2016 IL App (1st) 141378-U

SIXTH DIVISION
July 29, 2016

No. 1-14-1378

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. 06 CR 27308
	)	
BRIAN GOOLSBY,	)	Honorable
	)	Arthur F. Hill,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed where claim that trial counsel was ineffective for failing to investigate four alibi witnesses was barred as to three witnesses by *res judicata* principles; similar claim regarding final alibi witness was insufficient as defendant was not arguably prejudiced.

¶ 2 Following a jury trial, defendant Brian Goolsby was found guilty of the first-degree of Terrell Davis (the victim) and sentenced to 85 years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. See *People v. Goolsby*, 2013 IL App (1st) 103358-U. The trial court dismissed defendant's *pro se* petition for relief under the Post-

Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq. (West 2014)) (petition at the first stage). On appeal, defendant argues his petition presented an arguable claim that trial counsel was constitutionally ineffective for failing to investigate four alibi witnesses and, therefore, the dismissal was in error. We affirm.

¶ 3 At trial, the victim's sister, Antoinette Brayboy, testified that at around 1 a.m., on October 6, 2005, the victim, who was 17 years old, left the family residence located on the 6200 block of South Maplewood Avenue in Chicago. Ms. Brayboy lived there with the victim, her mother, her grandmother, and other siblings. Approximately one hour later, Ms. Brayboy's grandmother heard gunshots. When the victim did not return home, Ms. Brayboy and her mother left the house and walked to the nearby intersection of Campbell Avenue and 63rd Street, where there was "something going on." En route Ms. Brayboy observed defendant sitting in a vehicle on Maplewood Avenue when, a man she knew as "Lucky," entered the vehicle and drove away with defendant. Before Ms. Brayboy and her mother reached Campbell Avenue and 63rd Street, she learned that her brother had been shot.

¶ 4 Johnny Hardin, who knew the victim and defendant from the neighborhood, gave a statement to an Assistant State's Attorney (ASA) and testified before the grand jury that, around 2 a.m., on October 6, 2005, he was leaving his girlfriend's house near Campbell Avenue and 63rd Street. As he walked, Mr. Hardin observed the victim running through a vacant lot. A few seconds later, Mr. Hardin observed defendant, whose face was illuminated by the streetlights, chasing after the victim. The victim fell near the end of the vacant lot where defendant caught up with him and shot him two or three times with a chrome gun. As defendant fled the scene, he threw the gun onto the roof of a building.

¶ 5 At trial, Mr. Hardin, who had four prior felony convictions for drug possession, recanted the statements he made to the ASA and the grand jury. Mr. Hardin testified that on July 23, 2006, as he was driving his children to school, the police stopped him, recovered a gun from his vehicle, and brought them to the police station. The police questioned him for several hours regarding the murder. Eventually, Mr. Hardin and the police came to an "arrangement" that he would implicate defendant in the victim's murder. In exchange, the police would not charge Mr. Hardin with possession of the firearm which was recovered from his vehicle and the Illinois Department of Children and Family Services would not take away his children. Mr. Hardin testified that he made the statements to the ASA and the grand jury pursuant to this arrangement. Additionally, Mr. Hardin testified that, in October 2005, he was on electronic monitoring at his sister's residence which was located on the 6900 block of South Indiana Avenue, and if he had traveled more than 100 feet from there, the sheriff's office would have been alerted. As such, Mr. Hardin testified that he did not leave his sister's house on October 5 or 6, 2005 and did not actually witness defendant shoot Mr. Davis.

¶ 6 Mark Love, who had four prior felony convictions at the time of trial and knew defendant and the victim, testified that one or two days before the victim was shot, he and defendant got into an altercation. They exchanged punches near a group of people, which included the victim. At trial, Mr. Love testified that he told defendant that he "hit like a b***." Defendant replied to Mr. Love that it was "cracking" or, "fighting" between them. Mr. Love stated that "cracking" could mean that a shootout was forthcoming in some neighborhoods, but not in his neighborhood.

