2014 IL App (5th) 120552-U

NO. 5-12-0552

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 05-CF-1433
	)	
JOSEPH C. ROTHE,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE SCHWARM delivered the judgment of the court.
Justices Chapman and Spomer concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly denied the defendant's amended petition for postconviction relief.

¶ 2 In August 2007, a Madison County jury found the defendant, Joseph C. Rothe, guilty of armed robbery (720 ILCS 5/18-2(a)(1) (West 2004)). At trial, the evidence established the following.

¶ 3 On June 6, 2005, at approximately 12:40 a.m., Shawn Woodruff, Brandon Potthast, and Steve Bortko were walking north on Main Street in Edwardsville after leaving a downtown bar. Woodruff was a short distance in front of his friends as they walked. At the intersection of Dunn Street and Main Street, a white male with dark

circles under his eyes approached Woodruff, demanded his money, and struck him in the face with a large red pipe wrench. Stunned and bloodied, Woodruff fell to the ground with a severely damaged jaw. The man then took Woodruff's wallet from his back pocket and ran away. Woodruff and Bortko called 9-1-1 on their cell phones, and the police quickly responded. The first officer arrived at the scene at "[a]pproximately 12:42 a.m." Woodruff was subsequently transported by ambulance to a hospital, where his jaw was surgically repaired. As a result of his injury, Woodruff "had to eat a liquid diet for two months."

¶ 4 At the scene of the robbery, Woodruff, Potthast, and Bortko provided the police with consistent descriptions of Woodruff's attacker, and each stated that the man had worn an orange shirt. A canine used to track the suspect's path of flight led the police to Kansas Street, on which the defendant lived, but the trail ended at a chain-link fence by Terrence Hartley's house, two blocks away and in the opposite direction of the defendant's house. Hartley and his daughter, Tara, allowed officers to search their home, but nothing connecting them to the robbery was found. Tara also advised the officers that three of her friends had left the home sometime between 12:30 and 1 a.m.

¶ 5 Based on the eyewitnesses' physical descriptions and the proximity of his house to Dunn and Main, the police suspected that the defendant, who was on parole and required to wear a monitoring device on his ankle, was possibly the perpetrator. "[S]hortly after the robbery," Officer Randall Luttrell, who knew the defendant "[t]hrough prior contacts during [his] career," parked his patrol car in front of the defendant's house "to see if, possibly, he would come home." The defendant and Larry Wallace, who was living with

the defendant at the time, subsequently exited the house, approached Luttrell, and asked him what he was doing in the area. After Luttrell told them that he "couldn't discuss it," they went back inside the house.

¶ 6 A few hours later, Potthast and Bortko picked the defendant's picture out of a photographic lineup, and the defendant was arrested at his home sometime between 4 and 4:30 a.m. The defendant and his mother allowed the police to search the home, but nothing connecting the defendant to the robbery was found. One officer later recounted that when arrested, the defendant had attempted to appear as if he had just woken up, but "[i]t was such bad acting that it was clear" that he had not. Wallace and Debra Reed were present at the residence when the defendant was taken into custody.

¶ 7 When interviewed following his arrest, the defendant denied robbing Woodruff and claimed that he had been at home all night sleeping. When confronted with the fact that his monitoring device had indicated that he had gone "out of range," the defendant explained that "the device had sent false signals in the past when he was actually home."

¶ 8 On June 15, 2005, after responding to a call that Wallace was intoxicated and refusing to leave a local business, Officer Luttrell gave him a ride home to the defendant's house. Luttrell attended high school with Wallace and had prior "dealings with him as a police officer." Once they arrived at the defendant's residence, Wallace, who was "extremely intoxicated," directed Luttrell's attention to two garbage bags on the street in front of the house. Wallace told Luttrell that "there was a shirt in [one of] the bags that [he] would be interested in." Luttrell collected the bags, and an orange shirt bearing the logo of a business where the defendant had once worked was found stuffed

inside a box in one of them.

¶ 9 At trial, Luttrell, Wallace, Reed, Woodruff, Potthast, and Bortko were among the State's numerous witnesses, and Potthast unequivocally identified the defendant as Woodruff's attacker. The State also presented evidence that the defendant's monitoring device had been working properly on June 5-6, 2005, and that the device had indicated that the defendant had been "out of range" of the 150-foot zone of his home on Kansas Street from 11:54 p.m. on the fifth until 12:25 a.m. on the sixth and again on the sixth from 12:25 a.m. until 1:21 a.m. The device's reading suggesting that the defendant was both in and out of range at 12:25 a.m. indicated that the defendant had entered through the 150-foot zone "very quickly."

