2019 IL App (1st) 153568-U

THIRD DIVISION
November 20, 2019

No. 1-15-3568

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 05563
	)	
TOMMIE NICKLES,	)	
	)	Honorable
Defendant-Appellant.	)	Gregory Robert Ginex,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Ellis and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant failed to make a substantial showing of a due process violation where blood evidence purportedly lost or destroyed by the police was not material to defendant's self-defense claim, and where there was no showing of bad faith. Defendant also failed to make a substantial showing of ineffective assistance of trial counsel for failure to object to the blood evidence's destruction, where the underlying claim was nonmeritorious.

¶ 2 After a bench trial, defendant, Tommie Nickles, was found guilty of the armed robbery and aggravated battery of Keith Mori, and was sentenced to life imprisonment as a habitual offender. Defendant's conviction and sentence were affirmed on direct appeal. This appeal arises

from the 2015 dismissal of defendant's postconviction petition at the second stage of postconviction proceedings.

¶ 3 The facts elicited at trial are substantially set forth in the Rule 23 order arising out of defendant's direct appeal. Because the trial evidence is relevant to the issues set forth in this appeal, we will repeat the facts below.

> "Defendant was convicted of robbing the Stone Park Gold & Silver Exchange pawn shop on Mannheim road in Stone Park, Illinois, and of the aggravated battery of the shop's clerk, Keith Mori.
>
> Mori testified at trial that at about 7 or 7:15 p.m. on November 15, 2003, he was working alone when defendant arrived. He knew defendant because defendant had sold items to the pawn shop in the past. Defendant told Mori that he had some items in his car but needed something to prop open his trunk so he could unload the items. Mori let defendant through two security doors and into the back room. Defendant found a four to five foot steel carpenter's level on the ground and indicated that he could use it to prop open his trunk. Defendant walked through the first set of doors with Mori following behind him. Before defendant reached the second set of doors, he turned around and struck Mori on the head with the level. Mori described the area between the first and second doors as an 'air pocket' about five feet wide by six feet long. Defendant then struck Mori on the head with the level a second time. Mori grabbed defendant and they began punching each other. Defendant then struck Mori on the head with the level a third time. Mori fell down and grabbed a drill that was on the floor. Defendant stepped on Mori's hand and told him not to pick up the drill. Mori then

realized that blood was 'shooting' out of his forehead and he told defendant to take whatever defendant wanted. Defendant asked where the shop kept its money. Mori told defendant that the money was in the desk and defendant retrieved a money pouch from the desk drawer. Defendant dropped the level and left the pawn shop. Mori did not see defendant enter his car and did not know what type of car defendant had been driving. Mori used his cellular telephone to call his boss, Peter Casio, who lives in Elmwood Park, to tell him about the robbery. Casio's wife answered the call and told Mori that she would call 911. Soon thereafter, the police arrived as well as an ambulance that took Mori to the hospital. Mori told the officers that defendant robbed the shop and that he could identify defendant. Mori later identified defendant from a photo array. Mori further stated that about $1,000 or $1,500 was in the money pouch.

On cross-examination, Mori denied knowing an individual by the name of Debra Gartner. Although Gartner's name was on the pawn shop's ledger for selling merchandise to the shop that day, he stated that he did not know her or recognize a picture of her. Mori did not remember if defendant called the shop that evening before defendant arrived and Mori denied telling defendant that he was going to close the shop early because he and Gartner were going somewhere. He denied that Gartner was in the back room with him when defendant arrived. Mori also denied having a conversation with defendant about clearing some items out of the 'air pocket' so defendant could bring in his boxes. Mori stated that defendant did not bring any boxes into the shop that evening. Mori did admit that the 'air pocket' was approximately three feet wide, rather than five feet. He

further stated that as defendant hit him with the level, defendant did not swing sideways, but hit him on top of his head. Mori denied hitting his head on an object during the struggle.

Officer Eddie Salgado testified that when he arrived at the shop, Mori told him that 'Tommie' had committed the robbery. On cross-examination, Officer Salgado stated that in his initial police report he indicated that Mori told him that Mori handed the level to defendant.

Officer Christopher Pavini testified that when he arrived at the pawn shop, there was blood 'everywhere.' He retrieved the carpenter's level, which also had blood on it. The level measured about 26 or 27 inches in length. On cross-examination, he admitted that no samples of the blood were taken to determine whose blood it was.

The State rested its case and the defense informed the court that it would call Debra Gartner to testify. The State objected, arguing that she was not listed on defendant's answer to discovery. The court ruled that Gartner could testify only as to information that would rebut the testimony of Mori.

