

NOTICE
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2016 IL App (5th) 140060-U

NO. 5-14-0060

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Jackson County.
)	
v.)	No. 13-CF-111
)	
DESTANY L. SMITH,)	Honorable
)	William G. Schwartz,
Defendant-Appellant.)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's order is affirmed where the defendant received effective assistance of counsel, as she was not prejudiced in that there does not exist reasonable probability that a different result would have occurred absent trial counsel's alleged failures. However, we vacate in part the court's order directing the defendant to pay the attorney-reimbursement fee.

¶ 2 The defendant, Destany L. Smith, was convicted of aggravated battery (720 ILCS 5/12-3.05(a) (West 2012)) and mob action (720 ILCS 5/25-1 (West 2012)) on November 4, 2013, and was sentenced to two years in the Illinois Department of Corrections (IDOC) with one year of mandatory supervised release (MSR).

¶ 3 On January 27, 2013, the defendant attended the Polar Bear event at Cali's Bar in Carbondale, Illinois, with a friend, Leah Owens (Owens). After visiting Cali's Bar, the defendant and Owens drove together to Don Taco. The undisputed facts indicate that Kristen Johnson (Johnson), accompanied by Brandi Taylor (Taylor), struck the front of the defendant's car while Johnson pulled her vehicle into Don Taco's parking lot. Following this minor vehicle accident, which resulted in slight damage to the defendant's vehicle, an altercation between the defendant, Johnson, and Owens occurred. Following this altercation, the Carbondale police responded to the scene regarding a traffic crash. Upon arrival, the officers found Johnson slumped over in her vehicle with severe injuries to her face and right eye. Johnson was able to communicate to the officers that the occupants of the other vehicle, Owens and the defendant, hit and battered her.

¶ 4 The presentence investigation report reveals that prior to being transported to the hospital, Johnson informed the police that she was certain that the defendant, the driver of the other vehicle, was the first person to strike her in the face and did so repeatedly while she was seated in her car. Johnson indicated to the police that she vaguely recalled being pulled from her vehicle, attacked by at least three other people, and that her head was slammed against a concrete parking block. Johnson later advised the police that she located a photo of the defendant on Facebook and positively identified her as the primary aggressor. After receiving treatment, it was determined that Johnson had a broken orbital bone beneath her right eye.

¶ 5 The presentence investigation report indicates that Detective Baril met with Taylor at a later date. Taylor identified the defendant as the first person to strike Johnson and

the one who pulled "Johnson from [her] vehicle, after which time Ms. Owens became violent and began kicking and punching Ms. Johnson and slammed her head against a parking block." Taylor positively identified both the defendant and Owens as the suspects who battered Johnson, as she was familiar with both women, having known them for approximately one year.

¶ 6 On May 7, 2013, the trial court appointed counsel for the defendant.

¶ 7 On May 13, 2013, counsel filed a request for the production of police reports. The record reveals that no other pretrial motions or motions *in limine* were filed.

¶ 8 On May 28, 2013, the defendant, with counsel present, waived her right to a preliminary hearing, requesting that not guilty pleas be entered on all counts.

¶ 9 On September 26, 2013, the defendant waived her right to a jury trial in the presence of counsel.

¶ 10 On November 4, 2013, the trial court held a bench trial. Johnson testified that after she accidentally struck the front of the defendant's car, the defendant became angry. Johnson testified that the defendant exited her car and approached Johnson's driver's side where the defendant hit her through the window. Johnson testified that the defendant then "ran around to the passenger side of my car and opened my door and leaned in and took my keys out." Johnson testified that before she exited her vehicle to retrieve her keys, the defendant and Owens repeatedly kicked her vehicle. Upon exiting the vehicle, Johnson testified that both the defendant and Owens battered her while she was on the ground.

¶ 11 At trial, Taylor testified that the defendant hit Johnson through her driver's side window and then took Johnson's keys from her vehicle's ignition. Next, Taylor testified that after Johnson exited her vehicle to retrieve her keys, she was attacked by both the defendant and Owens. Taylor testified that Owens slammed Johnson's head into the ground while the defendant repeatedly kicked her in the head.

¶ 12 The defendant testified that after her car was struck, she asked Johnson for her insurance card, but Johnson refused. After this verbal exchange, the defendant testified that as Johnson attempted to pull out of the parking lot, she ran over the defendant's feet. The defendant further testified that Owens was the first aggressor, and that she was not involved in the physical altercation other than attempting to stop Owens from hitting Johnson.

