2013 IL App (2d) 120378-U
No. 2-12-0378
Order filed March 19, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 04-CF-1959
	)	
ANSON PAAPE,	)	Honorable
	)	Daniel P. Guerin,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition at the second stage. Defendant's allegation that he was denied the effective assistance of trial counsel as a result of his attorney not impeaching a witness failed because defendant did not establish prejudice; defendant's petition failed to sufficiently allege that his trial counsel threatened to cease representing him if he exercised his right to a jury trial and to testify; and the State advising a witness not to discuss the incident was harmless error and defendant was not denied due process. Thus, we affirmed.

¶ 2 In 2004, the State charged defendant, Anson Paape, with first-degree murder after he shot and killed the victim during an alleged game of Russian roulette. Defendant did not dispute that he shot the victim, but argued that he did not possess the requisite mental state to sustain a first-degree

murder conviction because he did not know the gun was loaded. Following a bench trial, the trial court found defendant guilty of two counts of first-degree murder. We affirmed defendant's conviction and sentence. *People v. Paape*, No. 2-07-0658 (2009) (unpublished order under Supreme Court Rule 23).

¶ 3 Thereafter, defendant filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) alleging eight claims of error. The trial court dismissed defendant's petition at the second stage of the proceedings and defendant now appeals, arguing that the trial court erred in dismissing his petition without an evidentiary hearing because (1) he established that he was denied the effective assistance of counsel because his attorney failed "to impeach the key witness for the State on the key issue to be resolved" by the trial court; (2) he established that he was denied the effective assistance of counsel because his trial counsel "threatened to cease representing him" if he exercised his right to testify and his right to a jury trial; and (3) he established that a key witness for the State had been instructed by law enforcement officials not to speak about the incident, which violated his right to due process. We affirm.

¶ 4 I. Background

¶ 5 The facts underlying defendant's conviction were set forth in detail in our prior order. The record reflects that defendant lived at 846 Hawthorne in Elmhurst with his wife, Victoria Grissette, and their five children. On July 9, 2004, defendant was at his house with Victoria, Mick Murray (the victim), Mike Libet, Ron Chwojko, John Dominick, and his daughter Natasha Lindsey. Defendant's children were also at the house. Defendant initiated a card game, which prompted defendant, the victim, Libet, Chwojko, and Dominick to go to the basement. Defendant explained that the loser of the card game would have to play "Russian roulette" and proceeded to hand out ammunition.

Defendant later changed the rules of the card game, stating that the person sitting to the right of the loser would have to play Russian roulette.

¶ 6 After one hand was played, defendant went upstairs to check on pizza, then returned to the game with a .44-caliber revolver in a black holster. Based on the result of the card game, the victim was to play Russian roulette. Defendant was holding the gun and then pointed the gun at the victim, who tried to grab the gun, but defendant said ,"No, this is my house, I'll do it." Thereafter, defendant pointed the gun at the victim's head, asked the victim if he was ready, to which the victim responded, "Yeah." Defendant fired the gun, the gun discharged, and the victim died as a result of the injuries he sustained.

¶ 7 A bench trial commenced on January 9, 2007. The State first called Dominick as a witness. Dominick testified that he was at defendant's house on July 9, 2004, and that defendant was intoxicated. Dominick testified that defendant asked him, Libet, Chwojko, and the victim to play a card game downstairs. Dominick testified that defendant explained that the person who lost the game would have to play Russian roulette, brought a box of live ammunition to the basement, and proceeded to pass out one AK-47 bullet and two .44 bullets to each player. Dominick testified that defendant later changed the rules, and said that the person who sat to the right of the person who lost the game would have to play Russian roulette.

¶ 8 Dominick testified that the victim won the hand and Dominick lost the hand. After that hand, all of the players except Libet went upstairs to get pizza. Dominick testified that everyone but the victim went back downstairs, which prompted defendant to say to the victim, " 'You pussy. Come downstairs.' " Dominick testified that he saw defendant pick up a bullet while he had the gun in his hand with the cylinder of the gun open. Dominick stated that he did not observe defendant place the bullet in the cylinder, but that he did not see anyone else handle the gun. Dominick testified that he

then saw defendant spin the cylinder of the gun. Dominick testified that defendant pointed the gun at the victim, who tried to grab the gun, but defendant said, " 'No, this is my gun, my house. I'll do it.' " Dominick testified that defendant pointed the gun at the victim's head, asked if he was ready, and shot the victim. Dominick testified that defendant remained in the basement while the other players ran outside, and that defendant went outside and told the other players that it was fake and to come back inside.