¶ 7 Mr. Love acknowledged that he testified before a grand jury that it was the victim who told defendant he "hit like a b***." At another point during trial, however, Mr. Love could not recall telling the grand jury that the victim made this remark and, specifically, denied that the victim had said it. Mr. Love also clarified that defendant told only him that it was "cracking" between them, despite testifying to the grand jury that defendant said this to the entire group.

¶ 8 ASA Sabra Ebersole testified that, during Mr. Love's grand jury testimony, he stated that the victim told defendant he "hit like a b***" and, as a result, defendant told the entire group it was "cracking." Mr. Love also told the grand jury that he was afraid defendant was going to come back and "do something stupid."

¶ 9 Damion Dorsey testified that he knew defendant and the victim and has an older brother named Delwin. Sometime around October 1, 2005, Damion was with a group which included defendant, the victim, and Lucky. Damion's cousin and Lucky got into an altercation. Defendant punched Damion in the face, but Damion was not visibly injured. The victim started "laughing, hooping and hollering" and called defendant a "big p****."

¶ 10 Around 2 a.m. on October 6, 2005, Damion was at home when he heard gunshots. Damion left his home and walked to the area where he had observed police and ambulance lights and saw the victim lying on the ground. Damion spoke to the police later that day, but he did not mention that the victim mocked defendant and called him a "big p****."

¶ 11 The day after the shooting, Damion was with Delwin and a group of people when Delwin received a phone call from defendant. Delwin placed defendant on speaker phone and defendant said: "What mother*** thought I was playing about whacking [the victim.] What I got to do, come through there and pop the s*** out of one of y'all everyday?" Damion did not recall

describing to the grand jury what defendant had said regarding his shooting of the victim during the phone call.

¶ 12 Former ASA Bradley Giglio testified that Damion told the grand jury that defendant had admitted to him that he chased the victim down and shot him in his back and leg.

¶ 13 Delwin Dorsey testified that he had four prior felony convictions. On the day before the shooting, he had a conversation with defendant outside a store where they discussed a feud between defendant and a group of people which included the victim and Mr. Love. Defendant told Delwin it was "cracking" between him and the group. Delwin explained that "cracking" could mean either fighting, or "[i]f someone like *** [does] something to you [and] you was talking about doing something back to them." Because Delwin was friendly with Mr. Love, the victim, and defendant, defendant asked Delwin whose side he was on. Delwin told defendant "we all was cool," and he would not choose sides. Delwin denied that, on that same day, he had observed the victim and defendant having a conversation, or that defendant had threatened to kill the victim.

¶ 14 The day after the shooting, Delwin was with a group of people, including his brother Damion, when Delwin's girlfriend received a call from defendant. While on speaker, defendant told the group that he saw people talking to the police and that it was "cracking." Delwin denied that, during the phone call, defendant told the group that he had killed the victim and he had described the manner by which he did so.

¶ 15 Delwin acknowledged speaking to the police, giving a statement to an ASA, and testifying before a grand jury. He explained at trial that he spoke to the police and the ASA only after Chicago police Detective Sayan Sampin had forced him at gunpoint to accompany him to

the police station and because he felt that he could be charged as an accessory to murder. Delwin denied telling the ASA and the grand jury that he had observed defendant outside the store, pointing a gun at and threatening the victim. Delwin also denied telling the ASA and the grand jury that defendant admitted to killing the victim and that he described the murder on the phone. Delwin did acknowledge telling the grand jury that, on the day before the shooting, defendant recounted to Delwin he had told the victim: "they sign they death certificate."

¶ 16 Former ASA Giglio testified that Delwin told the grand jury that defendant admitted to him that he initially shot the victim in the leg. When the victim ran, defendant shot him in the back and the victim fell. Defendant shot the victim again, once or twice. Delwin also told the grand jury that he saw defendant, inside a store, threatening to kill the victim with a gun. Defendant told the victim: "Y'all need to sign y'all death certificate."

