2015 IL App (2d) 140122-U
No. 2-14-0122
Order filed December 10, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TAVIEUS SIMMONS, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 10-CF-799 Honorable John R. Truitt, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition was reversed and remanded where defendant set forth an arguable claim of prejudice resulting from his counsel's alleged failure to investigate and call the co-defendant to testify.

¶ 2 Defendant, Tavieus Simmons, appeals from the first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). For the reasons that follow, we reverse and remand for second-stage proceedings.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of two counts of aggravated kidnapping (720 ILCS 5/10-2(a)(6) (West 2010)), and the jury returned a special verdict form finding that defendant committed the offenses while armed with a firearm. The jury also found defendant guilty of one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2010)), but the trial court determined that the conviction merged into the convictions of aggravated kidnapping. The trial court sentenced defendant on two counts of aggravated kidnapping to concurrent terms of 33 years' imprisonment, each of which included an automatic 15-year sentence add-on because he was armed with a firearm (720 ILCS 5/10-2(b) (West 2010)).

¶ 5 Defendant's convictions arose out of his participation in the kidnapping of Mira Puckett and her one-year-old son, Isaiah Harris, Jr. The kidnapping occurred immediately after a car chase between the car defendant was in and another car. The underlying facts are set forth in this court's order affirming the convictions on direct appeal (*People v. Simmons*, 2012 IL App (2d) 110146-U), and we restate only the pertinent facts here.

¶ 6 The State called Necoah Tennin and Roger Pennie to testify at trial. Necoah, defendant's cousin, testified that defendant and Isaiah Harris, Sr. chased Necoah and Roger's car on the evening of March 10, 2010. Necoah testified that she never saw defendant with a gun during the course of the incident, and that she became embroiled in an argument with defendant over family issues after the cars stopped. She explained that she called the police solely because she was angry that defendant jumped on the hood of her car and kicked in her windshield. She testified that she was "highly intoxicated" at the time of the incident after consuming alcohol and smoking marijuana throughout the day. Necoah testified that her level of intoxication affected her ability to perceive things that day.

¶ 7 Roger testified that he was also intoxicated at the time of the incident. Roger testified that he "believe[d] [he] heard somebody say pull over or I'll shoot[]" during the car chase. He testified that he did not know defendant, he could not identify defendant as the individual who broke his windshield, and he did not see any guns during the incident. Roger also testified that the individual who broke his windshield did not argue with Mira.

¶ 8 The State impeached Necoah and Roger with their written statements made to the police a few hours after the incident, as well as their grand jury testimony. In her police statement, Necoah stated that defendant and Isaiah were holding black guns and pointing them at her, Roger, Mira, and Isaiah Harris, Jr. Once the cars were stopped, defendant exited the car, threatened to kill Necoah, jumped on the hood of her car, and broke the windshield. She further stated that Isaiah pulled Mira out of Necoah and Roger's car by her hair. In Roger's police statement, he stated that defendant threatened to shoot him and his passengers unless they pulled over. Once defendant and Isaiah cut off Roger's car, defendant exited his vehicle with a black gun, jumped on the hood of the car, and hit the windshield with the gun. Roger stated that defendant threatened to shoot him as he attempted to exit his car. Roger also stated that Isaiah forced Mira and her baby to leave the car, and they were "struggling real hard."

¶ 9 Necoah and Roger's testimony at the grand jury proceedings were similar to their police statements. Both testified that defendant and Isaiah were making threats to pull over or be shot, and both testified that defendant explicitly threatened to shoot Roger around the time defendant jumped on the hood of the car. Necoah testified that she did not actually see a gun, but defendant's actions made her think that he had a gun. Roger testified that defendant had an "object" in his hand. The police statements and grand jury testimony were admitted as

substantive evidence at trial under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2010)).