¶ 10 Reed testified that she had met the defendant through a mutual friend approximately two weeks before the robbery. Reed stated that she had stayed at the defendant's home "a couple of nights" since meeting him and had stayed there the night of June 5-6, 2005. She further stated that on the night of June 5, she had been at the defendant's house until 9 p.m. and had then gone to Cleo's bar in downtown Edwardsville with Wallace. Sometime around 10 or 10:30 p.m., Reed and Wallace went to another bar, Vanzo's, and Wallace left about 15 minutes later. Reed had "several" beers at Vanzo's and hung out with her friend, Darla, who was there when Reed and Wallace arrived. Reed testified that the defendant had come into Vanzo's around midnight or a "quarter after," but she could not give "an exact time." She further testified that someone had purchased the defendant a drink and that when she and Darla left the bar between 12 and 12:30 a.m., the defendant was still there. Reed was not positive as to when she and

Darla had left Vanzo's, and she could not state "to the minute" when they had. Reed testified that after leaving Vanzo's, she and Darla had gone to get something to eat and had then gone to the defendant's house. Reed stated that she and Darla had arrived at the defendant's "[p]robably a little after" 1 a.m.

¶ 11 Wallace testified that he "was already intoxicated" when he and Reed had gone to Vanzo's on the night in question. He stated that he had stayed at the bar for a few hours before leaving around 10 p.m. to go "[s]traight home." When Wallace arrived at the defendant's house, the defendant was home on his computer. Wallace went to bed, but the defendant woke him up when "the police were across the street." After speaking with the police, Wallace "passed out" again. Later that night, the police came to the defendant's house, searched it, and took the defendant to jail. When asked about the orange shirt that had later been found in the trash in front of the defendant's house, Wallace claimed that he had thrown it away fearing that the police might "come back and charge [him] with this incident." Indicating that he could not clearly recall much of his June 15 encounter with Officer Luttrell, Wallace admitted that he was a recovering alcoholic, who had been perpetually drunk "for years."

¶ 12 The defendant presented no evidence in his defense, but his attorney argued that before an investigation into the crime had even started, the police had determined that the defendant, who was on parole and lived nearby, was the perpetrator. Defense counsel assailed the manner in which the police had handled the case and noted, among other things, that although the canine used to track the suspect's path of flight had led officers to Hartley's house, from where three people had recently left, no efforts had been made to

investigate those individuals. Defense counsel faulted the police for failing to find the weapon that had been used in the robbery and criticized the quality of the photographic lineup that the police had shown the eyewitnesses. Defense counsel, who repeatedly emphasized that he was a former prosecutor, maintained that the police "didn't do their job" and that the investigation of the robbery was "by far the worst police investigation [he had] ever seen." He further argued that, once the police had subjectively determined that the defendant was the perpetrator, "[t]hey didn't care about investigating." Referring to Wallace as "a liar" and an admitted "drunk," counsel suggested that the discovery of the orange shirt nine days after the defendant's arrest actually incriminated Wallace rather than the defendant. Counsel further suggested that Woodruff, Potthast, and Bortko were intoxicated on the morning of June 6 and were unable to get a good look at Woodruff's attacker. Referring to the evidence regarding the defendant's monitoring device, counsel maintained that the defendant had lied to the police about being "home in bed" because he did not want to get into trouble for violating his parole. Suggesting that the defendant had been at Vanzo's at the time of the robbery, counsel stated: "He was at Vanzo's. That's what we know. Debbie Reed testified to that." Counsel argued that the police had tried to "make the evidence fit" their chosen suspect and that the State had utterly failed to prove the defendant guilty beyond a reasonable doubt.

¶ 13 With respect to the evidence regarding the defendant's monitoring device, the State argued that the defendant had been away from his house from midnight to 12:25 a.m., before briefly passing back through "the zone" prior to robbing Woodruff a few blocks away. Noting that the evidence indicated that the defendant had not subsequently

returned home until 1:22 a.m., the State further suggested that the defendant had approximately 40 minutes to dispose of the pipe wrench that he had used to strike Woodruff in the face. The State also argued that the defendant had been at Vanzo's around "midnight and a little after," before he had gone "back into the zone right in front of his house at 12:25 and right back out."

¶ 14 As previously noted, the jury found the defendant guilty of armed robbery. In June 2009, the defendant's conviction was affirmed on direct appeal. *People v. Rothe*, No. 5-07-0683 (2009) (unpublished order under Supreme Court Rule 23).

¶ 15 In July 2010, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In August 2011, appointed counsel filed an amended petition on the defendant's behalf. The amended petition raised several issues and alleged, among other things, that the defendant had been "denied the effective assistance of counsel in that trial counsel failed to raise the affirmative defense of alibi."

