

THIRD DIVISION  
December 27, 2017

No. 1-15-1632

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 25773 (02)
	)	
DEON SAILS,	)	Honorable
	)	Timothy Joseph Joyce,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court of Cook County dismissing defendant's petition for postconviction relief following an evidentiary hearing is affirmed; defendant's claim of ineffective assistance of counsel does not make a substantial showing of a deprivation of a constitutional right where trial counsel's decision, as a matter of trial strategy, not to call a witness who could provide arguably exculpatory testimony but who could have been impeached with arguably inculpatory testimony was objectively reasonable.

¶ 2 Defendant, Deon Sails, filed a petition for postconviction relief from the judgment of the circuit court of Cook County convicting him of one count of first degree murder and one count of armed robbery. The petition alleged defendant received ineffective assistance of counsel at

trial. The trial court advanced defendant's postconviction petition to the third stage and conducted an evidentiary hearing. Following the hearing the court denied the petition. For the following reasons, we affirm.

¶ 3

### BACKGROUND

¶ 4 This court has previously set forth the evidence adduced at defendant's trial in our order affirming defendant's conviction and sentence on direct appeal. We will briefly set forth those facts necessary to an understanding of our disposition of the current appeal. A group of teenagers accosted the victim and struck him with fists. One of them threw a large garbage can at the victim, which struck him in the head. The victim fell to the ground whereupon one of the attackers took his wallet and removed property therein. The State charged defendant and Willie Taylor with the first degree murder and armed robbery of the victim, Willie Green. The State also charged Jonathan Rucker as a juvenile for those crimes. Rucker pled guilty to second degree murder and was sentenced to six years' incarceration. The State tried defendant and Taylor in simultaneous, separate trials. Defendant elected a jury trial, while Taylor elected a bench trial.

¶ 5 In relevant part, Andre Donner testified he was in the area when the crime occurred and he saw defendant, Taylor, Rucker, and a fourth youth who the others called A.P. beating the victim. Donner testified all four were punching the victim. Taylor threw a large wheeled garbage can at the victim, striking him in the head. As the victim lay on the ground, defendant removed the victim's wallet and took something out of it. Donner testified that the next day he asked defendant why the beating occurred and defendant responded it was because defendant had sold the victim fake drugs and the victim wanted his money back. Donner did not tell police about his conversation with defendant until a subsequent interview.

¶ 6 Doncell Richard was also nearby when the crime occurred and also testified at defendant's trial. Richard testified Donner called to him and told him someone was being beat up. By the time Richard got to the scene, the victim was lying on the ground. Richard testified there were at least six people standing around the victim and at least three or four hitting the victim. Richard saw defendant standing near the victim, and he saw Taylor and the fourth attacker, A.P. pick up the victim and punch him. Richard gave a handwritten statement in which he said he saw Taylor, Rucker, A.P. and defendant punching the man on the ground in the head. At trial Richard testified he did not see defendant hit the victim.

¶ 7 Chiquita Hicks, Richard's sister, also testified. She was walking her dog when she saw four youths beating an older man. She identified defendant, Taylor, and Rucker in a line up. Hicks testified Rucker hit the victim with the garbage can. She also testified each of the four youths punched the victim in the face with closed fists. Hicks saw defendant and Rucker remove property from the victim's person.

¶ 8 Following trial the jury found defendant guilty of first degree murder and armed robbery. The trial court sentenced defendant to 20 years' imprisonment for the murder and to a consecutive term of six years' imprisonment for the armed robbery. We affirmed defendant's conviction and sentence on direct appeal.

¶ 9 Defendant filed a *pro se* petition for postconviction relief alleging, in pertinent part, he received ineffective assistance of counsel at trial based on his trial attorney's failure to call Rucker as a witness at trial. The petition alleged defendant told his attorney he did not participate in the beating and that he identified Rucker as a potential witness. The petition also alleged Rucker spoke to defendant's trial attorney. Defendant attached a handwritten affidavit from Rucker in which Rucker averred defendant did not participate in beating the victim. Rucker further averred he spoke with defendant's trial attorney, he was supposed to testify at the

trial, but he was never called as a witness. The trial court advanced defendant's *pro se* petition to the second stage of postconviction proceedings and appointed postconviction counsel.

Defendant's postconviction counsel filed a supplemental petition. The State filed a motion to dismiss the petition based, in part, on the fact Rucker made statements implicating defendant and could have been impeached with that evidence had defendant's trial counsel called Rucker to testify. Following a hearing on the State's motion to dismiss, the trial court denied the motion and ordered an evidentiary hearing.