¶ 9 On cross-examination, Dominick admitted that he had bad feelings toward defendant as a result of the shooting, that he was arrested for possession of marijuana, and that he had previously lied to the police. Dominick also admitted on cross-examination that defendant appeared stunned after he shot the victim and said, " 'Oh my god.' " On redirect examination, Dominick testified, over defense counsel's objection, that he previously observed defendant play Russian roulette, and that defendant had possessed several weapons, including an AK-47, a .44-caliber gun, a musket, a long-range rifle, knives, and swords.

¶ 10 Chwojko and Libet also testified on behalf of the State. Chwojko testified that defendant initiated a card game in the basement, explained the rules of the game, and handed out three bullets to each player. He further testified that he did not see any empty shells. Chwojko testified that, once defendant came back to the basement after going upstairs to check on a pizza, he observed defendant load the gun and spin the cylinder twice. Libet testified that after the first hand of the card game, everyone playing the game, including himself, went upstairs for pizza for a "couple minutes." Libet testified that when they returned to the basement, he saw defendant bring a gun and a holster. Libet testified that he observed defendant load a live round in the gun and spin the cylinder. Libet heard defendant say that it was his house so he was going to " 'do it,' " point the gun at the victim, and shoot the victim.

¶ 11 Various other witnesses testified for the State, including James Pokryfke, a former detective with the Elmhurst police department and, at the time of trial, a federal agent with the Drug Enforcement Administration. Pokryfke testified that the Elmhurst police department discovered a gun behind defendant's house. After the State rested, defendant called Natasha Lindsey, his daughter. Lindsey testified that her family had planned to go camping on the evening of July 9, 2004, and that their van was packed with camping materials and food. Defendant also called Amanda Grissette, another daughter, to testify. Amanda testified that, subsequent to the victim's shooting, she heard Libet brag about how he loaded the gun.

¶ 12 On March 23, 2007, the trial court found defendant guilty of two counts of first-degree murder, two counts of obstruction of justice, and one count of violation of bail bond. The trial court denied defendant's motion for a new trial, and it thereafter sentenced defendant to an extended-term sentence of 75 years' imprisonment.

¶ 13 On October 25, 2010, defendant filed his petition for postconviction relief. Defendant's petition argued that he was actually innocent because Pokryfke drafted and swore to an application for a search warrant explaining that defendant "went into the crawl space under the stairs and returned with a handgun," Dominick told him that defendant "went under the stairwell to get the revolver," and that Dominick described the gun as being "kept in the lower level in the crawl space area under the stairs." Defendant argued that, because he retrieved the gun from under the crawl space and because "it is now known [that] Libet was left alone with the gun and ammunition, witnesses that testified otherwise have been shown to be untruthful and none of their testimony can be accepted as proof beyond a reasonable doubt." Defendant's petition also alleged that he was denied the right to a fair trial when the State failed to disclose Pokryfke's application for a search warrant. Defendant argued that, with such disclosure, he could have cross-examined Dominick

regarding his testimony that defendant brought the gun to the basement and defendant could have presented testimony from Pokryfke to establish that "Libet was left alone with the gun and could have loaded it just as [d]endant alleged."

¶ 14 Defendant's petition further alleged that he was denied the effective assistance of counsel for a variety of reasons, including because his trial attorney failed to introduce evidence that defendant retrieved the gun from the crawl space; failed to investigate witnesses; and defendant's trial counsel made the determination that defendant would not testify and would waive his right to a jury trial. Defendant's petition alleged that he was denied his right to a fair trial because, during its investigation, the State told Libet "not to talk to anyone about this incident and especially people [you] don't know," and because the State failed to disclose the criminal history of Daniel Scully, another witness. Defendant attached to his petition an investigative action report from law enforcement officers reflecting that a police officer advised Libet not to discuss the case. Finally, defendant's petition argued that he was subjected to cruel and unusual punishment because he was not guilty of first-degree murder because he lacked the required mental state.