¶ 13 Following the close of the evidence, the State offered a closing argument, but the defense refrained. Subsequently, the trial court found the defendant guilty of aggravated battery and mob action.

¶ 14 On January 16, 2014, the trial court sentenced the defendant to two years in the IDOC with one year of MSR. The defendant was ordered to turn herself in to the Jackson County sheriff on February 1, 2014. In addition, the court ordered the defendant to pay a \$300 attorney-reimbursement fee, as well as a \$250 DNA fee.

¶ 15 On appeal, the defendant argues that counsel was ineffective where he did not develop a theory of defense, argue on the defendant's behalf, object to improper questions, or test the credibility of the State's witnesses. In particular, the defendant argues that she was denied her right to effective assistance of counsel where her

appointed counsel failed to file pretrial motions, other than request for the production of police reports. In addition, the defendant contends that counsel was ineffective in waiving the preliminary hearing, by failing to make any objections at trial, by failing to give an opening statement, by failing to cross-examine three of the State's four witnesses, by asking limited, nonconfrontational questions of one of the State's witnesses, by failing to present evidence or witnesses to bolster the defendant's defense, and by failing to give a closing argument.

¶ 16 In response, the State argues that the defendant's claim of ineffective assistance of counsel raises issues identified by *People v. Veach*, 2016 IL App (4th) 130888, ¶ 72, as those involved in a Category A case, which are "direct appeals raising ineffective assistance of counsel that the appellate court should decline to address." Accordingly, the State requests this court to decline to address the defendant's ineffective assistance claims, affirm the trial court's judgment, and indicate that the defendant's claims of ineffectiveness may be raised in a postconviction petition where a record may be made and the attorney-client privilege no longer applies. We disagree.

¶ 17 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) states that only persons "imprisoned in the penitentiary" may bring a postconviction proceeding, and case law has consistently noted that a person who has served her prison sentence and MSR term generally may not file a postconviction petition. *People v. West*, 209 Ill. App. 3d 1019, 1021 (1991); *People v. Farias*, 187 Ill. App. 3d 879, 884 (1989). Here, the defendant was discharged from MSR on July 22, 2015. Thus, the defendant lacks standing for postconviction review because a defendant must actually be deprived

of her liberty as a result of serving, as opposed to having served, a sentence of imprisonment and MSR.

¶ 18 We now turn to the defendant's claim that she was denied effective assistance of counsel at trial. First, we do not believe that the facts in this case establish that trial counsel entirely failed to subject the prosecution's case to meaningful adversarial testing, as the defendant argues, such that the standard in *United States v. Cronin*, 466 U.S. 648 (1984), is met. Instead, we find the facts in this case to be much different from those cases where ineffectiveness was presumed when it was clear that counsel's strategy was contradictory to defendant's position. While there are few Illinois cases discussing the *Cronin* standard, examples of such failures include employing a trial strategy that concedes a defendant's guilt when the defendant has pled not guilty (see *People v. Hattery*, 109 Ill. 2d 449, 464 (1985)), insisting on raising an unavailable defense (see *People v. Kozłowski*, 266 Ill. App. 3d 595 (1994)), and stipulating to the admission of testimony that is inadmissible against a defendant by supreme court rule (see *People v. Hoerer*, 375 Ill. App. 3d 148, 152 (2007)).

¶ 19 Because prejudice may not be presumed based on the facts in this case, we must apply the *Strickland* test to determine if there has been ineffective assistance. We note that the standard of review for determining if an individual's constitutional rights have been violated is *de novo*. *People v. Hale*, 2013 IL 113140, ¶ 14. The defendant presents multiple arguments asserting that the representation of her trial counsel fell below the constitutionally mandated standard. Claims of ineffective assistance of counsel are generally evaluated under the two-part test set forth in *United States v. Strickland*, 466

U.S. 668, 687 (1984). *Strickland* requires a defendant to show both that (1) her attorney's performance fell below an objective standard of reasonableness and (2) the attorney's deficient performance resulted in prejudice to the defendant; the failure to satisfy either element will preclude a finding of ineffective assistance of counsel. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998).

¶ 20 It is important to note that claims of ineffective assistance of counsel may be disposed of on the ground that defendant suffered no prejudice from the claimed errors, without deciding the first prong, whether the errors were serious enough to constitute less than reasonably effective assistance. *Strickland*, 466 U.S. at 697. Under the second prong of *Strickland*, defendant must show that there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 695. A reasonable probability is one that is sufficient to undermine confidence in the outcome. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). This requires a substantial, not just conceivable, likelihood of a different result. *Harrington v. Richter*, 562 U.S. 86, 112 (2011).