Debra Gartner testified that she had known Mori for several years and they had both a personal and business relationship. She stated that at the time of the incident, she would see Mori or speak with him almost every day and she sold items at the pawn shop to him 'hundreds' of times. Although Gartner knew Mori was married, she still had an intimate relationship with him. Gartner admitted to having a 'substantial criminal history' that included prior convictions for theft and

stated that she was currently on parole for retail theft. On cross-examination, Gartner admitted to possibly using numerous aliases.

Defendant testified that he was an employee of the pawn shop and that the manager, Michael Dituri would give him 'orders' for stolen merchandise, which he would pick up at a Home Depot store and bring to the shop. Defendant had done this over a hundred times. He would receive a third of the items' retail value from whomever was working at the shop. Defendant stated that on the day of the incident, Dituri called defendant and told him to go to the Home Depot in Lake Zurich. Defendant went to the store and picked up the items Dituri had requested. He called the pawn shop and spoke to Mori and told Mori that he had Dituri's order and that he was on his way to the shop. Mori told defendant to hurry because he had planned on closing early because business was slow. Defendant arrived at the pawn shop sometime after 7 p.m. and was driving a Toyota 4-Runner S.U.V. Both Mori and Gartner were at the shop. Defendant told Mori that he had Dituri's order and Mori told him to bring it in the shop. As defendant was bringing in his boxes of items, Gartner left, and Mori told her he would meet her at the bar next door in about half an hour. Mori and defendant totaled up the amount of defendant's items, which came to $2,000, of which defendant should have received $665. Mori told defendant he could only give him $400 because they were overstocked on the items. Defendant told Mori he would wait until Dituri was there to turn in the items and they argued for a few minutes. Mori became upset and said he was 'tired of these stupid n[***] going over his head when he makes a decision.' Defendant reached to retrieve his items and Mori

struck him across the back with an object. Defendant pushed Mori away and Mori rushed toward him. Defendant stated that they were fighting and 'wrestling' when Mori fell backwards and hit his head on a file cabinet. Mori grabbed an electric drill and cut defendant's hand. Defendant hit Mori with the level across the forehead. Defendant then took his items and left. He did not take a money pouch or anything else from the shop. When defendant returned home, he received a telephone call from Dituri. Dituri told defendant to call him back in a couple of days and to just let the incident 'blow over.' Defendant also stated that at that time, Dituri helped him rent an apartment by loaning him $600 for the security deposit. Defendant explained that it was common for the pawn shop to loan money to regular employees. Defendant admitted to having numerous prior convictions.

On cross-examination, defendant admitted that he did not contact police after the incident and did not go to the hospital. He also admitted that when he was arrested he gave police officers an alias.

On redirect, defendant explained that he did not go to the hospital because he did not have health insurance. Defendant also did not contact police officers because he did not think that they would believe him because of his prior convictions.

Dr. James Daleo testified for defendant as an expert in emergency medical care. Dr. Daleo testified that he reviewed Mori's emergency room medical records and concluded that it would be impossible for defendant to inflict a wound on the back of Mori's head in such a confined space as the 'air pocket.' On

cross-examination, he stated that his conclusion was based on his assumption that defendant and Mori were facing each other when Mori was struck. On redirect, Dr. Daleo further stated that the medical records indicated that Mori had only one laceration on the back of his head, and it would be very difficult, if not impossible, for defendant to reach up and over to hit Mori in the same spot, more than once, to create one laceration.

George A. Bertucci testified that he is employed as the deputy chief of police by the Village of Elmwood Park police department. He stated that he could not locate any record of a 911 call or a non-emergency call in reference to the incident at the pawn shop. On cross-examination, he stated that if a telephone call was made from Stone Park to 911, the call would go directly to the Stone Park police department.

The defense recalled Debra Gartner to testify. Gartner stated that on the day of the incident, she was at the shop at about 6 p.m., in the back room. Mori told her that Dituri had instructed him to wait for a delivery to come in and as soon as the delivery came in, Mori could leave for the night. Defendant then arrived at the shop. She had seen defendant at the shop several times. She left to go to the bar next door and saw defendant carrying boxes into the shop. On cross-examination, Gartner admitted that she had recently been arrested for retail theft and had contacted defense counsel from jail, but explained that she only asked him to contact someone for her because she was unable to do so.

In rebuttal, Michael Dituri testified that he was the manager of the pawn shop and that Peter Casio was the owner. He denied that defendant was an

employee of the pawn shop, and denied loaning defendant money for a security deposit for an apartment. Dituri denied ever giving defendant an 'order' to pick up stolen merchandise at Home Depot. He denied talking to defendant on the date of the robbery and denied instructing defendant to go to Home Depot to pick up some items. Dituri also denied calling defendant after the robbery and stated that he never had a conversation with defendant after the robbery. Dituri stated that he only knew defendant as a customer of the shop who would bring in merchandise to sell. On cross-examination, Dituri stated that defendant did business with the shop about 40 to 50 times and he had known defendant for about a year or less.