¶ 15 On August 12, 2011, the trial court entered an order finding that "the 90[-]day review period under [the Act] has run and the matter shall proceed to the second stage under the Act." The State filed a motion to dismiss defendant's petition, and on March 2, 2012, following a hearing, the trial court granted the State's motion and entered an order dismissing defendant's petition. Defendant timely appealed.

¶ 16 II. Discussion

¶ 17 A. Failure to Impeach

¶ 18 Defendant's first contention on appeal is that the trial court erred in dismissing his postconviction petition without an evidentiary hearing because he established that he was denied the

effective assistance of counsel because his trial counsel failed to impeach a key witness for the State. In support of this contention, defendant concedes that he fired the gun; however, the key issue was whether he possessed the requisite intent and knowledge. Defendant argues that the State primarily relied on Dominick's testimony that "after one hand was played, [d]efendant went upstairs to check on pizza, then returned to the game with a gun in a black holster." However, defendant argues that shortly after the shooting, Dominick told police officers that defendant "went under the stairwell and got a revolver." According to defendant, defendant could have impeached Dominick "on the crucial issue in the case and his [trial] counsel failed to do so with the prior inconsistent statements."

¶ 19 The Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). With regard to this requirement, a defendant at the first stage need only present a limited amount of detail (*People v. Ligon*, 239 Ill. 2d 94, 104 (2010) (citing *People v. Hodges*, 234 Ill. 2d 1, 9 (2009))), and the defendant need not make legal arguments or cite to legal authority (*Ligon*, 239 Ill. 2d at 104 (citing *People v. Gaultney*, 174 Ill.2d 410, 418 (1996))). At the second stage, an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. At the third stage, the trial court conducts an evidentiary hearing on the petition. *Id.* at 418. A defendant is not entitled to an evidentiary hearing on her or his petition as a matter of right. *People v. Lucas*, 203 Ill. 2d 410, 418 (2002). "Rather, a defendant is only entitled to an evidentiary hearing where the allegations contained in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation." *Id.* at 418.

We review *de novo* the dismissal of a postconviction petition at the second stage. *People v. Whitfield*, 217 Ill. 2d 177, 182-83 (2005) (citing *People v. Munson*, 206 Ill. 2d 104, 115 (2002)) .

¶ 20 When a claim pursuant to the Act alleges the ineffective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Hoekstra*, 371 Ill. App. 3d 720, 722 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984)). A defendant's right to effective assistance of counsel is provided by the sixth and fourteenth amendments to the United States Constitution. *People v. Angarola*, 387 Ill. App. 3d 732, 735 (2009) (citing U.S. Const., amends. VI, XIV). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 688 (1984). To satisfy the first prong, the petitioner must show that his trial counsel's performance was deficient because the representation fell below an objective standard of reasonableness. *People v. Harris*, 206 Ill. 2d 1, 16 (2002) (discussing an ineffective-assistance-of-counsel claim in the context of a postconviction petition). To meet the second prong, the petitioner must demonstrate prejudice by showing that there is a reasonable probability that, but for trial counsel's errors, the result of the proceeding would have been different. *Id.* A defendant must satisfy both *Strickland* prongs, and if an ineffective-assistance-of-counsel claim can be disposed of because the defendant did not suffer prejudice, a court need not determine whether counsel's performance was deficient. *People v. Villanueva*, 382 Ill. App. 3d 301, 308 (2008).

¶ 21 In this case, defendant's claim of ineffective assistance of counsel fails because he cannot satisfy the prejudice prong under *Strickland*. Defendant's *Strickland* claim is premised on his trial counsel's failure to impeach Dominick's testimony that defendant retrieved the gun from upstairs while checking on a pizza, when Dominick previously told Pokryfke that defendant retrieved the gun

from a crawl space. Defendant argues that, "with that testimony, it was clear that Libet had ample time to load the gun that [d]efendant left behind when he went upstairs."