¶ 10 At the evidentiary hearing on the postconviction petition, defendant's postconviction counsel informed the trial court she was unable to locate Rucker to testify. Defendant testified at the hearing that he told his trial attorney about Rucker and defendant believed Rucker would testify defendant had no part in the beating. Defendant admitted he did not know what Rucker had said to police. The State called defendant's trial attorney to testify at the evidentiary hearing. Trial counsel testified the trial file was lost and, therefore, he did not have the opportunity to review the file before his testimony. Immediately before the hearing, counsel did review the statements, police reports, and the State's answer to discovery. Counsel testified he did not recall defendant identifying Rucker as a witness and he did not interview Rucker. Counsel testified the reason he did not interview Rucker was because Rucker was present in court on a date set for trial (the parties were not able to proceed on that date) and the court gave defense counsel for defendant and Taylor the opportunity to talk to Rucker in the back of the courtroom, but "he would not talk with us that day." Counsel added, "based on the discovery and all the information that we had, all the information from Johnny Rucker was not advantageous to our client."

¶ 11 Counsel was aware, prior to defendant's trial, that Rucker had pled guilty as a juvenile to second degree murder. Defendant's attorney testified he was "sure that before trial, [he] would

have had the transcript of the \*\*\* plea.” Counsel reviewed the plea transcript a few hours before he testified and stated “there was information in that plea that basically [Rucker] said that he and the three guys he was with hit [the victim.]” Counsel reviewed the transcript of the plea hearing again while on the stand in the evidentiary hearing and testified that “part of the statement of facts was that \*\*\* Hicks would testify that Mr. Rucker repeatedly hit [the victim] and that she saw all four individuals start punching [the victim].” Counsel testified that another portion of the factual basis for the plea was that during Rucker’s videotaped statement to police, Rucker stated the victim got up off the ground and “it was his friends who were with him that continued to punch [the victim] and not [Rucker.]” One of “his friends” was defendant. Counsel received police reports in discovery before defendant’s trial, and prior to the evidentiary hearing counsel reviewed reports detailing a statement by Rucker’s father. Rucker’s father told police that Rucker told him defendant and the victim got into a fight and defendant was punching the victim. Counsel identified a witness list the State provided to him before defendant’s trial which listed Rucker and Rucker’s father as witnesses.

¶ 12 Defendant’s trial counsel reviewed a recording of Rucker’s statement to police, and a log of that statement summarizing the times and statements in the recording, prior to defendant’s trial. Counsel testified he reviewed the log of the recording the morning before the evidentiary hearing and “it certainly had points in there [that] are germane.” Counsel explained Rucker said in his videotaped statement that he was with Chris, Anthony, and defendant, and that they all hit the victim. Counsel was asked if the statements Rucker made to police were something he took into consideration in determining his trial strategy, including which witnesses to call, and counsel testified they were. At the evidentiary hearing counsel added that based on his review of the log of the videotaped statement earlier that day, he recalled that Rucker had told police he and the guys he was with did not hit the victim that often. Counsel testified he reviewed

Rucker's affidavit but he never had a chance to talk to Rucker. Counsel also stated that what defendant told him about what happened was not entirely consistent with what Rucker stated in his postconviction affidavit. Counsel stated he had no intention of calling Rucker to testify because "he was not going to help my client, my case. Everything I had knowledge about [Rucker] was negative regarding [defendant.]" Counsel's trial strategy was that the State could not meet its burden of proof.

¶ 13 Following the evidentiary hearing on defendant's postconviction petition the trial court denied the petition. The court stated its belief Rucker had refused to talk to defendant's trial counsel and that it found Rucker's affidavit to the contrary untrue. The court found that "calling Rucker under any situation was fraught with peril because the DVD of the interrogation of Rucker in which he claims that [defendant] struck [the victim] \*\*\* would have been available not only to impeach Mr. Rucker, but also as substantive evidence \*\*\* to prove [defendant's guilt.]" The court held there were "eminent strategic and tactical reasons not to have called Mr. Rucker" as a witness and denied the postconviction petition.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Defendant appeals the trial court's denial, following an evidentiary hearing, of his petition for postconviction relief alleging ineffective assistance of counsel at trial. "The Post-Conviction Hearing Act [citation] [(Act)] provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights. [Citation.]" *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). A violation of the right to effective assistance of counsel, guaranteed by our federal and state constitutions, is cognizable under the Act. *People v. Jackson*, 205 Ill. 2d 247, 258-59 (2001).

“To prevail on a petition for post-conviction relief based on the ineffective assistance of counsel, the petitioner must satisfy the two-pronged *Strickland* standard. The petitioner must show that (1) counsel’s performance was so deficient that it fell below an objective standard of reasonableness, and (2) but for the counsel’s deficient performance, there exists a reasonable probability that the outcome of the proceeding would have been different. [Citations.] It is unnecessary to address the first prong of the *Strickland* standard if the defendant fails to establish that the deficient performance affected the outcome of the trial. [Citation.]” *People v. Guillen*, 261 Ill. App. 3d 1092, 1097 (1994).

