5 to 10 minutes.

¶ 10 Taylor filed a second *pro se* motion to supplement the postconviction petition about a year later. The petitions were docketed and postconviction counsel was appointed. In March 2012, Taylor filed a *pro se* waiver of appointed counsel for postconviction relief and application to proceed *pro se*, alleging that postconviction counsel was "substandard." The circuit court permitted Taylor to proceed *pro se.*

¶ 11 In May 2012, Taylor filed, *pro se,* an amended petition for postconviction relief with a supporting memorandum of law alleging (i) the State withheld exculpatory evidence and presented false evidence at trial, (ii) trial counsel failed to present a "valid alibi defense" and to impeach witnesses with evidence in his possession, and (iii) appellate counsel failed to raise meritorious issues on direct appeal. In pertinent part, the petition alleged that detectives contacted Taylor's parole officer and verified that Taylor met with the parole officer from 10:24 a.m. to 11:15 a.m. which contradicted Bowman's testimony that Taylor was with him from 9 a.m. until 1:50 p.m. The petition further alleged that the State knowingly used Bowman's perjured testimony and the "tainted" testimony of Anthony Hocker. Attached to the petition were the supporting affidavits of Roddy, Bowman, Harris, and Taylor’s mother that had been attached to

previous filings. Also attached were documents from AMS Correctional Services showing that Taylor and his parole officer met on December 10, and documents indicating that Taylor received a ticket on December 10, at 11:50 a.m.

¶ 12 In June 2012, Taylor filed a *pro se* motion to supplement the amended postconviction petition to allege that the indictment and sentence were void because the legislature violated parliamentary rules during debate on the bill that became Public Act 80-1099. The State then filed a motion to dismiss. Taylor filed a *pro se* response and a motion invoking the Supremacy Clause of the United States Constitution. He also filed a *pro se* motion to supplement the amended postconviction petition with trial records. On October 18, 2012, the circuit court heard argument on the motion to dismiss. Taylor appeared *pro se* and argued. The court verified that Taylor was proceeding on the amended postconviction petition filed in May 2012, the supplemental argument regarding Public Act 80-1099, the motion invoking the Supremacy Clause, the State's motion and Taylor's response, and the motion to supplement the record with trial records.

¶ 13 On January 24, 2013, the trial court granted the State's motion to dismiss in a written order. Taylor, who was present in court, stated that he intended to file a motion for reconsideration. The half-sheet reflects that Taylor later requested, and was appointed, counsel for the motion to reconsider. On December 2, 2013, Taylor filed a *pro se* waiver of appointed counsel for motion to vacate judgment for postconviction relief and application to proceed *pro se*, and a motion to reconsider. Private counsel entered an appearance, and withdrew a few months later.

¶ 14 Taylor then filed a *pro se* "Motion to Vacate Judgment, and To Re-Open P.C. Proceedings based on newly discovered Evidence, and to Raise an Additional Claim based on this Newly Discovered Evidence," to which he attached the affidavit of Anthony Hocker. According to Hocker, he did not see the face of the man with the hood, and that at a hospital he gave a description to detectives of the shooter as 5'9" with a stocky build. Hocker further stated that on December 21, 2003, he viewed a photographic array and line-up at Area 4. Although he told detectives that he did not see the shooter's face, detectives insisted that Taylor was the shooter and that Dixon had already identified Taylor. Hocker "just went along with the detectives" and "testified untruthfully" at trial. Hocker also stated that Taylor did not fit the "description of the person" who committed the crime as the shooter was "much taller" than Taylor.

¶ 15 On the day set for the circuit court to hear argument on Taylor's motion, Taylor asked to supplement his motion with an affidavit from Eric McCord as to what could be seen from the apartment window of one of the trial witnesses. The court asked the parties to first address Taylor's motion to reopen the postconviction proceedings. On June 24, 2014, the court denied Taylor's request to reopen the postconviction proceedings. The court then heard argument on Taylor's motion for reconsideration of its January 2013 order granting the State's motion to dismiss and took the matter under advisement.

¶ 16 On December 10, 2014, Taylor filed, *pro se*, "A Motion to Supplement Motion for Reconsideration with a Claim of Actual Innocence" based on the newly discovered affidavit of Brian Weston. The affidavit stated that Weston at about 2 p.m. on the day of the shooting he was selling marijuana in the area when he saw a man, about 5' 10," wearing a grey hooded sweatshirt.

The man was not Taylor. Weston added that he learned that Taylor was convicted of the victim's death in 2013 when he "ran into" Taylor.

¶ 17 On December 11, 2014, the court told Taylor that it was not allowing him to supplement the motion for reconsideration that was "already before the Court." On February 26, 2015, the trial court denied Taylor's motion. Taylor now appeals.