¶ 10 Defendant testified at trial that he was in the passenger seat of the vehicle when Isaiah "took off" after another car, and defendant did not know why Isaiah began chasing the car. He testified that when they pulled over beside Roger and Necoah's car, he got into a heated argument with Necoah about the way she was treating their grandmother. Defendant testified that, as a result of his argument with Necoah, he jumped on the hood of her car and kicked in the windshield. He testified that neither he nor Isaiah had a gun, he did not threaten anyone during the incident, and Isaiah never touched Mira in any way. Defendant also testified that Necoah told him that "she was going to make sure [defendant and Isaiah] never get out of jail again as long as she live [*sic*]." He insisted that his argument with Necoah, as well as his act of kicking in the windshield, was unrelated to the simultaneous incident between Isaiah and Mira. Defendant admitted that he drove the car after the altercation "for everybody's safety in the car."

¶ 11 In November 2013, defendant filed a *pro se* petition under the Act alleging ineffective assistance of trial and appellate counsel. Defendant claimed that his trial counsel was ineffective for failing to interview or call two witnesses, Isaiah Harris, Sr. and Champaine Harris, who could have contradicted and rebutted the testimony of the State's witnesses.[1] Defendant attached a personal affidavit, as well as affidavits from Isaiah and Champaine.

¶ 12 Defendant averred that he told his trial counsel that his co-defendant, Isaiah, wrote him a letter in which Isaiah stated that he was willing to testify at defendant's trial. But defendant's

[1] Defendant's postconviction petition had five claims alleging that trial and appellate counsel were ineffective, but only defendant's claim regarding trial counsel's failure to interview or call witnesses at trial is at issue here.

trial counsel allegedly told him that Isaiah could not testify because he believed that Isaiah's attorney would not allow him to, "so it would be a waste of time[.]" Defendant further averred that his trial counsel told him that Champaine's testimony would not change the outcome.

¶ 13 Champaine averred that she is Necoah's sister, and on March 10, 2010, Necoah called her immediately after the incident to come pick her up. Champaine arrived at the scene of the incident, and Necoah then told her that defendant kicked in her windshield. Champaine further averred that Necoah told her "how she was gone [*sic*] get [defendant] locked up and make sure he never came home again." Champaine took Necoah to the liquor store while the police were talking to Roger, and Necoah, who was already "drunk," purchased more alcohol. Champaine averred that she told defendant that she would testify, but his trial counsel never contacted her.

¶ 14 Isaiah averred that he was involved in a "domestic dispute" on March 10, 2010, with Mira, the mother of his baby, for which he and defendant were arrested. He further averred that defendant "just happened to be with [him] as the incident spontaneously transpired." Isaiah and defendant never conspired for the incident to happen, and defendant did not aid or abet him during the incident. He further averred that "the simultaneous altercation [defendant] got into with his cousin [Necoah] had nothing to do with [what] was transpiring between [Isaiah and] Mira. Their altercation was one of convenience." Defendant did not interfere with the incident. Isaiah also averred that no weapons were involved, except for the "bluff with [his] cell phone." Isaiah alone forced Mira into the car that he was driving, and he told defendant to drive after the incident occurred. He also averred that defendant was not responsible for Isaiah's actions and should not be "forced to serve prison time for it." Isaiah averred that he would have testified to the statements in the affidavit if he were called to do so.

¶ 15 The trial court summarily dismissed defendant's petition as frivolous and patently without merit. Addressing defendant's claim that trial counsel was ineffective for failing to interview or call Isaiah and Champaine, the trial court explained: "whether to call a particular witness at trial is a matter of trial strategy. Such a claim cannot form the basis for a claim of ineffective assistance of trial counsel unless the trial strategy is so unsound that counsel can be said to have entirely failed to conduct any meaningful adversarial testing of the State's prosecution." The court also explained that Isaiah and Champaine's testimony "would have added little and the evidence against the defendant was overwhelming."

¶ 16 Defendant timely appealed.

¶ 17 II. ANALYSIS

¶ 18 At issue in this appeal is whether the summary dismissal of defendant's postconviction petition was proper. The Act provides a method by which criminal defendants can assert that their conviction and sentence were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Proceedings under the Act consist of three stages. *Hodges*, 234 Ill. 2d at 10. This appeal concerns a summary dismissal at the first stage.

¶ 19 At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether the claim in the petition is frivolous or patently without merit. *Hodges*, 234 Ill. 2d at 10. A postconviction petition is frivolous or patently without merit only if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16. A petition that has no arguable basis in law or in fact is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. An indisputably meritless legal

theory is one that is completely contradicted by the record, and a fanciful factual allegation is one that is fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17.