It is well-established that “the decision whether to call a certain witness for the defense is a matter of trial strategy, left to the discretion of counsel after consultation with the defendant.” *People v. Peterson*, 2017 IL 120331, ¶ 80. “Accordingly, such decisions will not ordinarily support a claim of ineffective assistance of counsel. [Citations.]” *Id.* A mistake in trial strategy or an error in judgment alone does not render representation constitutionally defective. *Id.* “Only if counsel’s trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the State’s case will ineffective assistance of counsel be found. [Citations.]” (Internal quotation marks omitted.) *Id.* “We assess counsel’s performance using an objective standard of competence under prevailing professional norms.” *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010).

¶ 17 The Act provides a three-stage process for adjudicating postconviction petitions. *Beaman*, 229 Ill. 2d at 71-72. The third stage is an evidentiary hearing. *Id.* At the evidentiary hearing the defendant may present evidence in support of the petition via affidavits, testimony, or other evidence, and the trial court makes credibility determinations and findings of fact. See *People v. Pendleton*, 223 Ill. 2d 458, 472-73 (2006); *People v. Hotwagner*, 2015 IL App (5th

130525, ¶ 30. Following an evidentiary hearing where the trial court engages in fact-finding, and credibility determinations are involved, this court will not reverse the trial court's judgment unless it is manifestly erroneous. *Beaman*, 229 Ill. 2d at 72. This standard of review recognizes that we must give great deference to the trial court's factual findings because it stands in the best position to weigh the credibility of the witnesses. *Hotwagner*, 2015 IL App (5th) 130525, ¶ 31. The trial court's judgment is manifestly erroneous if it is not based on the evidence, is arbitrary, and is unreasonable. *People v. Jones*, 2012 IL App (1st) 093180, ¶ 49. "The burden of convincing a reviewing court that a trial court's decision was manifestly erroneous is a heavy one." *Id.*

¶ 18 Defendant argues the trial court's judgment is manifestly erroneous because defendant's trial counsel allegedly did not have an independent recollection of defendant's case and instead gave a *post hoc* explanation for not calling Rucker as a witness, and counsel's testimony Rucker refused to speak to him is "of questionable veracity."

"As the *Strickland* Court stated, 'strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' [Citation.] Deciding whether to call a witness at trial is a matter of trial strategy, and, accordingly, there is a strong presumption that such decisions reflect sound strategy rather than incompetence. [Citation.]

For the second *Strickland* prong, the defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different if not for counsel's unprofessional errors. [Citation.] A reasonable



probability is ‘a probability sufficient to undermine confidence in the outcome’ [citation], but it need not be over 50% [citations].” *People v. Evans*, 2017 IL App (1st) 143268, ¶¶ 46-47.

¶ 19 In support of his claim his trial counsel’s failure to call Rucker as a witness was not reasonable, defendant first argues that counsel’s testimony Rucker would not speak to him is belied by the trial record, where co-defendant Taylor’s attorney testified Rucker had spoken to her. The trial court accepted defendant’s trial counsel’s testimony. The alleged evidence in the record to the contrary is vague. We agree with the State in that the fact Rucker may have spoken to Taylor’s attorney on an unknown court date does not impugn counsel’s testimony Rucker refused to speak to him. We will not overturn the trial court’s credibility determination absent “a record clearly contrary to the trial court’s findings.” *Kern v. Rafferty*, 131 Ill. App. 3d 728, 731 (1985). Defendant has not pointed to clearly contrary record evidence here; accordingly, we accept the trial court’s finding Rucker refused to speak to defendant’s trial counsel.

¶ 20 Defendant complains trial counsel did not have an independent recollection of his case, but merely constructed reasons for not calling Rucker based on a review of evidentiary materials before the hearing. We construe defendant’s argument to be that the strategy counsel alleged at the hearing was not subjectively in his mind at the time of trial. We find that argument incompatible with the inquiry required under *Strickland*. “In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Defendant has the burden to “overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’ [Citation.]” *Id.* at 689. A defendant making a claim of ineffective assistance of counsel must identify the acts or omissions alleged not to have been the result of reasonable professional judgment; we must then determine

whether those acts or omissions were outside the “wide range of professionally competent assistance.” *Id.* at 690. Thus, we are to look at the challenged action or inaction and determine whether it fell below an objective standard of reasonableness—and no more. “*Strickland* ‘calls for an inquiry into the objective reasonableness of counsel’s performance, not counsel’s subjective state of mind.’ [Citation.]” *Bryant v. Brown*, 873 F.3d 988, 998 (7th Cir. 2017).