¶ 18 Analysis

¶ 19 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his or her constitutional rights in the proceedings that resulted in conviction. 725 ILCS 5/122-1 (West 2008); *People v. Davis*, 2014 IL 115595, ¶ 13. If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage where defendant may be represented by counsel, if requested (725 ILCS 5/122-4 (West 2008).

¶ 20 At the second stage of proceedings, the defendant has the burden to make a "substantial showing of a constitutional violation." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). This showing involves the legal sufficiency of a defendant's well-pled allegations of a constitutional violation which, if proved at an evidentiary hearing, would entitle defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. All well-pled facts in the petition that are not positively rebutted by the trial record are taken to be true. *Pendleton*, 223 Ill. 2d at 473. We review the circuit court's dismissal of a postconviction petition at the second stage of proceedings under the Act *de novo*. *Id.*

¶ 21 To prevail on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, "a

defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Because the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel (*People v. Enis*, 194 Ill. 2d 361, 377 (2000)), we "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies" (*Strickland*, 466 U.S. at 697). "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). Therefore, at the second stage of the proceedings, a defendant has the burden to make a substantial showing that a reasonable probability exists that the outcome of the proceedings would have been different had his or her counsel's performance been different. See *People v. Harris*, 206 Ill. 2d 293, 307 (2002).

¶ 22 Taylor first contends that trial counsel failed to properly prepare Rose Roddy to testify. Taylor next contends that he was denied the effective assistance of trial counsel because counsel "failed to present a viable corroborative testimony" at trial. Taylor argues that his testimony and the testimony of Harris, his parole officer Robert Anderson, and the officer who issued him a traffic citation on the day of the shooting would contradict the testimony of the State's witness Bowman and corroborate Taylor's testimony and version of events. Taylor also argues that the circuit court improperly "engaged in significant and extreme fact-finding" when it determined that the facts contained in his mother’s and Harris's affidavits would not have altered the outcome of the trial.

¶ 23 With regard to defense counsel's failure to adequately prepare Roddy to testify at trial, in her affidavit Roddy states that trial counsel did not interview her before she testified, did not ask what her testimony would be, and did not discuss her allegations of police misconduct with her. But, at trial Roddy was impeached with her grand jury testimony in which she testified Taylor asked her to lie about when she picked him up and to be his alibi. Therefore, Taylor cannot show how he was prejudiced by counsel's failure to prepare Roddy regarding her potential testimony.

¶ 24 With regard to Harris's and Taylor's mother's testimony, although they corroborated Taylor's version of events and contracted Bowman's testimony, neither woman was present at the time of the shooting. In other words, the shooting took place between 1:50 and 2 p.m., and neither Harris nor Ruby Taylor was with Taylor at that time.

¶ 25 Taylor is certainly correct that that testimony from his parole officer and the officer who allegedly gave Taylor a ticket would have further corroborated Taylor's version of events. Absent from the record is an affidavit from either of these potential witnesses. To sustain an ineffective assistance of counsel claim for failure to investigate or call a witness, the defendant's allegations must be supported by an affidavit from the witness containing the witness's proposed testimony. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 52. Without the affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant. *Id*. See also *People v. Johnson*, 183 Ill. 2d 176, 192 (1998) (to support claim of ineffective assistance of counsel for failure to investigate and call a witness, defendant must tender affidavit from individual who would have testified).

¶ 26 Ultimately, despite Taylor's arguments that the proposed testimony of Harris, his mother, his parole officer, and the officer who issued him a traffic citation would have contradicted

Bowman's testimony regarding events the morning of December 10, we cannot agree with Taylor's speculative conclusion that their contradictions to Bowman's version of events would have caused the trial court to discount the three witnesses who identified Taylor as the shooter at trial. See *Bew*, 228 Ill. 2d at 135 ("*Strickland* requires actual prejudice be shown, not mere speculation"). Thus, Taylor has failed to make a substantial showing that there is a reasonable probability that the outcome of his trial would have been different if trial counsel had presented the testimony of the alibi witnesses. *Domagala*, 2013 IL 113688, ¶ 35.

¶ 27 Taylor next contends *pro se* that he was denied the effective assistance of trial counsel because trial counsel failed to perfect Hocker's impeachment. Taylor argues that the initial description Hocker gave to officers at a hospital was that the shooter was 5'9" with a "stocky" build and contends that counsel should have presented the testimony of detectives who spoke to Hocker at the hospital to "perfect" this impeachment.