¶ 20 We review the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 21 A. Ineffective Assistance of Counsel

¶ 22 Defendant alleges that trial counsel was ineffective for failing to interview or call Isaiah and Champaine to testify at his trial. Defendant argues that Isaiah and Champaine would have corroborated his testimony and contradicted the State's "most powerful pieces of evidence[,]" Necoah and Roger's prior inconsistent statements.

¶ 23 To prevail on an ineffective assistance of counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). At the first stage of postconviction proceedings, a defendant's petition may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. The failure to satisfy either the deficiency prong or the prejudice prong precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

¶ 24 Defendant argues that Isaiah would have corroborated his defense, but trial counsel failed to interview Isaiah. According to defendant's affidavit, trial counsel told defendant that Isaiah could not testify because he believed Isaiah's attorney would not allow it. The State contends that defendant's claim falls within the realm of trial strategy, and, therefore, it cannot support a claim of ineffective assistance. The State also contends that Isaiah's testimony would not have changed the jury's decision because the evidence against defendant was overwhelming.

¶ 25 Decisions concerning which witnesses to call at trial and what evidence to present on defendant's behalf are matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *Wilborn*, 2011 IL App (1st) 092802, ¶ 79. The failure to interview witnesses, however, may be indicative of deficient representation when the witnesses are known to trial counsel and their testimony may be exonerating or support an otherwise uncorroborated defense. *People v. Coleman*, 183 Ill. 2d 366, 398 (1998); *People v. Grover Tate*, 305 Ill. App. 3d 607, 612 (1999). Whether trial counsel was ineffective for failure to investigate is determined by the value of the evidence that was not presented at trial and the closeness of the evidence that was presented. *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005).

¶ 26 Here, the record does not show that trial counsel interviewed or attempted to interview Isaiah. Although Isaiah never indicated in his affidavit whether defendant's trial counsel interviewed or contacted him, we must take as true defendant's averment that trial counsel merely "believe[d]" that Isaiah's attorney would not allow him to testify. See *Hodges*, 234 Ill. 2d at 10. Even so, considerations of trial strategy are inappropriate at this stage. See *Tate*, 2012 IL 112214, ¶ 22 ("The State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced"); see also *People v. Wilson*, 2013 IL App (1st) 112303, ¶ 19 ("[A]t a first-stage review of a postconviction petition, when considering a claim of ineffectiveness of trial counsel for failure to call certain witnesses, the court should not consider trial strategy[.]").

¶ 27 Therefore, we examine the prejudice prong under *Strickland*. To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Makiel*, 358 Ill. App. 3d at

108. This prong is satisfied if the defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Makiel*, 358 Ill. App. 3d at 108-09. Again, at the first stage of postconviction proceedings, it need only be arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17.

¶ 28 Here, defendant contends that he was arguably prejudiced by counsel's failure to interview or call Isaiah to testify because the trial testimony of Necoah and Roger, which corroborated defendant's testimony, was so impeached by their prior inconsistent statements as to be "utterly infirm." Thus, defendant argues, Isaiah would have corroborated defendant's defense at trial and contradicted Necoah and Roger's prior inconsistent statements that were admitted as substantive evidence. We agree.

¶ 29 Defendant relies on *People v. Wilson*, 2013 IL App (1st) 112303, and *People v. Tate*, 2012 IL 112214, to support his contention that he was arguably prejudiced by counsel's failure to interview Isaiah or call him to testify. In *Tate*, the Illinois Supreme Court reversed the summary dismissal of a postconviction petition because it was arguable that the defendant was prejudiced by counsel's failure to investigate or call four witnesses, two of whom could have provided the defendant with an alibi defense. *Tate*, 2012 IL 112214, ¶ 24-25. One witness would have testified that he was five feet from the victim at the time of the shooting, he saw the shooting, he had known defendant for years, and he was "sure" that the defendant was not the shooter. *Tate*, 2012 IL 112214, ¶ 5. No physical evidence linked the defendant to the crime and the defendant did not make a confession. *Tate*, 2012 IL 112214, ¶ 24. Thus, the witness' testimony would have provided a first-person account of the incident that directly contradicted the State's eyewitness testimony. *Tate*, 2012 IL 112214, ¶ 24.