Christina Estrada also testified in rebuttal. She stated that she was working at the hair salon next door to the pawn shop on the date of the robbery with another woman, Guadalupe Saucedo. At about 7 p.m. that night, she heard a noise from the pawn shop. She went to lock the door to the salon and saw a man come out of the pawn shop. He was not carrying any items or boxes as he left the shop and, he drove away in a Toyota 4-Runner S.U.V.

Frank Birch testified in rebuttal that he was employed as a police dispatcher for the Village of Stone Park. He stated that on the date of the robbery, there were two calls to the Stone Park police department at about 7:22 pm. The first call was a female who requested a police officer for a loud noise at the pawn shop. The second call was from a female who identified herself as Guadalupe. She requested an officer at the pawn shop and indicated there had been a robbery and that the clerk was injured." *People v. Nickles*, 1-06-2979, 2-8 (March 25, 2008) (unpublished order under Supreme Court Rule 23).

¶ 4 After hearing all the evidence, the court found defendant guilty of armed robbery and aggravated battery. The court indicated that the evidence "boil[ed] down to a credibility issue" between Mori and defendant, and the court determined that Mori was the more credible witness. Thereafter, defendant was sentenced to a term of life imprisonment, with the court noting that such sentence was mandatory based on defendant's criminal background, which included two separate prior Class X convictions.

¶ 5 On direct appeal, defendant raised several issues. Specifically, defendant contended that

> "(1) he was not proven guilty beyond a reasonable doubt; (2) the State's discovery violations mandate[d] reversal; (3) the trial court acted improperly with respect to defendant's subpoena for the pawn shop's records; (4) the trial court erred in limiting cross-examination; (5) he did not knowingly waive his right to a jury trial; and (6) the trial court erred in denying his motion for a mistrial."

¶ 6 In rejecting defendant's claims, another division of this court found that the evidence supported the trial court's determination of defendant's guilt beyond a reasonable doubt. It rejected defendant's claim that the conviction rested solely on Mori's "[un]convincing" testimony, noting that "much of Mori's testimony was supported by additional testimony at trial whereas much of defendant's testimony was not." Regarding defendant's discovery claims, the appellate court found that the State did not violate discovery rules in failing to tender Mori's cell phone records, and the addresses of Dituri and Estrada. The appellate court found that defendant had, in fact, been tendered Mori's cell phone records and Dituri's address, and that Estrada was called as a rebuttal witness and the prosecutor did not form the intent to call her until after defendant testified. The appellate court also found no support for defendant's claim that the trial court acted improperly with respect to defendant's subpoena for the pawn shop's records, where

the trial court had limited the scope of the subpoena to the day of the robbery, and there was no evidence that the State had not tendered all documents it received pursuant to the subpoena. The appellate court further found that it was not error for the court to limit counsel's questioning of Mori on cross-examination where the questions in counsel's offer of proof were not relevant, and that there was no support for defendant's claim that he was prevented from making a knowing jury waiver. Finally, the court determined that defendant's claim that the trial court erred in denying his motion for a mistrial was insufficiently developed to permit appellate review. *Nickles*, 1-06-2979, 9-21 (March 25, 2008) (unpublished order under Supreme Court Rule 23). Defendant's petition for leave to appeal to the Illinois Supreme Court was denied. *People v. Nickles*, 229 Ill. 2d 649 (2008).

¶ 7 Thereafter, on June 26, 2009, defendant filed a *pro se* petition for postconviction relief, which alleged that his constitutional rights were violated "when the State knowingly used perjured testimony by Officer Pavini." Specifically, defendant contended that Officer Pavini's testimony that there was blood on the carpenter's level at the scene was contradicted by the report from the Illinois State Police Crime Lab indicating that there were "no latent impressions suitable for comparison" on the level. Petitioner further alleged that his trial and appellate counsel were ineffective for failing to "recognize" the perjured testimony. In support of his postconviction claims, defendant attached an evidence report for the level, the Illinois State Police Crime Lab report, a letter from an attorney regarding potential postconviction issues, and defendant's own unnotarized "affidavit."

¶ 8 On December 10, 2010, defendant filed a *pro se* motion for leave to file an amended postconviction petition. In the amended petition, defendant reiterated the claims in his initial petition, and added a claim that he did not knowingly and voluntarily waive his right to a jury

trial. Defendant asserted that his decision to waive his right to a jury trial was made under duress and threats by defense counsel. In addition to the attachments supporting his initial petition, defendant also attached his own affidavit and an affidavit of his father, Tomie Nickles, in support of the new claim.

