2012 IL App (1st) 103615

FIRST DIVISION
November 13, 2012

No. 1-10-3615

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	
	)	No. 02 CR 20374
	)	
JERMAINE BROWN,	)	Honorable
	)	Marcus R. Salone,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court did not err in dismissing defendant's postconviction petition at the second stage where defendant failed to make a substantial showing of a violation of his constitutional rights.

¶ 2 Defendant appeals from the dismissal of his postconviction petition at the second stage. On appeal he argues that the circuit court erred in dismissing his petition where he made a substantial showing that trial counsel was ineffective for:(1) failing to investigate and call Keesha Stuckie as a witness; and (2) failing to present available

evidence relating to the decedent's violent character. For the following reasons, we affirm the circuit court's dismissal of defendant's petition.

¶ 3 BACKGROUND

¶ 4 The evidence at his jury trial established that the victim, Ulysses Taylor, shot defendant in the leg in May 2002 during the course of an ongoing dispute over a gun that defendant sold to Taylor. The next month, defendant noticed the victim circling around in his car so defendant retrieved a handgun and asked a friend to drive his car while he pursued the victim. Defendant eventually found the victim's car and waited approximately 30 minutes for the victim to return. Defendant then approached the victim from behind and fatally shot him. At trial, defendant did not contest that he shot the victim, but argued that he acted in self-defense. Defendant was convicted of first degree murder and was sentenced to 25 years' imprisonment.

¶ 5 On appeal, defendant did not challenge the sufficiency of the evidence against him. Rather, he argued that he was denied a fair trial because the prosecutor made improper statements in closing argument. Defendant also claimed that his fourth amendment rights were violated by the compulsory extraction of his blood and storage of his DNA. We affirmed defendant's conviction and sentence on December 21, 2005, in *People v. Brown*, No. 1-04-1876 (unpublished order pursuant to Supreme Court Rule 23).

¶ 6 On October 13, 2006, defendant filed a *pro se* petition for postconviction relief wherein he raised numerous claims of ineffective assistance of trial and appellate counsel. Thereafter, the circuit court appointed an assistant Public Defender to

represent him. On May 21, 2009, counsel filed an amended postconviction petition alleging that trial counsel was ineffective for failing to investigate and call Keesha Stuckie as a defense witness, and for failing to present all available evidence pertaining to Taylor's violent character. Attached to the amended petition were notarized affidavits from defendant and Stuckie. Defendant's affidavit stated that he asked his trial counsel to locate Keesha Stuckie, a key defense witness, but counsel never did. Defendant also stated that counsel failed to investigate his case.

¶ 7 In her affidavit, Keesha Stuckie stated that she knew defendant and Taylor from the neighborhood. She knew that defendant had been shot in the leg in May 2002, but did not know who shot him until she spoke with Taylor several days later. Taylor told her that he tried to kill defendant but that defendant got away and would not be so lucky next time. Stuckie believed that Taylor intended to kill defendant so she warned defendant to "watch his back." She saw "fear in [defendant's] eyes" like he feared for his life. After defendant was arrested for killing Taylor, defendant told her that his attorney would contact her but he never did. Stuckie stated that she called the attorney's office and left a message but that the attorney did not call her back.

¶ 8 On October 21, 2010, counsel filed a supplemental exhibit to defendant's amended postconviction that consisted of an affidavit from Janet Wright, a complaining witness in Taylor's case for aggravated unlawful use of a weapon. In her affidavit, Wright stated that Taylor fired a gun at her about ten times after she had a brief argument with his girlfriend sometime after June 2001. Wright further stated that no one contacted her about testifying at defendant's trial.

¶ 9 The circuit court granted the State's motion to dismiss defendant's amended petition on November 18, 2010. This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant first argues that the circuit court erred in granting the State's motion to dismiss his amended postconviction petition where he made a substantial showing that trial counsel was ineffective for failing to contact, call and investigate Keesha Stuckie as a witness. Defendant contends that Stuckie's testimony was crucial to his theory of self-defense because she was capable of providing credible evidence that defendant possessed an actual, reasonable fear that Taylor intended to kill him.