¶ 17 Detective Sampin testified that he investigated the shooting. Two weeks after the shooting while searching nearby rooftops for the gun, Mr. Hardin and Delwin approached him. Mr. Hardin told Detective Sampin he was searching on the wrong roof. After Detective Sampin asked Mr. Hardin to direct him to the correct roof, Mr. Hardin walked away. Detective Sampin asked Delwin to come to the police station. Delwin declined, stating that defendant had people watching "all the time," and he could be killed for speaking to the police. However, Delwin later came to the police station voluntarily.

¶ 18 Detective Sampin did not find the gun on any roof. Detective Sampin denied ever pointing a firearm at Delwin, or threatening Mr. Hardin with criminal charges or the loss of his children, in exchange for his statement. Detective Sampin maintained that all the witnesses gave their statements voluntarily.

¶ 19 A medical examiner testified that the victim's death was a homicide and the result of multiple gunshot wounds to the right hand, left hip, right buttock, and chest. Although investigators found evidence at the scene of the crime, none of the evidence directly connected defendant to the murder.

¶ 20 Defendant presented two witnesses, including Detective Paulette Wright. Detective Wright stated that she interviewed Ms. Brayboy, and that Ms. Brayboy told her that it was Ms. Brayboy's aunt who heard the gunshots. Defendant did not testify.

¶ 21 The jury found defendant guilty of first-degree murder finding that defendant personally discharged the gun which caused the victim's death.

¶ 22 Defendant's trial counsel filed a motion for new trial, contesting the sufficiency of the evidence. Thereafter, new counsel for defendant filed an appearance and two supplemental motions for new trial; trial counsel was allowed to withdraw. In the supplemental motions, new counsel argued, *inter alia*, that trial counsel was ineffective for failing to investigate and present several witnesses. In affidavits attached to the supplemental motions, Kianta Britten and Tiana Williams averred that they were present during the altercation between defendant and Mr. Love and they did not hear the victim mock defendant. The witnesses who are at issue in this appeal were not named in the supplemental motions.

¶ 23 At a hearing on the posttrial motions, defendant and trial counsel testified. Defendant testified that he had approximately five conversations with trial counsel during the period of time he represented him. At the first meeting with trial counsel, defendant told trial counsel that he had not been present at the shooting. Defendant did not testify to any additional information as to his whereabouts at the time of the murder. Defendant gave trial counsel the names and addresses

of four alibi witnesses: Paris Henderson, Donna Henderson, Benita Jackson, and John Elmore. Trial counsel told defendant that he "don't do alibi defenses," and refused to contact them. Defendant knew about the handwritten statements of Paris and Mr. Elmore. Defendant wanted to "take the stand to defend" himself. However, he acknowledged that, during the trial, he told the trial court that it was his decision to not testify and explained that he wished to cooperate with trial counsel.

¶ 24 Trial counsel testified that defendant informed him he had an alibi for the date of the offense. Trial counsel acknowledged telling defendant that he does not "put on alibi defenses." Defendant only gave him the names of two potential alibi witnesses: Mr. Elmore and Paris Henderson. He subsequently learned about Donna Henderson from defendant's family.

¶ 25 Trial counsel reviewed the handwritten statements and the grand jury testimony of Paris and Mr. Elmore, and the police reports which related to their interviews. According to Paris's prior statements, she was with defendant on the night of the shooting, but was unable to account for his whereabouts at around 2 a.m., the time of the shooting. Trial counsel, therefore, concluded that Paris "would make a very poor alibi witness." According to Mr. Elmore's prior statements, he was intoxicated on the night of the shooting, and that fact weighed into trial counsel's decision as to whether Mr. Elmore would be a credible alibi witness. Trial counsel, his investigator, and his clerks were unsuccessful in their attempts to contact Mr. Elmore. Trial counsel acknowledged knowing about Donna, but he could not recall who had given her name to him. He listed her in his answer to discovery as a potential witness, but never met with her. Trial counsel also could not recall that defendant, nor a member of his family, had provided him

with Ms. Jackson's name. Ultimately, trial counsel had not interviewed any of the potential alibi witnesses.