¶ 16 In September 2011, the State filed a motion to dismiss the defendant's amended postconviction petition. In March 2012, the trial court granted the State's motion with respect to all issues raised in the petition except for the defendant's alibi-defense claim.

¶ 17 In October 2012, the cause proceeded to a hearing on the defendant's claim that trial counsel was ineffective for failing to raise an alibi defense. The sole witness at the hearing was the defendant's trial attorney who, when called by the State, testified that he had not pursued an alibi defense because of the evidence regarding the defendant's monitoring device. Noting that the robbery had taken place "two or three blocks away"

from the defendant's house, counsel explained that he had not wanted to draw attention to the exact "time frame" of the crime because the monitoring device had indicated that the defendant had briefly been in range of his house "at the approximate time of the incident." Counsel further indicated that he had spoken with Reed about her having seen the defendant at Vanzo's but was concerned that her account would still have allowed for "a time frame of availability for the crime to [have] occur[red] after she [had] left." Counsel recalled that Vanzo's, the defendant's house, and the scene of the robbery were all fairly close together. When asked whether he and the defendant had discussed raising an alibi defense, trial counsel indicated that he would not answer that question unless the defendant waived the attorney-client privilege. When postconviction counsel advised the court that the defendant did not want "to do that," the matter was dropped.

¶ 18 The trial court subsequently entered a written order denying the defendant's alibi-defense claim. The court stated that trial counsel's "explanation [was] reasonable and not ineffective or lacking" and that the defendant's amended postconviction petition had "now been resolved entirely." The present appeal followed.

¶ 19 DISCUSSION

¶ 20 The Post-Conviction Hearing Act

¶ 21 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010). The Act provides a three-stage

process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 22 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A *pro se* petition for postconviction relief is considered frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 23 If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss the petition. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2010). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001).

¶ 24 At the third stage of a postconviction proceeding, the trial court "serves as the fact finder" and "must determine whether the evidence introduced demonstrates that the petitioner is, in fact, entitled to relief." *People v. Domagala*, 2013 IL 113688, ¶ 34.

After an evidentiary hearing, if fact-finding and credibility determinations are involved, the trial court's judgment on a postconviction petition "will not be reversed unless it is manifestly erroneous." *People v. English*, 2013 IL 112890, ¶ 23. If such determinations are not necessary, however, and the issue presented is a pure question of law, the trial court's judgment is reviewed *de novo*. *Id.*

¶ 25 Ineffective Assistance of Counsel

¶ 26 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 27 Whether trial counsel's representation was constitutionally deficient "is a mixed question of law and fact." *Strickland*, 466 U.S. at 698. "When a trial court rules on

issues which present a mixed question of law and fact, the reviewing court must afford deference to a trial court's factual findings." *People v. Crane*, 195 Ill. 2d 42, 51 (2001). "A reviewing court, however, remains free to engage in its own assessment of the facts in relation to the issues presented and may draw its own conclusions when deciding what relief should be granted." *Id.*

¶ 28 The Defendant's Alibi-Defense Claim

¶ 29 Maintaining that he "established a substantial deprivation of his constitutional right to effective assistance of counsel after an evidentiary hearing, because his trial counsel failed to pursue an available alibi defense," the defendant argues that the trial court erred in denying his amended petition for postconviction relief. We disagree.

¶ 30 We initially note that although the defendant's amended petition alleged that he had been denied the effective assistance of counsel in that trial counsel failed to raise the "affirmative defense" of alibi, "an alibi is not an affirmative defense. Rather, it is a method of countering the prosecution's case." *People v. Brandon*, 197 Ill. App. 3d 866, 884 (1990); see also *People v. Shelton*, 33 Ill. App. 3d 871, 874 (1975) (noting that "evidence placing [a] defendant somewhere other than the scene of the crime is merely one method of negating the prosecution's evidence showing that the defendant committed the crime"); Illinois Pattern Jury Instructions, Criminal, No. 24-25.05, Committee Note (4th ed. 2000) ("Alibi is not an affirmative defense."). "An alibi defense essentially denies that the defendant committed the act charged, while an affirmative defense basically admits the doing of the act charged but seeks to justify, excuse[,] or mitigate it."

People v. Huckleberry, 768 P.2d 1235, 1238 (Colo. 1989). An alibi defense is thus a "negative or negating defense." *State v. Walkup*, 220 S.W.3d 748, 755 (Mo. 2007).