¶ 9 On February 26, 2010, the postconviction court appointed counsel to represent defendant. On November 4, 2011, private counsel filed an appearance on defendant's behalf, and on January 2, 2015, private counsel filed an amended postconviction petition. In the amended petition, defendant alleged that he was denied due process when "the State destroyed crime-scene evidence that could have exculpated him." Defendant specifically contended that the Stone Park police "either did not secure or destroyed key pieces of evidence from the crime scene, including a saw covered in blood, blood samples from a metal cabinet, blood from a pool of blood under the saw, and a blood sample found on the carpenter's level." Defendant contended that the evidence would have impeached Mori's testimony, and corroborated defendant's trial testimony that he "only hit Mori in self-defense, [and] that Mori cut his head on the filing cabinet and not from being hit with the level." Defendant also claimed that trial counsel was ineffective for "failing to object to the destruction of exculpatory evidence," for "failing to articulate and argue a legal basis for the exclusion of the carpenter's level [based on an] [in]sufficient chain of custody to allow its admission," and for "failing to investigate and present evidence that would have corroborated [defendant]'s testimony." Regarding the last claim, defendant specifically maintained that counsel failed to utilize certain crime scene pictures when questioning Mori and defendant, and that counsel failed to call Tammy Moore, defendant's ex-girlfriend, who could have corroborated defendant's testimony regarding his employment by the pawn shop, and testified that defendant had a cut on his hand after the incident.

¶ 10 On June 24, 2015, the State filed a motion to dismiss defendant's amended postconviction petition. The State contended that defendant failed to make a substantial showing that his constitutional rights were violated by the "destroyed evidence." Specifically, the State asserted that defendant had failed to show that the evidence was "constitutionally material" pursuant to *California v. Trombetta*, 467 U.S. 479 (1984), or that the police acted in bad faith by failing to preserve the evidence pursuant to *Arizona v. Youngblood*, 488 U.S. 51 (1988). The State noted that the case "boiled down to who was the aggressor," that defendant and Mori provided "diametrically opposed testimony on that point," and that "[n]othing about the unrecovered evidence sheds any light on this critical issue." The State also contended that defendant failed to make a substantial showing that he was provided ineffective assistance of counsel, where he failed to show that the result of the proceedings would have been different had counsel objected to the destruction of evidence, and where defendant could not show prejudice from counsel's allegedly deficient performance.

¶ 11 On December 4, 2015, the court held a hearing on the State's motion to dismiss. After hearing arguments from both parties, the court granted the State's motion, finding that "[i]t doesn't necessarily follow that because blood is there and it is the defendant's that it supports his theory. It's pure speculation." The court further found that Detective Pavini's decision not to test the blood on the level did not "rise to the level of a deprivation of the defendant's constitutional rights." The court also stated that it was clear that counsel "cross-examined and argued, not only the level, but whose blood is it? The trier of fact had that issue to deal with." In granting the State's motion to dismiss, the trial court further stated:

> "Tammy Moore argues that, in essence, you know, she *** saw a cut on [defendant's] hand, and that supposedly is consistent with his assertion of self-

> defense. Cutting his hand is consistent with him being involved in a melee. *** [D]oes that violate due process? I don't believe it does.
>
> Whether there's blood on the saw, whether the defendant—his handprint is—there's blood on the floor, whether *** there's a lack of hair on the level, assuming those were admitted, the question that this Court has is, how do those show a self-defense?"

¶ 12 Regarding defendant's ineffective assistance of counsel claim, the court found that trial counsel called witnesses, made appropriate objections, argued the case properly, and called a defense expert to challenge Mori's version of events. The court then stated that it "d[id] not believe that the defendant has met [his] burden" of making a substantial showing of ineffective assistance of trial or appellate counsel. Accordingly, the court granted the State's motion to dismiss defendant's amended postconviction petition. Defendant filed a timely notice of appeal from that judgment on December 17, 2015.

¶ 13 In this court, defendant argues that the trial court erred in granting the State's motion to dismiss his amended postconviction petition. Defendant contends that he made a substantial showing that he was denied due process "when the State destroyed crime scene evidence that could have exculpated him," and that he made a substantial showing that trial counsel was ineffective for "failing to object to the destruction of exculpatory evidence, and *** failing to present evidence that would have corroborated [defendant]'s testimony." Because defendant has concentrated his arguments solely on these claims, we initially note that he has abandoned the remaining claims set forth in his amended postconviction petition and forfeited them for review. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2016)) provides a method for an individual seeking to challenge a conviction by alleging that it was the result of a substantial denial of federal or state constitutional rights, or both. "The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal." *People v. English*, 2013 IL 112890, ¶ 22. Postconviction proceedings are not a continuation of, or an appeal from, the original case. *People v. Flowers*, 208 Ill. 2d 291, 303 (2003). Rather, a postconviction petition is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial. *People v. Greer*, 212 Ill. 2d 192, 203 (2004).