¶ 26 The trial court denied defendant's motions for new trial. Although it found trial counsel's aversion to alibi defenses "curious," it did not find trial counsel's overall representation of defendant objectively unreasonable, or that prejudice resulted from his alleged errors. In denying defendant's subsequent motion to reconsider, the circuit court reaffirmed its finding that defendant was not prejudiced by counsel's representation.

¶ 27 Defendant was subsequently sentenced to 85 years' imprisonment for first-degree murder which included a mandatory 25-year enhancement for personally discharging the gun which caused the victim's death. Defendant appealed. *Goolsby*, 2013 IL App (1st) 103358-U.

¶ 28 On appeal, the defendant argued, *inter alia*, that he received ineffective assistance of trial counsel because of counsel's refusal to interview and present three potential alibi witnesses: Mr. Elmore, Paris Henderson, and Donna Henderson. We affirmed, rejecting the defendant's claim. *Id.* ¶¶ 95-100. We determined that trial counsel was not ineffective by failing to interview Mr. Elmore and Paris Henderson. *Id.* ¶¶ 97-98. Paris was uncertain of the defendant's whereabouts at the time of the victim's murder, and Mr. Elmore stated that he was intoxicated on the night of the shooting. *Id.* ¶ 97. Furthermore, trial counsel had taken reasonable steps to contact Mr. Elmore. *Id.* ¶ 98. Concerning Donna, we noted that there was no evidence of what her potential testimony would have been and, thus, we could not assume the defendant was prejudiced by trial counsel's failure to investigate and present her as an alibi witness. *Id.* ¶ 99. Finally, concerning Ms. Jackson, we noted that, although the defendant did not include her in his argument on appeal, he testified during his hearing on the motion for new trial that he gave trial counsel her

name as a potential alibi witness. *Id.* ¶ 99, fn. 5. We found that, as the record lacked any information about Ms. Jackson's potential testimony, we similarly could not assume the defendant was prejudiced by trial counsel's failure to investigate and present her as an alibi witness. *Id.*

¶ 29 In February 2014, defendant filed his postconviction petition which alleged that his trial counsel was constitutionally ineffective for failing to interview and present alibi witnesses: Mr. Elmore, Ms. Jackson, Paris Henderson, and Donna Henderson. Defendant attached to the petition the affidavits of Mr. Elmore and Ms. Jackson. In his petition, defendant asserted that: he told trial counsel about the four witnesses; Ms. Jackson was not available at the time of the trial or direct appeal; and affidavits could not be obtained from either Paris, or Donna, because of defendant's current incarceration and, also, because their addresses had changed twice over the last eight years.

¶ 30 In his affidavit, Mr. Elmore averred that, on October 6, 2005, he lived at 6968 South Anthony Avenue. On that date, defendant appeared at his residence around 1:15 a.m. Mr. Elmore, Paris, and defendant played cards and had a few drinks until 3:30 or 4 a.m. Afterward, everyone went to sleep there. Mr. Elmore was "100% sure" of the details of that morning.

¶ 31 In her affidavit, Ms. Jackson averred that, on October 6, 2005, she lived at 6968 South Anthony Avenue. On that date, she observed defendant enter the building between 1:00 and 1:30 a.m. Ms. Jackson remembered the date because it was her boyfriend's birthday, and she "waited for close to one hour before he finally arrived and no one else came [or] left during that time." Ms. Jackson averred that, based on the layout of the building and her vantage point, she would have been able to see anyone leaving.

¶ 32 The trial court found the claims concerning the alibi witnesses were barred by *res judicata* and that, even if it did review the merits of the claims, it would have reached the same conclusion as we did on direct appeal. Accordingly, the trial court summarily dismissed the petition as frivolous and patently without merit. This appeal followed.