¶ 21 The defendant argues that trial counsel was ineffective in waiving the preliminary hearing. However, the record rebuts the defendant's contention on this point; when questioned by the court during the preliminary hearing as to whether the defendant had talked to her attorney about the nature and purpose of the preliminary hearing and the right she was waiving, the defendant responded, "yes." Thus, the defendant cannot demonstrate that trial counsel's conduct was unreasonable and prejudicial where the

record supports that the defendant, herself, without threat or force, knowingly and voluntarily waived her right.

¶ 22 Based on the record, we are aware of the shortcomings of trial counsel. However, we differ in view from the defendant as to the extent of this ineffectiveness and whether the representation was so prejudicial that there is a reasonable probability that the outcome would have been different. We do not believe that a different result would have occurred. We first note that each of the following alleged errors in counsel's assistance are matters of strategy for counsel to determine. Specifically, the defendant argues that it is plausible that had trial counsel cross-examined the credibility of Johnson and more vigorously cross-examined Taylor's alcohol consumption, this would have established that both Taylor's and Johnson's testimonies of the events were unreliable. Initially, we note that any evaluation of counsel's conduct cannot properly extend into matters involving the exercise of judgment, trial tactics, or strategy. *People v. Mitchell*, 105 Ill. 2d 1, 12 (1984). We note that the record reveals that Taylor did not deny the use of alcohol and was forthright in her testimony that she had attended the Polar Bear event at Cali's Bar that afternoon and had consumed "five [or] six" Grey Goose and pineapple juice drinks while there.

¶ 23 In addition, the defendant argues that Taylor's testimony was inconsistent about her location. Based on the record, when Johnson and Taylor arrived at Don Taco, "[Taylor] and Porsche got out of the car as Johnson pulled into the parking lot *** [a]nd we went to go find a parking spot and we parked by Destany's car." Taylor then stated that Johnson hit the defendant's car when Johnson tried to repark her vehicle, stating that

she was then in the backseat of the vehicle at that time. The defendant argues that Taylor's statements are significant because they support the defendant's testimony that Johnson's passengers were in Don Taco when Johnson hit the defendant's car. Therefore, Taylor was not a witness to the incident. However, the record does not support the defendant's claim. Instead, the record supports Taylor's testimony that she went to "find a parking spot," and after finding this spot, it appears that she got back into the car and directed Johnson to park. Contrary to the defendant's claim, the record does not support the defendant's testimony that Taylor was inside the Don Taco restaurant when Johnson hit the defendant's car.

¶ 24 Next, the defendant argues that a cross-examination of Johnson would have shown that Johnson was in fact at Cali's Bar and intoxicated, which would have been consistent with the defendant's testimony that Johnson was drunk. Johnson testified "we had went to Cali's. We didn't get in" the bar. Regardless of whether cross-examination would have clarified whether Johnson and Taylor were drinking inside or outside of Cali's Bar, we are unconvinced that a cross-examination regarding this point would have changed the result of the proceedings, given the overwhelming evidence that the defendant's vehicle was struck by Johnson and that the defendant, acting in concert with Owens, repeatedly struck and kicked Johnson with force.

¶ 25 Moreover, the defendant further asserts that counsel failed to ask Johnson why she exited her vehicle to retrieve her keys instead of calling the police. The record supports the fact that Johnson, after being hit through her driver's side window, attempted to retrieve her keys from the defendant, who had taken them from the ignition. We find

that the defendant has failed to demonstrate how a cross-examination regarding Johnson's motive to exit her vehicle to retrieve her keys could have changed the result in this case.

¶ 26 Lastly, the defendant argues that counsel failed to question Johnson on her identification of the defendant, which the defendant claims was unreliable, as she was only able to identify her "after being told it was Ms. Smith and viewing the photos online." The defendant, however, has failed to establish how aggressive questioning regarding Johnson's 100% certain identification of the driver as the initial attacker, but only 80% certainty of her identification of the defendant as the driver, would have resulted in testimony more favorable to the defendant, changing the outcome in the case.