¶ 21 We also find the trial court’s judgment that trial counsel’s decision not to call Rucker was reasonable and a matter of sound trial strategy is not manifestly erroneous. It was not objectively unreasonable not to call Rucker as a witness for the defense, and counsel’s strategy to instead demonstrate the State’s inability to satisfy its burden of proof was not so unsound that he entirely failed to conduct meaningful adversarial testing of the State’s case. On appeal, defendant does not refute the fact that had Rucker testified, he could have been impeached with his prior statement to police. Instead, defendant argues that “its suggested impeachment value, if any, is minimal at best.” By his very argument defendant establishes that the decision whether to call Rucker was a strategic one—whether to risk that the jury would believe his trial testimony and construe his statement to police consistently therewith, or to forego that testimony and avoid opening the door to additional potentially inculpatory evidence. Illinois courts recognize trial strategy considers the costs and benefits of calling particular witnesses. *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 85. Counsel could reasonably choose not to risk placing more inculpatory evidence before the jury—even if Rucker’s statement to police was subject to an inference that was not explicitly inculpatory, there was no guarantee how the jury would construe Rucker’s prior statement, which at minimum implicated defendant in the crime and subjected him to culpability on accountability theories. Instead, counsel chose to focus on the weaknesses in the State’s case; and had trial counsel called him as a witness Rucker would have provided corroboration for much of the State’s evidence. We cannot say trial counsel’s choice was so

irrational and unreasonable that no reasonably effective defense attorney would pursue that strategy when facing similar circumstances. *Id.* (“A defendant can overcome the strong presumption that defense counsel’s choice of strategy was sound if counsel’s decision appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy. [Citations.]” (Internal quotation marks and emphasis omitted.)).

¶ 22 Although our inquiry may end here, we also note defendant failed to establish that not calling Rucker as a witness prejudiced him. Defendant argues Rucker’s testimony would have caused the jury to “look more critically at the weak identification testimonies of [Hicks] and [Donner,] in light of [Rucker’s] and [Richard’s] contrary testimony that [defendant] did not participate in the beating.”<sup>1</sup> Defendant notes all three eyewitnesses were impeached: Donner only spoke to police because he heard police arrested his friend for the murder, in a written statement Donner gave a contradictory account of the crime (but one which nonetheless implicated defendant), and Donner admitted to smoking large amounts of marijuana at the time which caused him to suffer some memory loss; when Hicks spoke to police she believed her brother would be charged with the murder; and Richard, who testified at trial that defendant was not involved in the beating, told police and the grand jury defendant punched the victim in the head and face, but on appeal defendant questions the veracity of those earlier statements, but not Richard’s trial testimony. We find no reasonable probability the outcome of the trial would have been different had Rucker testified.

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<sup>1</sup> Defendant argues the State failed to respond to his prejudice argument, thereby forfeiting argument on the issue. But “this court has interpreted the waiver rule as an admonition to the parties, not a limitation upon the jurisdiction of the reviewing court. [Citation.]” (Internal quotation marks omitted.) *Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill. 2d 389, 399 (1987).

¶ 23 The jury credited the eyewitness’s trial testimony that defendant was involved in the beating despite those witnesses’ alleged motivation to protect Richard because Richard is the witnesses’ friend and brother. The jury either discredited Richard’s trial testimony about defendant’s involvement in the beating and credited Richard’s earlier statement to police, or found that Richard’s trial testimony was outweighed by Donner and Hicks’s trial testimony despite any bias or motivation. Defendant has failed to demonstrate how Rucker’s testimony makes Donner and Hicks less credible than before; and assuming Rucker testified consistently with his affidavit that defendant was not involved in the offense, he also would have been impeached with a prior statement implicating defendant in the actual beating. Defendant questions the impeachment value of Rucker’s prior statements. In that statement Rucker only said “we” hit the victim once or twice—referring to the group which included defendant—without specifically saying defendant hit the victim. But the jury was nonetheless free to infer Rucker included defendant in the statement “we” all hit the victim; and if the jury did not specifically so infer, the prior ambiguous statement would at minimum call into question the credibility of Rucker’s later certain statement that defendant did not strike the victim, coming after defendant was convicted. Given Richard’s contradictory testimony, any weight Rucker’s testimony adds to evidence defendant was not involved in the beating is minimal, at best, in light of the impeachment evidence consisting of Rucker’s own prior statement to the contrary and his failure to specifically exonerate defendant earlier. We hold the error complained of is not sufficient to undermine our confidence in the jury’s verdict.

¶ 24 Accordingly, defendant’s claim of ineffective assistance of counsel fails.

¶ 25 **CONCLUSION**

¶ 26 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 27 Affirmed.