¶ 15 The Act provides a three-stage process for adjudicating petitions. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage, the trial court determines whether the petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed during first-stage proceedings, it advances to the second stage. *Cotto*, 2016 IL 119006, ¶ 26.

¶ 16 During second-stage proceedings, the court may appoint counsel for an indigent defendant, who may amend the petition as necessary, and the State may file a motion to dismiss or an answer to the petition. 725 ILCS 5/122-4, 122-5 (West 2016). In the second stage of postconviction proceedings, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If such a showing is made, then the petition proceeds to the third stage, where the trial court conducts an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2012).

¶ 17 Issues that were decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal, but were not, are deemed waived. *People v.*

Enis, 194 Ill. 2d 361, 375 (2000). All well-pleaded facts in the petition and in any accompanying affidavits are taken as true. *Id.* at 376.

¶ 18 Here, the allegations of defendant's petition that are the subject of this appeal were dismissed at the second stage. Our review of a trial court's dismissal of a postconviction petition at the second stage without an evidentiary hearing is *de novo*. *People v. Dupree*, 2018 IL 122307, ¶ 29.

¶ 19 Defendant first asserts that he made a substantial showing that he was denied due process when the State destroyed certain crime scene evidence that could have exculpated him. Specifically, defendant complains that the police "either failed to secure or destroyed key pieces of evidence, including a saw covered in blood, a pool of blood under the saw, blood from a metal cabinet and blood found on the carpenter's level." The State responds that defendant did not make a substantial showing of a constitutional violation because the proposed evidence had no exculpatory value to defendant, and it would not have established who was the initial aggressor to support his claim of self-defense.

¶ 20 As an initial matter, however, the State argues that this issue is forfeited because defendant failed to raise it at trial or in his direct appeal. The State points out that trial counsel failed to object at trial that the blood at the scene and on the level was not preserved, and that defendant did not raise any such claims in his posttrial motion. Accordingly, the State contends that the issue would have been forfeited on appeal even had appellate counsel raised it. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). In defendant's reply brief, he does not address the State's forfeiture argument. Nevertheless, we need not reach the State's forfeiture argument, because we conclude that defendant's claim fails on the merits.

¶ 21 When reviewing a defendant's due process claim based on lost or destroyed evidence, our review depends on whether the evidence is materially exculpatory, or only potentially useful. *People v. Sutherland*, 223 Ill. 2d 187, 235-36 (2006). A denial of due process occurs if materially exculpatory evidence is withheld or destroyed and, in those cases, whether the State acted in good or bad faith is irrelevant. *Id*. at 236. On the other hand, if the State fails to preserve evidence that is merely potentially useful, our supreme court has applied the analysis set forth by the United States Supreme Court in *Arizona v. Youngblood*, 488 U.S. 51 (1988). *Sutherland*, 223 Ill. 2d at 236-37 (citing *In re C.J.*, 166 Ill. 2d 264, 273 (1995)). See also *Illinois v. Fisher*, 540 U.S. 544, 549 (2004) ("the substance destroyed here was, at best, 'potentially useful' evidence, and therefore *Youngblood*'s bad-faith requirement applies").

¶ 22 In this case, defendant claims, first, that the proposed evidence—"a saw covered in blood, a pool of blood under the saw, blood from a metal cabinet and blood found on the carpenter's level"—was "materially exculpatory," and accordingly, that the good or bad faith of the police is irrelevant to our analysis. He notes that the police were notified at the scene that Mori had been struck with the carpenter's level, and that there were no other eyewitnesses to the incident. Defendant claims that, in these circumstances, the police "were on notice that if the case went to trial it could include conflicting accounts whose credibility would be determined by physical evidence." Defendant further contends that the "destroyed forensic evidence was essential to [his] self-defense claim because it was the only way he could prove that the blood found on the level or at the crime scene belonged to him, not Mori." Implicit in defendant's argument is that (1) had the police tested the blood evidence, the results of the testing would have shown defendant's blood at the scene, and (2) such a result would tend to support defendant's version of events, and contradict Mori's.

¶ 23 Initially, we note that it is not known what the results of a blood test on those items would show. Accordingly, we are dealing here with evidence that is, at best, only potentially useful to defendant. See *Youngblood*, 488 U.S. at 58 (finding evidence not materially exculpatory where police failed to refrigerate the victim's semen-stained clothes or timely test the stains in a sexual assault case, noting that police do not have "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution"). In such circumstances, *Youngblood* controls, and the bad-faith requirement applies. See *Sutherland*, 223 Ill. 2d at 236.