¶ 27 Next, the defendant lists a multitude of suggested cross-examination questions that trial counsel should have asked of the State's two remaining witnesses, Detective Baril and Officer Lockinour—questions, the defendant contends, that could have bolstered her credibility while undermining that of Johnson and Taylor. However, we do not find, based on the record, that an examination of Detective Baril regarding the two lineups, which included the defendant and Owens, and the reliability of Taylor's and Johnson's identifications would have changed the result in this case given the overwhelming evidence against the defendant. First, the evidence supports Taylor's identification of the defendant, as she had previously known her for one year before the incident. Additionally, the record supports that Johnson identified the defendant without the assistance of Taylor, given that the two women did not speak for several months after the incident. Moreover, the record supports Johnson's identification of the driver, the

defendant, as the first aggressor, given that the two women had a verbal exchange prior to the physical altercation.

¶ 28 Likewise, we do not find that the defendant was so prejudiced by counsel's decision not to cross-examine Officer Lockinour regarding Johnson's alleged intoxication, Taylor's testimony that she did not speak with the police that evening, or the defendant's report that Johnson ran over her feet, about which Officer Lockinour testified that on the night of the incident the defendant did not seek medical attention and did not appear to have injuries. In fact, we find it interesting that in making these arguments the defendant does not address Officer Lockinour's testimony that the defendant's story changed significantly between the oral statement that the defendant provided the night of the incident and the written statement she gave weeks after the incident. Officer Lockinour testified that before the written statement, the defendant had never mentioned Owens. However, in the written statement, the defendant mentioned Owens for the first time and blamed Owens alone for the attack on Johnson, informing Officer Lockinour that she never hit Johnson. Thus, in light of this testimony, we cannot find that the defendant was prejudiced by counsel's decision not to address the defendant's inconsistent statements that provided self-serving testimony uncorroborated by any other witness. In conclusion, we cannot find that there exists a reasonable probability that the trial's result would have been different had these questions been asked on cross-examination.

¶ 29 The defendant further contends that trial counsel was deficient for failing to file additional pretrial motions, present evidence or witnesses to bolster the defendant's defense, raise objections to prior consistent statements regarding Taylor's and Johnson's

identifications of the defendant, and for not presenting opening and closing statements. As previously stated, when we examine the defense counsel's conduct, we cannot properly inquire into areas involving the exercise of judgment, discretion, or trial tactics. *Mitchell*, 105 Ill. 2d at 12. First, the defendant fails to identify those witnesses, such as two passengers in her vehicle that evening who could have served as eyewitnesses to corroborate her testimony, and possible defenses that counsel could have presented, and purportedly ignored, or how they would have impacted the case, as well as how the filing of additional pretrial motions could have changed the result. See *Penrod*, 316 Ill. App. 3d 713, 724 (2000). We cannot speculate or move beyond the record. Additionally, the defendant fails to display how counsel's decision to not present opening and closing statements was so prejudicial that, if presented, there is a reasonable probability that the outcome would have been different but for counsel's failure. Moreover, as a general rule, for purpose of ruling on claims of ineffective assistance of counsel, trial strategy encompasses decisions such as what matters to object to and when to object. *People v. Pecoraro*, 144 Ill. 2d 1, 13 (1991). We cannot find that trial counsel's failure to bring a motion, which the defendant does not specify, to object to testimony, or to offer opening and closing arguments establishes incompetent representation that so seriously prejudiced the defendant.

¶ 30 Next, we find, and the defendant acknowledges, that the defendant's request for a new sentencing hearing is moot because the defendant has served the entirety of her sentence. *People v. Melton*, 2013 IL App (1st) 060039, ¶ 28 (a challenge to the validity

of an imposed sentence becomes moot once the entire sentence has been served (citing *People v. Lieberman*, 332 Ill. App 3d 193, 195 (2002)).

¶ 31 Lastly, the defendant's final argument on appeal is that the trial court erred when it ordered reimbursement for court-appointed fees without conducting a hearing to determine the defendant's ability to pay. In response, the State concedes, and we agree, that the court-appointed fee must be vacated. A court must give the defendant notice that it is considering the imposition of a fee, and the defendant must be given the opportunity to present evidence regarding her ability to pay and other relevant circumstances. 725 ILCS 5/113-3.1(a) (West 2014); see *People v. Somers*, 2013 IL 114054, ¶ 14. The record establishes that the defendant received no such notice nor did the trial court question the defendant regarding her financial ability to pay prior to imposing the fee. Thus, the court's order should be vacated where it ordered the defendant to pay a \$300 attorney-reimbursement fee.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Jackson County where we do not find that trial counsel's representation prejudiced the defendant in such a manner that there exists a reasonable probability that a different result would have occurred absent the counsel's alleged failures. However, we vacate in part the court's order directing the defendant to pay the attorney-reimbursement fee.

¶ 33 Affirmed in part and vacated in part.