¶ 12 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)), allows a criminal defendant a procedure for determining whether he was convicted in substantial violation of his constitutional rights. 725 ILCS 5/122-1(a) (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). Where a defendant is not sentenced to death, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 13 At the first stage, the circuit court must determine whether the petition before it alleges the " 'gist of a constitutional claim.' " *Edwards*, 197 Ill. 2d at 244, quoting *Gaultney*, 174 Ill. 2d at 418 . Taking all well-pleaded facts as true, the court must determine whether the petition alleges a constitutional infirmity that, if proven, would demonstrate a deprivation of petitioner's constitutional rights. 725 ILCS 5/122-2.1(a) (West 2010); *People v. Coleman,* 183 Ill. 2d 366, 385 (1998). If the trial court determines that a petitioner has stated the "gist of a constitutional claim," the petition is

advanced to the second stage and counsel is appointed, if necessary, in accordance with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2010).

¶ 14 At the second stage, the State is required to either answer the post-conviction petition or move to dismiss. 725 ILCS 5/122-5 (West 2010). As the State in this case moved for dismissal, the trial court was required to rule on the legal sufficiency of the allegations contained in the petition, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). As we review this case at the second stage, our inquiry is whether the allegations raised by petitioner in his petition, supported by records and other documents, demonstrate a substantial violation of petitioner's constitutional rights. *Edwards*, 197 Ill. 2d at 245-46. The standard of review we apply to the circuit court's dismissal of defendant''s petition is *de novo*. *Coleman*, 183 Ill. 2d at 378-79.

¶ 15 Defendant argues that the trial court erred in dismissing his petition at the second stage where he established that appellate counsel was ineffective for failing to raise the issue of trial counsel's ineffectiveness. The law is clear that a defendant in any criminal case is constitutionally guaranteed effective assistance of counsel. U.S. amend. VI, XIV; ILL CONST., 1970, Art. 1 § 8; *Strickland v. Washington*, 466 U.S. 668 (1984); adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984). The *Strickland* court set forth the two requirements that a defendant must show to prevail in an ineffective assistance claim; (1) counsel's performance fell below an objective standard of reasonableness and; (2) there is reasonable probability that, but for counsel's errors, the result of the trial would have been different. The burden is on the defendant to

overcome the strong presumption that defense counsel rendered adequate assistance using reasonable professional judgment pursuant to sound trial strategy. *Strickland*, 466 U.S. at 689-90.

¶ 16 Further, defendant must show there was a reasonable probability that defense counsel's errors *affected* the outcome of the proceeding. *Strickland*, 466 U.S. at 694 (emphasis added). A reasonable probability is one sufficient to "undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. It is the "confidence in" and "reliability of" the outcome that is in question. *Strickland*, 466 U.S. at 694 . In making this inquiry, *Strickland* dictates that we must consider the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. It is not enough that trial counsel failed to meet the competence standard; defendant must also show that he was prejudiced as a result. *Strickland*, 466 U.S. at 692-93.

¶ 17 Given the procedural posture of this case, we must determine whether the allegations raised by defendant in his petition, supported by records and other documents, demonstrate a substantial violation of defendant's constitutional rights. *Edwards*, 197 Ill. 2d at 245-46. No credibility determinations will be made at the second stage. *People v. Childress*, 191 Ill. 2d 168, 174 (2000).

¶ 18 Generally, decisions concerning which witnesses to call and what evidence to present on a defendant’s behalf are considered to be matters of trial strategy and are accorded immunity from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). Alleged mistakes concerning trial strategy are insufficient to demonstrate that trial counsel was incompetent. *People v. Young*, 341 Ill.

App. 3d 379, 383 (2003).

¶ 19 Defense counsel called four witnesses, including defendant. Randy Black testified that he saw Taylor, wearing a black mask over his nose and mouth, shoot defendant in front of a store in May 2002. Black also testified that Taylor shot at him and several others in Garfield Park on June 22, 2002. Taylor circled the park several times before he began shooting in the park. Antwon Coleman testified that he was present in Garfield Park on June 22, 2002, and saw Taylor several times before defendant arrived there. Taylor shot at Coleman and his companions. Randy Boyd testified that he was also present when Taylor opened fire in Garfield Park. Defendant stated that Taylor shot him in May 2002, after defendant sold Taylor a non-working gun. Defendant testified that he shot Taylor in self-defense because he "felt like he was some type of threat to me, and I was scared." Defendant testified that he feared for his life because Taylor was "fiddling with his hand and he didn't leave." Defendant assumed that Taylor was going to shoot him again.