¶ 30 In *Wilson*, the defendant made an inculpatory videotaped statement to police, in which he stated that he called his co-defendant to tell him where to find a previously stolen vehicle. *Wilson*, 2013 IL App (1st) 112303, ¶ 6. The defendant acknowledged that he knew his co-defendant carried a gun in these situations, the co-defendant informed him that he would bring his gun, and that he witnessed the co-defendant shoot and kill the victim. *Wilson*, 2013 IL App (1st) 112303, ¶ 6. At trial, however, the defendant disavowed his confession and claimed that he was physically coerced into making that statement. *Wilson*, 2013 IL App (1st) 112303, ¶ 21. The defendant was convicted of first-degree murder on an accountability theory for calling his co-defendant and informing him of the vehicle's location, while knowing that the co-defendant was armed with a gun. *Wilson*, 2013 IL App (1st) 112303, ¶ 3. The appellate court held that it was arguable that the defendant was prejudiced by trial counsel's failure to call the defendant's girlfriend to testify. *Wilson*, 2013 IL App (1st) 112303, ¶ 22. The girlfriend could have corroborated the defendant's trial testimony that he did not facilitate the crime and only told his co-defendant where to retrieve the vehicle. *Wilson*, 2013 IL App (1st) 112303, ¶ 22. The girlfriend attested that she was in the car with defendant when he called the co-defendant on speaker phone, the defendant only told his co-defendant where the car was located, and they left the area before the co-defendant arrived. *Wilson*, 2013 IL App (1st) 112303, ¶ 10.

¶ 31 Here, as in *Tate* and *Wilson*, it is arguable that defendant was prejudiced by counsel's failure to interview Isaiah or call him to testify. As in *Tate*, Isaiah's proffered testimony would have provided a first-person account of the incident, and his averment that no weapons were involved would have contradicted Necoah and Roger's initial statements that defendant and Isaiah had firearms. Also, as in *Wilson*, Isaiah could have corroborated defendant's testimony that defendant's altercation with Necoah was unrelated to Isaiah's dispute with Mira.

¶ 32 We are mindful that Isaiah implicated defendant in the ongoing commission of the kidnapping when he averred that he "told [defendant] to drive and take [him] to [Martelle's] house[.]" Nevertheless, Isaiah's averment that no weapons were involved arguably supported defendant's theory of defense at trial that neither he nor Isaiah had a firearm. See *Hodges*, 234 Ill. 2d at 19 (the question of whether counsel was ineffective for failing to interview and present testimony from certain witnesses "focuses on defendant's theory of defense at trial and whether the *** witnesses' alleged testimony arguably would have supported this theory."). Ultimately, defendant was convicted of two counts of aggravated kidnapping while armed with a firearm and one count of unlawful use of a weapon by a felon. Moreover, he was sentenced on both counts of aggravated kidnapping to concurrent terms of 18 years' imprisonment with an automatic 15-year sentence add-on for both. Isaiah's testimony would have corroborated not only defendant's testimony with respect to whether or not a gun was involved, but the testimony of all witnesses at trial that defendant did not have a weapon. Isaiah's proffered testimony would have arguably strengthened defendant's theory of defense. That theory was substantially weakened at trial by Necoah and Roger's prior inconsistent statements that were admitted as substantive evidence. Isaiah's testimony may have been important, and the record does not positively rebut his factual averment that no weapons were involved. Thus, it is at least arguable that defendant was prejudiced by counsel's failure to interview or call Isaiah to testify.

¶ 33 We express no opinion at this stage as to whether defendant will ultimately be able to prevail on his ineffective-assistance claim. We merely hold that defendant's claim of a constitutional violation is arguable on its merits.[2]

[2] Defendant also contends that he was arguably prejudiced by counsel's failure to interview Champaine or call her to testify. We need not address this argument, however,

¶ 34 III. CONCLUSION

¶ 35 We reverse the summary dismissal of defendant's postconviction petition by the circuit court of Winnebago County and remand for second-stage proceedings.

¶ 36 Reversed and remanded.

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because partial summary dismissals are not permitted under the Act, and we reverse and remand the dismissal of defendant's petition in its entirety. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).