¶ 33 Defendant contends that his postconviction petition presented an arguable claim of ineffective assistance of trial counsel where counsel never investigated defendant's four alibi witnesses despite having been told by defendant about the witnesses and his alibi. The State responds that this claim had already been decided on direct appeal, thus, the doctrine of *res judicata* bars our consideration.

¶ 34 The Act provides a means by which a defendant may challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2014). "A postconviction proceeding is not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *People v. Davis, 2014 IL 115595*, ¶ 13. Thus, the circuit court only "examines constitutional issues which escaped earlier review." *People v. Blair*, 215 Ill. 2d 427, 447 (2005). Under the Act, at the first stage, the circuit court must determine whether the defendant's petition is "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). If it does, the court will dismiss the petition. *Id.* Encompassed within this standard is the doctrine of *res judicata* (*Blair*, 215 Ill. 2d at 445), which bars consideration of issues which were raised and decided on direct appeal. *Davis*, 2014 IL 115595, ¶ 13. An exception to *res judicata* occurs when "the facts relating to the issue do not appear on the face of the original appellate record." *People v. English*, 2013 IL 112890, ¶ 22. We review the petition's summary dismissal at the first stage *de novo*. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 35 Defendant asserts that his claim is distinct from the one decided on direct appeal and argues that the exception to *res judicata* applies because he attached affidavits from Mr. Elmore and Ms. Jackson to his petition which were not part of the record on direct appeal. Defendant relies upon *People v. Wilson*, 2013 IL App (1st) 112303.

¶ 36 In *Wilson*, this court had, on direct appeal, rejected the defendant's claim of ineffective assistance of trial counsel for failing to call his girlfriend as a witness because counsel made a conscious decision to not call her, which, as a matter of trial strategy, was generally immune from ineffective assistance claims. *Id.* ¶ 8. The defendant subsequently filed a postconviction petition, alleging in part that his trial counsel was ineffective for failing to interview or present his girlfriend as an alibi witness and attached her affidavit to the petition. *Id.* ¶¶ 9-10. The circuit court dismissed the petition based on *res judicata*, and the defendant appealed.

Id. ¶ 11

¶ 37 As it does in the instant case, the State in *Wilson* argued that the defendant's claim was barred by *res judicata*, as having been addressed and rejected on direct appeal. *Id.* ¶ 13. This court found that the details of the girlfriend's "testimony as set out in the affidavit are not part of [the direct appellate] record, and it also is not clear from the record that counsel knew the substance of [her] account." *Id.* ¶ 17. Consequently, because the facts relating to the defendant's claim were outside the record on direct appeal, *res judicata* did not bar the court from addressing the claim. *Id.*

¶ 38 Following *Wilson*, we must determine whether defendant has provided new facts that were not part of the record on direct appeal.

¶ 39 With respect to both Paris and Donna, defendant has not provided an affidavit from either potential witness and has, therefore presented no facts relating to their alleged alibi testimony which was not already included on the record on direct appeal, therefore, *Wilson* is inapposite. With respect to Mr. Elmore, his affidavit simply restates facts that trial counsel already knew from Mr. Elmore's prior handwritten statements and grand jury testimony. Although these prior statements are not contained in the record before us, trial counsel testified during the hearing on the motions for new trial that Mr. Elmore's prior statements potentially gave defendant an alibi, but also indicated that Mr. Elmore had been intoxicated on the night of the shooting. Mr. Elmore's affidavit does not provide any new facts. Therefore, *Wilson* is again inapposite. Having found no new facts as to the ineffectiveness claims as to Paris, Donna, and Mr. Elmore which were not a part of record, *res judicata* bars our consideration of defendant's ineffective assistance of counsel claim concerning these three witnesses.