¶ 20 We reject defendant's argument that trial counsel was ineffective for failing to investigate and call Stuckie as a witness where defendant suffered no prejudice as a result. Based on her affidavit, Stuckie's testimony would not have bolstered defendant's theory of self-defense. While Stuckie's affidavit establishes that defendant told her that "[Taylor] is going to kill me," defendant never told her that he was in "fear for his life." She only averred to her perception of defendant's reaction to Stuckie telling him that Taylor said he wouldn't be so lucky next time. Furthermore, while an argument could be made based on Stuckie's affidavit that defendant did actually fear for his life at

the time he and Stuckie had the conversation several days after Taylor shot defendant, her affidavit does not establish that defendant feared for his life on the day he shot Taylor, nearly a month later. Stuckie was not present at the time defendant shot Taylor. Accordingly, the circuit court did not err in dismissing this claim where defendant failed to make a showing of a substantial violation of his constitutional rights.

¶ 21 Defendant next contends that his postconviction petition made a substantial showing that trial counsel was ineffective when he failed to introduce evidence of Taylor's history of violence and aggression, where such evidence was admissible under *People v. Lynch*, 104 Ill. 2d 194 (1984), and would have affected the jury's perception as to who was the aggressor, whether defendant feared for his life, and whether such a belief was reasonable. Defendant claims that the trial court erred in dismissing this claim.

¶ 22 As previously discussed, in order to prevail on a claim of ineffective assistance of counsel defendant must show that counsel's performance was deficient and the deficient performance prejudiced him so as to deny him a fair trial. *Strickland*, 466 U.S. at 687-88. To demonstrate prejudice, a defendant must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694.

¶ 23 At trial, the testimony of the defense witnesses established that the victim, Taylor, shot defendant one month before the incident in this case. On the day Taylor was killed, he parked his car in an alley and walked over to Garfield Park and fired shots at several men sitting in the park. Defendant attached documents to his

postconviction petition that show Taylor had a conviction for aggravated unlawful use of a weapon and had been charged in a separate case with aggravated assault. In addition, defendant attached an affidavit from 15-year-old Janet Wright who was the victim in Taylor's aggravated assault case. Wright averred that Taylor fired a gun at her when she refused to approach his car. This additional evidence, defendant urges, was the type of information the jury needed to see just how dangerous Taylor was.

¶ 24 In *Lynch*, our supreme court held that when a defendant raises self-defense as a theory in his case, evidence showing the victim's aggressive and violent character is relevant to show (1) the defendant's knowledge of the victim's violent tendencies affected his perceptions of and reactions to the victim's behavior, or (2) to support the defendant's version of the facts when there are conflicting versions of events. *Lynch*, 104 Ill. 2d at 200. "Under the first approach, evidence is relevant only if the defendant knew of the victim's violent acts. Under the second approach, the defendant's knowledge is irrelevant." *People v. Nunn*, 357 Ill. App. 3d 625, 631 (2005).

¶ 25 While the information regarding Taylor's criminal history and the affidavit from Wright may be admissible under *Lync*h, we disagree with defendant's assertion that this additional evidence was necessary to show Taylor's aggressive and violent character. As discussed, defendant and Black both testified that Taylor shot defendant about seven weeks before Taylor was killed. In addition, Black, Coleman and Boyd each testified that Taylor shot at them in Garfield Park on the morning he was shot. Any additional evidence of Taylor's violent nature or aggressiveness would be merely cumulative. We therefore cannot find that defendant was prejudiced in any way by trial

counsel's failure to present the additional *Lynch* evidence defendant attached to his postconviction petition. Consequently, the circuit court did not err in dismissing this claim.

¶ 26 CONCLUSION

¶ 27 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 28 Affirmed.