¶ 22 "[W]hen assessing the value of the importance of the failure to impeach for purposes of a *Strickland* claim, '[t]he value of the potentially impeaching material must be placed in perspective.' " *People v. Brown*, 371 Ill. App. 3d 972, 978 (2007) (quoting *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989)). Here, while the value of Dominick's impeachment would have added further support to defendant's theory that he did not know that the gun was loaded, that impeachment would not be sufficient to create a reasonably probability that the outcome of the trial would have been different. See *Brown*, 371 Ill. App. 3d at 979. Even if defendant retrieved the gun from the crawl space, as opposed to from upstairs while checking on the pizza, and thus provided Libet an opportunity to load the gun, such testimony would have had minimal impact, if any, on Dominick's testimony that he did not see anyone else, other than defendant, handle the gun. Further, both Chwojko and Libet testified at trial that they observed defendant load the gun and spin the cylinder moments before shooting the victim. In light of the other testimony at trial, which would not have been affected, the failure to impeach Dominick on his prior statement to Pokryfke that defendant retrieved the gun from a crawl space does not create a reasonable probability that the outcome of the trial would have been different. Thus, defendant's *Strickland* claim necessarily fails because he cannot meet his burden of establishing the second *Strickland* prong. See *id.* at 980 (concluding that the defendant failed to establish an ineffective-assistance-of-counsel claim based on counsel's failure to impeach a witness because the defendant failed to establish prejudice).

¶ 23 B. Right To Jury Trial and To Testify

¶ 24 Defendant's second contention on appeal is that the trial court erred in dismissing his postconviction petition because his trial counsel threatened to cease representing him if he elected

to testify and if defendant did not acquiesce to a bench trial. According to defendant, his trial counsel effectively coerced him into waiving these fundamental rights, and the trial court should have taken these allegations in his postconviction petition as true and granted defendant an evidentiary hearing. The State counters that defendant failed to support these allegations with an affidavit or other documentation, as required by the Act. Further, the State maintains that defendant's claims are contradicted by the record, noting that the trial court advised defendant that he had a right to a jury trial, defendant signed a jury waiver, and the trial court advised defendant at multiple hearings that the decision of whether to testify was his.

¶ 25 Section 122-1(b) of the Act provides that a postconviction proceeding commences when a petitioner files a petition verified by affidavit. 725 ILCS 5/122-1(b) (West 2010). Section 122-2 further provides that the allegations in the petition must be supported by affidavits, records, or other evidence; and if such documentation is not attached, the petition must explain why it was unavailable. 725 ILCS 122-2 (West 2010).

¶ 26 Defendant cites *People v. Hall*, 217 Ill. 2d 324 (2005), for the proposition that, where the petition contains sufficient facts to infer that the only section 122-2 affidavit that a defendant could have furnished was that of his attorney, the failure to attach corroborating documentation or explain the absence may be excused. *Id.* at 333. In *Hall*, the State charged the defendant with aggravated kidnaping, among other charges, and the defendant pleaded guilty to aggravated kidnaping. *Id.* at 327. Thereafter, the defendant filed a petition for postconviction relief, alleging that he did not knowingly, intelligently, and voluntarily enter into the plea deal. *Id.* at 328. In his affidavit attached to the petition, defendant "described in detail" two separate conversations with his appointed attorney following his arrest, advising his attorney that he intended only to take the car and did not know a child was inside. *Id.* at 329. Defendant described that counsel repeatedly informed him that

not being aware that the child was in the car was not a defense to the charge of aggravated kidnaping. *Id.* The trial court dismissed the petition without an evidentiary hearing, and the appellate court affirmed. *Id.* at 330-31.

¶ 27 The *Hall* court reversed and remanded to the trial court for an evidentiary hearing. *Id.* at 327. In doing so, the supreme court noted that a petition for postconviction relief must be verified by affidavit and also be supported by affidavits, records, or other evidence. *Id.* at 332. The court concluded, however, that "[f]ailure to attach independent corroborating documentation or explain its absence may, nonetheless, be excused where the petition contains facts sufficient to infer that the only affidavit the defendant could have furnished, other than his own sworn statement, was that of his attorney." *Id.* at 333. The *Hall* court noted that, in the case before it, the explanation for the absence of additional documentation could be easily inferred from the allegations in the defendant's petition and affidavit. *Id.* Specifically, the court noted that defendant "described in detail his consultations with his attorney" and "referred only to himself and counsel in these descriptions and did not mention the presence of anyone else." *Id.* Thus, the *Hall* court opined, the "only affidavit defendant could have furnished" to support the allegations, other than his own, was that of his attorney. *Id.*

¶ 28 In this case, we find *Hall* distinguishable and conclude that defendant's failure to attach an affidavit should not be excused. In stark contrast to *Hall*, where the defendant's affidavit "described in detail" his conversations with his attorney, defendant here merely made broad and conclusory allegations that his counsel "threatened to cease the representation" if defendant exercised his right to testify or to a jury trial. See *People v. Hoffman*, 25 Ill. App. 3d 261, 266 (1974) ("It has been uniformly held that a *** postconviction petition which alleges only legal conclusions is insufficient

to require an evidentiary hearing."). Also, unlike *Hall*, defendant did not attach his own affidavit offering further detail with respect to these allegations.