¶ 24 Additionally, and even more importantly, we agree with the State and the trial court that the proposed evidence is not, in any way, "exculpatory," and that its evidentiary value is tenuous at best. Even assuming that the results of defendant's desired blood tests would show defendant's blood at the scene, such results would have no bearing on defendant's claim of self-defense, the question of who was the aggressor during the incident, or whether defendant stole the money from the pawn shop that was the basis of the armed robbery charge. The versions of events supplied by both defendant and Mori described a violent altercation between the two men—circumstances in which it would be unsurprising to find blood from both individuals—but both men disagreed as to who was the initial aggressor and who was acting in self-defense. In those circumstances, we fail to see how blood test results showing defendant's blood at the scene would exculpate him or otherwise provide support for his self-defense claim.

¶ 25 In the alternative, defendant contends that his due process rights were violated because the Stone Park police acted in bad faith by failing to preserve the blood evidence. See *Youngblood*, 488 U.S. at 58 ("unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process

of law."). "Bad faith 'implies a furtive design, dishonesty or ill will.' " *People v. Nunn*, 2014 IL App (3d) 120614, ¶ 17 (quoting *People v. Danielly*, 274 Ill. App. 3d 358, 364 (1995)).

¶ 26 Defendant contends that bad faith can be shown by providing either "evidence that the destroyed evidence had potential exculpatory value" or that the destruction of evidence "results from the violation of a government agency's standard procedures." Accordingly, defendant asserts that he showed bad faith on the part of the police because "the destroyed blood evidence had the potential to exonerate him." Because we have already found that the proposed blood evidence would not be material to defendant's self-defense claim, we also reject defendant's argument that he showed bad faith based on the evidence's evidentiary value.

¶ 27 Defendant also contends that he showed bad faith because the evidence technician who processed the scene "violated his own training" by failing to collect the blood evidence, relying on a training manual which provides that the technician "has a duty to preserve the integrity of the crime scene by preventing the destruction of evidence that may lead to the resolution of the crime." Similarly, defendant contends that the detective who sent the carpenter's level for fingerprint testing "told the Illinois State Police lab technician not to test the blood on the level, which led to the destruction of that blood." Defendant contends that, by doing so, the detective violated the Stone Park Police Department Rules of Conduct, which provides that members of the department "shall not convert to their own use, manufacture, conceal, falsify, destroy, remove, tamper with, or withhold any property or evidence in connection with an investigation or other police action, except in accordance with established police procedure."

¶ 28 First, it is not clear to this court that the alleged failures of the evidence technician or detective would qualify as violations of standard procedure. In particular, we note that defendant characterizes the detective's request that the level be tested for latent fingerprints as an

affirmative request that "the technician not *** test the blood," and "destroy" the blood evidence. However, there is nothing in the record that indicates that an affirmative request was made, or that supports defendant's speculation that the detective knew that the blood evidence would be destroyed by fingerprint testing. However, even assuming that the evidence technician and the detective violated their manual or Rules of Conduct by, respectively, not collecting the blood evidence and not requesting blood testing on the level, not every procedural violation will amount to bad faith, and defendant has not indicated how such failures would amount to bad faith here. See *Youngblood*, 488 U.S. at 58 (Although the police's failure to refrigerate the clothing and to perform tests on the semen samples could possibly "be described as negligent, *** there was no suggestion of bad faith on the part of the police.").

¶ 29 Defendant primarily relies on *People v. Walker*, 257 Ill. App. 3d 332 (1993), to support his contentions of bad faith. In *Walker*, the appellate court addressed whether the trial court erred in dismissing the defendant's indictment on the basis that the defendant's due process rights were violated when the police destroyed material evidence. *Id.* at 333. At trial, the victim testified that, on the night in question, she was waiting to pick up her order in a pizza restaurant when the defendant took her wallet and attempted to take money that she had in her hand. *Id.* She recalled during her testimony that the defendant was wearing "a brown leather cap, a light-colored jacket and blue jeans" at that time. *Id.* After the police arrested the defendant, he was brought back to the crime scene, where he was identified by the victim. *Id.* The victim testified that when the defendant exited the police car, he was wearing different clothes than when she saw him at the pizza restaurant and that he had mud on him, but that his face looked the same. *Id.* After the victim's testimony, the State informed the court and the defense that some inventoried evidence

had been destroyed six weeks after the arrest and eight months prior to trial, "including a plastic bag, a jacket, a hat, a knife, a grey suit and a pair of brown leather gloves." *Id.* at 333–34.