¶ 31 Here, the defense theory was that the police arrested the defendant without ever having conducted a proper investigation, because knowing him and knowing that he was on parole, they merely assumed that he was the perpetrator. Arguing that the State had failed to prove the defendant's guilt beyond a reasonable doubt, counsel further suggested that the State's eyewitness testimony was suspect and that Wallace might have committed the robbery in question. Trial counsel also referenced Reed's testimony and maintained that the defendant was at Vanzo's when Woodruff was robbed. As part of the overall defense, counsel thus used the State's own evidence to counter its own case with an alibi theory.

¶ 32 In his reply brief, the defendant concedes that defense counsel's trial strategy included an "alibi theory." He argues, however, that counsel was ineffective for "failing to produce evidence supporting the alibi" and for relying solely on the State's evidence to advance it. This contention, however, is without merit.

¶ 33 To the extent that the defendant suggests that counsel should have called additional witnesses who could have placed him at Vanzo's when Woodruff was robbed, it is well established that a postconviction claim that trial counsel failed to investigate and call witnesses must be supported by evidence indicating what the witnesses' testimony would have been. *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010); *People v. Penrod*, 316 Ill. App. 3d 713, 723 (2000). In the absence of such evidence, it is impossible to

determine prejudice, because a reviewing court cannot determine whether the proposed witnesses could have provided testimony or information favorable to the defendant. *Id*.

¶ 34 Here, the defendant presented no evidence at the evidentiary hearing, and his petition did not allege that additional witnesses who might have seen him at Vanzo's when Woodruff was robbed even existed. Further consideration of the defendant's intimation that counsel failed to adequately investigate his alibi is therefore unnecessary. *People v. Enis*, 194 Ill. 2d 361, 380 (2000); *People v. Johnson*, 183 Ill. 2d 176, 192 (1998).

¶ 35 To the extent that the defendant suggests that counsel should have called Reed as an alibi witness for the defense, it is equally "well established that decisions concerning whether to call certain witnesses for the defense are matters of trial strategy left to the discretion of trial counsel." *People v. Banks*, 237 Ill. 2d 154, 215 (2010). Moreover, it is reasonable for trial counsel to not call an alibi witness who would be subject to severe impeachment or whose testimony might prove harmful or otherwise weak. *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1038-39 (2011); *People v. Smado*, 322 Ill. App. 3d 329, 335 (2001).

¶ 36 Here, at the evidentiary hearing, trial counsel indicated that in light of the evidence regarding the defendant's monitoring device, he had not wanted to draw attention to the precise time frame of the robbery. He further indicated that he had spoken with Reed but was concerned that her testimony would not have fully accounted for the time frame. Like the trial court, we conclude that counsel's explanation for not asserting an alibi

defense beyond the extent to which he did was objectively reasonable under the circumstances.

¶ 37 By referencing the State's evidence that Reed had seen the defendant at Vanzo's between 12 and 12:30 a.m., trial counsel was able to argue that the defendant was still there when Woodruff was robbed. As a result, counsel did not need to call Reed as a defense witness in support of the claim. Compare *People v. Sutherland*, 223 Ill. 2d 187, 271 (2006) (noting that the State's "own witness" provided the defense with an alibi), and *People v. Henderson*, 171 Ill. 2d 124, 155 (1996) (noting that "[t]rial counsel's performance cannot be considered deficient because of a failure to present cumulative evidence"), with *People v. Bryant*, 391 Ill. App. 3d 228, 241-42 (2009) (finding trial counsel ineffective for failing to adduce available evidence that would have supported an otherwise unsupported defense). Furthermore, had defense counsel called Reed to reiterate her account of having seen the defendant at Vanzo's, on cross-examination, the State could have emphasized her uncertainty as to the exact time that she and Darla had left. The State could have also impeached Reed with the evidence that she had been spending nights at the defendant's house and had consumed "several" beers before leaving the bar. Calling Reed as a defense witness would have thus risked weakening an already shaky alibi and would have frustrated counsel's stated strategy of not drawing attention the time frame of the crime. We lastly note that strategic considerations aside, given the strength of the State's case, it cannot be said that the outcome of the defendant's trial would have been different had Reed testified as a witness for the defense.

¶ 38 CONCLUSION

¶ 39 As was noted when affirming the defendant's conviction on direct appeal, his trial attorney employed "a plausible defense strategy that was coherently developed throughout the trial and zealously argued to the jury." *Rothe*, No. 5-07-0683, order at 9. With respect to the alibi-defense claim that the defendant raised in his amended petition for postconviction relief, he is unable to satisfy either prong of the *Strickland* test and has thus failed to establish that he was denied the effective assistance of counsel. Accordingly, the trial court rightfully denied the defendant's amended petition, and we hereby affirm the court's judgment.

¶ 40 Affirmed.