¶ 29 In sum, defendant's allegations that his trial attorney told him that he would cease representing defendant if he exercised his right to a jury or his right to testify were nothing more than conclusory statements. Those broad allegations, which failed to provide details, were insufficient to create an inference that the only affidavit defendant would have been able to obtain was from his attorney.

¶ 30 C. Witness Intimidation

¶ 31 Finally, defendant contends that the trial court erred in dismissing his postconviction petition because his petition sufficiently alleged that his right to a fair trial and due process was violated when law enforcement officials "intimidated [Libet] into not speaking with anyone regarding the case." In support of this allegation, defendant attached a police report in which an investigator advised Libet not to talk to anyone about this incident, and particularly to not speak to people that he did not know.

¶ 32 In support of his argument, defendant cites *People v. Muschio*, 278 Ill. App. 3d 525 (1996). In *Muschio*, the State made comments during its oral motion to reconsider a witnesses's sentence indicating that if a witness for the defendant testified, that witness would have been sentenced to additional time in prison for crimes to which the witness had previously pleaded guilty. *Id.* at 530. The court in *Muschio* concluded that "[t]he State's intimidation of a witness cannot be tolerated" and that "[b]y intimidating [the witness] into not testifying, the State violated [the] defendant's right to present witnesses in his own defense." *Id.*

¶ 33 Threats or intimidation made by the government to dissuade a potential defense witness from testifying is a violation of a defendant's right to due process of law and his sixth amendment right

to compulsory process for obtaining defense witnesses. *United States v. Linder*, No. 12-CR-22-1, 2012 U.S. Dist. LEXIS 112134, at *50 (N.D. Ill. Aug. 9, 2012) (citing *Webb v. Texas*, 409 U.S. 95 (1972)). Government interferences generally occur when the government instructs a witness not to speak or artificially restricts defense counsel's access to a witness. *Linder*, 2012 U.S. Dist. LEXIS 112134, at *51. "To challenge the government's conduct on [s]ixth [a]mendment or due process grounds for witness interference, the defendant is required to make a 'clear showing' that the government instructed the witness not to cooperate with the defense." *Id.* at 52 (quoting *United States v. Roach*, 502 F.3d 425, 437 (6th Cir. 2007)). Nonetheless, even if substantial interference with a witness occurs, the misconduct will not result in a new trial if the error was harmless. *United States v. Foster*, 128 F.3d 949, 953 (6th Cir. 1997).

¶ 34 In this case, although we are troubled by law enforcement advising Libet not to discuss the incident, based on our careful review of the record, any error was harmless. Initially, we note that, unlike *Muschio*, Libet testified for the State and was subject to cross-examination. Further, defendant alleged only that "[i]t appears from the record that Libet refused to speak to anyone representing or working on behalf of [d]efendant prior to trial. One must assume that Libet refused to do so because he had been advised by law enforcement not to do so *** ." However, defendant failed to allege how his attempts to interview Libet were thwarted or how the officer advising Libet not to discuss the incident prejudiced defendant's preparation of his defense. See *People v. Rixie*, 190 Ill. App. 3d 818, 831-32 (1989) (holding that the defendant's allegation that his right to due process was violated as a result of the State informing witnesses not to speak with defense counsel failed because the defendant did not establish that his attempts to interview the witnesses were thwarted or set forth evidence that the State's conduct prejudiced the defendant's preparation and presentation of his defense). Accordingly, we reject defendant's contention.

¶ 35 III. Conclusion

¶ 36 For the foregoing reasons, we conclude that the trial court did not err in dismissing defendant's postconviction at the second stage of the proceedings. Accordingly, we affirm the judgment of the circuit court of Du Page County.

¶ 37 Affirmed.