¶ 30 On appeal, the State argued that the defendant's motion to dismiss the indictment should not have been granted because there was no showing of bad faith on the part of the police. *Id.* at 335. The court rejected the State's argument that the bag and clothing were destroyed in accordance with proper police procedure and in good faith. *Id.* The court found that the police had acted in bad faith where the evidence was destroyed six weeks after the defendant's arrest because "a reasonably prudent police officer acting in good faith would not assume that material evidence would no longer be needed six weeks after the arrest." *Id.* at 335-36. The appellate court concluded that the evidence was material, highlighting the "central role" that the evidence would play in defendant's misidentification defense, and found that it was of such a character that it could not be obtained through other means. *Id.* at 336.

¶ 31 The case here is markedly distinguishable from *Walker*. As discussed above, the evidence that defendant complains was destroyed was not material, and accordingly, would not play a "central role" in defendant's self-defense claim. Additionally, defendant has made no showing of bad faith on the part of the police in failing to collect or test the proposed blood evidence. Accordingly, we find that defendant has not made a substantial showing of a due process violation pursuant to *Youngblood*.

¶ 32 Defendant next contends that, even if this court were to reject the foregoing arguments, we still should find that defendant's due process rights were violated under the Illinois Constitution, pursuant to our court's "authority to interpret [Illinois's] respective constitutional provisions more broadly than United States Supreme Court interpretations of similar Federal constitutional provisions," citing *People v. McCauley*, 163 Ill. 2d 414, 426 (1994). Defendant

specifically relies on the Illinois Supreme Court's decision in *People v. Newberry*, 166 Ill. 2d 310, 315 (1995), to contend that the State violates a defendant's due process right under the Illinois Constitution when it disposes of evidence that is "essential to and determinative of the outcome of the case" after being put on notice that the evidence must be preserved. Defendant contends that the notice in this case arises from Section 116-4 of the Code of Criminal Procedure, which requires for certain prosecutions that the police "shall preserve, subject to a continuous chain of custody, any physical evidence in their possession or control that is reasonably likely to contain forensic evidence, including *** fingerprints or biological material in relation to a trial." 725 ILCS 5/116-4(a) (West 2002).

¶ 33 In *Newberry*, the Illinois Supreme Court distinguished *Youngblood* in situations where the inadvertently lost or destroyed evidence would have been decisive to the outcome of the case. *Newberry*, 166 Ill. 2d at 315. The defendant in *Newberry* was charged with possession of a controlled substance, where a police field test resulted in no indication of cocaine present in the substance, but a lab test found the presence of cocaine. *Id.* at 312. The substance at issue was destroyed before the defendant could test it, and there was no credible evidence of bad faith by the government. *Id.* at 312-13. Our supreme court found *Youngblood* distinguishable because the defendant's ability to test the substance at issue was "essential to and determinative of the outcome of the case," and the defendant did not "have any realistic hope of exonerating himself absent the opportunity to have [the substance] examined by his own experts." *Id.* at 315. The supreme court noted that the police "destroyed the disputed substance after defense counsel had requested access to it in his discovery motion" and found that where "evidence is requested by the defense in a discovery motion, the State is on notice that the evidence must be preserved, and

the defense is not required to make an independent showing that the evidence has exculpatory value in order to establish a due process violation." *Id.* at 317.

¶ 34 However, in *Illinois v. Fisher*, 540 U.S. 544 (2004) (per curiam), the United States Supreme Court specifically rejected *Newberry*'s exception to *Youngblood* when applied in the context of a federal due process analysis. The United States Supreme Court expressly disagreed with the reasoning in *Newberry*, emphasizing that, "[w]e have never held or suggested that the existence of a pending discovery request eliminates the necessity of showing bad faith on the part of police." *Id.* at 548. The court further stressed that, "[w]e also disagree that *Youngblood* does not apply whenever the contested evidence provides a defendant's 'only hope for exoneration' and is 'essential to and determinative of the outcome of the case.' " *Id.* (quoting *Newberry*, 166 Ill. 2d at 315).

¶ 35 Subsequently, many Illinois courts have considered and rejected arguments from defendants that courts in our state should repudiate the *Fisher* analysis, continue to rely on *Newberry*, and interpret the Illinois Constitution more broadly than the United States Supreme Court did in *Fisher*. See *People v. Cunningham*, 2018 IL App (1st) 153367, ¶ 43; *People v. Moore*, 2016 IL (1st) 133814, ¶ 28 ("Although we do not have further guidance from our supreme court, subsequent to *Fisher*, the appellate court has rejected *Newberry* and followed *Fisher*."); *People v. Voltaire*, 406 Ill. App. 3d 179, 183 (2010); *People v. Kizer*, 365 Ill. App. 3d 949, 960-61 (2006). Defendant provides no compelling reason for rejecting this line of cases, and we decline to do so.