¶ 40 The claim related to potential alibi witness Ms. Jackson, however, is not barred by *res judicata*. The testimony, as set forth in Ms. Jackson's affidavit, was that defendant entered the building she lived in and did not leave the building prior to the time of the shooting. This evidence is not part of the direct appeal record, and the record does not indicate that trial counsel knew the substance of Ms. Jackson's account. In fact, when trial counsel testified during the post trial motions hearing, he could not recall if defendant or a member of his family provided him with Ms. Jackson's name. Therefore, we find the claim with respect to Ms. Jackson identical to the situation in *Wilson*. Consequently, we will address the petition's substantive claim that trial counsel was ineffective for failing to investigate Ms. Jackson as a witness. *Wilson*, 2013 IL App (1st) 112303, ¶¶ 17-20.

¶ 41 Although the circuit court found the petition's entire claim concerning the alibi witnesses barred by *res judicata*, because our review is *de novo* (*Allen*, 2015 IL 113135, ¶ 19), and we review the circuit court's judgment, not its reasoning (*People v. Jones*, 399 Ill. App. 3d 341, 359 (2010)), the court's finding of *res judicata* does not preclude our substantive review of defendant's claim as to Ms. Jackson on appeal. In reviewing defendant's claim, all well-pled facts in the petition and supporting affidavits are accepted as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). If the petition "alleges sufficient facts to state the gist of a constitutional claim," it should survive first-stage proceedings. *Allen*, 2015 IL 113135, ¶ 24.

¶ 42 A postconviction claim of ineffective assistance of counsel is reviewed pursuant to the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). At the first stage of the Act, "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id.* Both prongs of the *Strickland* test must be met, otherwise the claim fails. *People v. Henderson*, 2013 IL 114040, ¶ 11.

¶ 43 While defendant argues that his trial counsel was deficient for not investigating Ms. Jackson as a witness, we will limit our analysis to whether defendant has made a sufficient showing that he was prejudiced when trial counsel allegedly failed to investigate and call her as an alibi witness. Prejudice is shown when "arguably a reasonable probability [exists] that the proceeding would have resulted differently" absent counsel's alleged errors. *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 34.

¶ 44 Here, even under the low standard of *Hodges*, we find defendant was not arguably prejudiced by his counsel's failure to investigate Ms. Jackson as a witness. While much of the evidence of defendant's guilt rested upon recanted statements from the witnesses, evidence admissible through the witnesses' prior inconsistent statements may be considered the same as direct testimony from those witnesses. See *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23. The substantive admission of these statements strongly implicated defendant in the murder of the victim. See *People v. Armstrong*, 2013 IL App (3d) 110388, ¶ 23 (recanted admitted prior inconsistent statement alone is sufficient to prove defendant's guilt beyond a reasonable doubt). This evidence showed a motive for defendant's murder of the victim and that defendant had threatened to kill the victim on the day prior to the shooting. Mr. Hardin's prior statement and grand jury testimony were that he observed defendant shooting the victim multiple times. Lastly, this evidence established that defendant admitted to killing the victim, including describing the manner in which he did so, which corroborated Mr. Hardin's prior statements regarding the actual shooting and the medical examiner's testimony as to the manner of death.

¶ 45 While Ms. Jackson averred in her affidavit that she saw defendant enter the building at 6968 South Anthony Avenue about the time of the shooting, this evidence would have to be considered in light of the contrary evidence at trial. This evidence included not only Mr. Hardin's prior statements that he saw defendant shoot the victim but, also, the testimony of the victim's sister, Ms. Brayboy, who observed defendant near the crime scene just after the shooting. In light of the foregoing evidence, we find that the petition does not sufficiently show the outcome of defendant's trial would have changed had trial counsel investigated Ms. Jackson as a witness and

defendant was not arguably prejudiced by trial counsel's alleged error. Defendant's postconviction claim of ineffective assistance of counsel fails.

¶ 46 For the foregoing reasons, we affirm the order of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 47 Affirmed.