¶ 28 Taylor's trial counsel cross-examined Hocker regarding his initial description of the shooter to officers. Hocker testified that he stated the shooter was "maybe" 5'4" or 5'5" and shorter than him, and denied stating that the shooter was 5'9" with a stocky build. Taylor argues that trial counsel should have "perfected" this "impeachment" by presenting the testimony of detectives in rebuttal. Without affidavits from these detectives; however, this court cannot determine whether they could have provided testimony favorable to defendant. See *Brown*, 2015 IL App (1st) 122940, ¶ 52 (to sustain ineffective assistance of counsel claim for failure to investigate or call a witness, defendant's allegations must be supported by affidavit from that witness detailing proposed testimony). Again, Taylor has failed to make a substantial showing. See *Domagala*, 2013 IL 113688, ¶ 35.

¶ 29 Finally, in his *pro se* amended reply brief, Taylor raises a claim of actual innocence based on newly discovered evidence consisting of an affidavit from Anthony Hocker recanting his identification of Taylor as the shooter and an affidavit from Brian Weston in which Weston states that Taylor was not the shooter.

¶ 30 The record reveals these affidavits were not attached to Taylor's *pro se* postconviction petition or any of his supplemental filings. Instead, these claims of actual innocence were raised for the first time after the circuit court granted the State's motion to dismiss. Specifically, Taylor filed a *pro se* motion for leave to supplement the motion for reconsideration with a claim of actual innocence and a *pro se* motion to vacate the judgment and reopen postconviction proceedings. The circuit court denied these motions.

¶ 31 A defendant may file a motion to "reconsider," or to vacate, the circuit court's dismissal of a postconviction petition. See *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 62, citing 735 ILCS 5/2-1203(a) (West 2010). "[O]ne of the purposes of a motion for reconsideration is to bring to the court's attention newly discovered evidence. If the motion for reconsideration presents new evidence, it lies within the trial court's discretion whether to consider the new evidence." (Internal citations omitted). *Coleman*, 2012 IL App (4th) 110463, ¶ 62. Nonetheless, "regardless of whether the motion to reconsider presents new facts, [appellate courts] review *de novo* the trial court's application of laws to the facts." *In re Application of the County Collector of Lake County*, 343 Ill. App. 3d 363, 371 (2003).

¶ 32 The scope of a motion to reconsider is limited to new evidence related to a preexisting claim raised in the original petition. *People v. Coleman*, 2012 IL App (4th) 110463 is instructive.

There, the defendant filed a postconviction petition through counsel alleging trial counsel was ineffective for entering into a stipulation regarding forensic testing of evidence because the cocaine had been improperly tested. *Id.* ¶¶ 26-27. The petition claimed the actual amount of controlled substance was not proven. *Id*. ¶ 40. The circuit court summarily dismissed the petition as frivolous and patently without merit. The defendant then filed a *pro se* motion to reconsider the circuit court's summary dismissal, supported by an affidavit from a private investigator stating that the forensic scientist who tested the cocaine told him that he did not perform a purity test. *Id*. ¶¶ 38, 41. The trial court ultimately denied the motion to reconsider.

¶ 33 On appeal, the court addressed the question of which materials in the record it should consider in evaluating the summary dismissal. *Id*. ¶ 58. It held that the circuit court considered the affidavit in denying the motion to reconsider, and that it would do the same on appeal where the "affidavit was not a new claim; rather, it was additional evidence in support of the preexisting claim." *Id*. ¶¶ 61-63; see also *People v. Henderson*, 2014 IL App (2d) 121219, ¶ 21 (considering affidavits attached to motion to reconsider where they supported preexisting claim). In other words, although circuit courts have the discretion to consider new evidence at the motion to reconsider stage, that new evidence must support a preexisting claim in the petition and new issues should not be considered.

¶34 Taylor's *pro se* motion for leave to supplement the motion for reconsideration and *pro se* motion to vacate the judgment and reopen postconviction proceedings raised new claims of actual innocence based on the newly discovered evidence. Indeed, the first time that Taylor's claims of actual innocence were brought to the circuit court's attention was after the court granted the State's motion to dismiss. See 725 ILCS 5/122-3 (West 2008) ("[a]ny claim of

substantial denial of constitutional rights not raised in the original or an amended petition is waived").

¶ 35 As the new evidence was unrelated to any of the preexisting claims raised in Taylor's *pro se* postconviction petition, supplemental petitions, or amendments, we conclude that the circuit court properly exercised its discretion when it denied the *pro se* motion for leave to supplement the motion for reconsideration and the *pro se* motion to vacate the judgment and reopen postconviction proceedings. See *Coleman*, 2012 IL App (4th) 110463, ¶¶ 61-63. Taylor's claims of actual innocence were never considered by the circuit court, and he cannot now raise them on appeal from the court's dismissal of his postconviction proceeding. See *People v. Jones*, 211 Ill. 2d 140, 149-50 (2004) ("defendant's contentions of constitutional error, not raised in her original [postconviction] petition, were forfeited on appeal").

¶ 36 Affirmed.