¶ 36 Nonetheless, even if *Newberry* applied, we have already found that the proposed evidence was not material to defendant's self-defense claim, and accordingly, we also find that it was not "essential to and determinative to the outcome of the case." Moreover, the evidence in

Newberry was destroyed despite a specific discovery request, which the supreme court stated put the State "on notice that the evidence must be preserved." Here, by contrast, no relevant discovery request or request for testing of the blood evidence was made. Defendant attempts to circumvent this distinction by arguing that the State was similarly "on notice" that the evidence needed to be preserved under Section 116-4 of the Code of Criminal Procedure. 725 ILCS 5/116-4(a) (West 2002). However, even assuming Section 116-4 applies, the State's destruction of evidence in contravention of Section 116-4 does not violate a defendant's due process rights absent a showing of bad faith. *People v. Grant*, 2019 IL App (3d) 160758, ¶ 9. Since we have concluded that defendant failed to make a showing of bad faith, defendant cannot obtain alternative relief under *Newberry* and Section 116-4.

¶ 37 Defendant next contends that his postconviction petition made a substantial showing that trial counsel was ineffective for failing to object to the destruction of exculpatory evidence, and for failing to present evidence that would have corroborated defendant's trial testimony.

¶ 38 Claims of ineffective assistance are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting *Strickland*). To prevail on a claim of ineffective assistance, a defendant must demonstrate that counsel's performance was deficient, and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. More specifically, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms, and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694. A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992). However, it is well-settled that the court need not

determine whether counsel's performance was constitutionally deficient if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 39 Here, defendant contends that trial counsel was ineffective for failing to object to the destruction of the blood evidence, and for failing to ask for sanctions or dismissal of the charges based on this due process violation, relying on the same evidence described above. Because we have already found defendant's underlying claim nonmeritorious, defendant's ineffective assistance claim for failure to object in the trial court also must fail. Defendant cannot make a substantial showing of prejudice under the *Strickland* test because, even if his trial counsel had objected to the blood evidence's destruction, or asked for sanctions or dismissal of the charges, there is no reasonable probability that such claims would have been successful. *Strickland*, 466 U.S. at 694 (defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

¶ 40 Defendant also contends that he made a substantial showing that trial counsel was ineffective for "failing to present available evidence that would have corroborated [his] defense and contradicted Mori's claims." Specifically, defendant objects to counsel's failure to utilize certain crime scene photos during questioning of Mori and defendant. Defendant contends that a photograph of the saw "establishes that someone was cut at the shop, as the blade is covered in blood and there is a pool of blood around the saw." Defendant alleges that this corroborates his account that Mori cut him with the saw after Mori attacked him. Defendant also contends that a photograph showing a "bloody handprint" supports his testimony because "it shows that [a] person with a bloody hand likely pushed themselves up using their hand." Finally, defendant asserts that a picture of blood on the metal cabinet "substantiates [his] testimony that Mori fell

and hit his head on a filing cabinet and contradict[s] Mori's claim that the level caused his posterior head wound."

¶ 41 We note that the crime scene photos of which defendant complains were in evidence at trial and, accordingly, were before the court as the trier of fact. It appears that defendant's complaint is only that counsel failed to specifically utilize those photos by showing them to Mori and defendant during their examinations.

¶ 42 As noted above, to establish the first prong of the *Strickland* test, that counsel's performance was deficient, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms. *Id.* at 687; *People v. Domagala*, 2013 IL 113688, ¶ 36. In order to establish deficient performance, the defendant must overcome the strong presumption that the challenged action may have been the product of sound trial strategy. *People v. Manning*, 241 Ill. 2d 319, 327 (2011). "Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel." *People v. Reid*, 179 Ill. 2d 297, 310 (1997). "As matters of trial strategy, such decisions are generally immune from claims of ineffective assistance of counsel." *Id.* "The only exception to this rule is when counsel's chosen trial strategy is so unsound that counsel entirely fails to conduct any meaningful adversarial testing." *Id.*

¶ 43 Here, defense counsel's decision regarding whether to refer to certain photographs during the examinations of Mori and defendant is clearly a matter of trial strategy. Particularly where those photographs were already in evidence, it was not necessary for counsel to refer specifically to the photographs during questioning. Instead, counsel questioned defendant, allowing him to present his version of events, and cross-examined Mori, attempting to impeach and discredit his rendition of the facts. In such circumstances, we cannot classify counsel's decision on this matter

to be "so unsound" that counsel failed "to conduct any meaningful adversarial testing." *Id.* Accordingly, defendant's ineffective assistance claim based on counsel's failure to utilize the photographs during questioning fails.

¶ 44 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 45 Affirmed.