NOTICE
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2017 IL App (5th) 140476-U

NO. 5-14-0476

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,	)	St. Clair County.
	)	
v.	)	No. 09-CF-850
	)	
LARRY D. PERKINS,	)	Honorable
	)	Jan V. Fiss,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Welch and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's denial of the defendant's petition for postconviction relief is affirmed as he was not denied the reasonable assistance of counsel at his evidentiary hearing.

¶ 2 BACKGROUND

¶ 3 On July 31, 2009, the State charged the defendant, Larry D. Perkins, with one count of aggravated battery with a firearm (count I) (720 ILCS 5/12-4.2(a)(1) (West 2008)), one count of aggravated unlawful use of a weapon (count II) (720 ILCS 5/24-1.6(a)(1)(3)(A) (West 2008)), and one count of aggravated assault (count III) (720 ILCS 5/12-2(a)(6) (West 2008)). All three counts stemmed from a July 20, 2009, incident

during which the defendant shot and wounded Keith Garner of Cahokia with a handgun and then pointed the gun at Deputy Gerald Brown of the St. Clair County sheriff's department, who had responded to the report of the shooting. The defendant then fled the scene on foot. On August 8, 2009, the defendant was arrested at his mother's home in Florida and was subsequently extradited back to Illinois.

¶ 4 In November 2009, the defendant's appointed trial attorney, Cathleen MacElroy, advised that the defendant intended to assert an alibi defense and that his alibi witnesses were residents of Florida. In April 2010, MacElroy indicated that the defendant might alternatively assert a claim of self-defense.

¶ 5 In May 2010, the defendant entered a negotiated plea of guilty to count I, which carried a sentencing range of 6 to 30 years. See 720 ILCS 5/12-4.2(b) (West 2008); 730 ILCS 5/5-4.5-25(a) (West 2008). In exchange for his plea, the State dismissed counts II and III and recommended that the defendant be sentenced to a 10-year term of imprisonment. The factual basis for the plea established that Garner knew the defendant by nickname and would identify him as the man who had shot him, that Brown would identify the defendant as the man who had pointed a gun at him, and that George Odom, Edward Willis, and Von Banner would testify that they had seen the defendant "fleeing the area with a gun in his hand." After admonishing the defendant pursuant to Supreme Court Rule 402(a) (eff. July 1, 2012) and finding that his plea was voluntary, the trial court accepted the defendant's guilty plea and imposed the recommended 10-year sentence.

¶ 6 In June 2011, 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)). Among other things, the defendant's petition alleged that MacElroy had failed to contact his alibi witnesses despite her representations that she had done so. In an affidavit attached to the petition, the defendant averred that he had advised MacElroy that he had moved to Florida on July 14, 2009, which was two weeks prior to his twenty-sixth birthday, and had continuously remained there until he was arrested in August. He further asserted that he had told MacElroy that his mother, Patsy Perkins, his sister, Antriala Perkins, and his girlfriend, Miracle Wysinger, were willing to testify and corroborate his claims. The defendant stated that at MacElroy's request, he had obtained statements from these witnesses, but she ultimately "refused" to advance his alibi defense.

¶ 7 Affidavits from Patsy and Wysinger were also attached to the defendant's *pro se* petition. Wysinger's affidavit claimed that the defendant had been in Florida on July 20, 2009, and that she had never been contacted by MacElroy to be interviewed as an alibi witness. Patsy's affidavit merely claimed that MacElroy had never contacted or interviewed her as an alibi witness.

¶ 8 In February 2014, appointed postconviction counsel filed an amended petition on the defendant's behalf. The amended petition alleged that the defendant had been denied the effective assistance of trial counsel due to MacElroy's failure to adequately investigate his alibi defense. The petition further alleged that MacElroy's ineffectiveness had essentially left him with no other choice but to plead guilty. The petition referenced Wysinger's and Patsy's affidavits, as well as "gas receipts" that the defendant suggested

would have further corroborated his assertion that he had been in Florida on July 20, 2009. The petition also alleged that MacElroy had told the defendant that a "jury would not believe his alibi witnesses since they were family." In August 2014, the cause proceeded to an evidentiary hearing where the following evidence was adduced.

¶ 9 Patsy testified that she resides in Orlando, Florida, and that the defendant and Wysinger had moved to Florida to live with her in May 2009. Patsy indicated that the defendant had continuously been in Florida from May 2009 until he was arrested in August 2009. Patsy testified that she had never met or spoken with MacElroy and had never been contacted by anyone from the St. Clair County public defender's office.

¶ 10 The defendant testified that he and MacElroy had spoken on several occasions after she had been appointed to represent him. The defendant explained that after advising MacElroy that he had been in Florida with Patsy and Wysinger on July 20, 2009, he had given her their contact information so that she could speak with them. The defendant claimed that he had also given MacElroy written statements that he had personally obtained from Patsy and Wysinger. The defendant further claimed that MacElroy had subsequently told him that she had spoken with Patsy and Wysinger, but both had later informed him that she had not. The defendant testified that MacElroy had nevertheless told him that his alibi was weak because his witnesses were family members. The defendant indicated that he had advised MacElroy that there were gas receipts and credit card records that would prove when he moved to Florida, but she had not attempted to locate them. The defendant further indicated that he had moved to Florida two weeks before his twenty-sixth birthday and that his twenty-sixth birthday was

July 29, 2009. The defendant stated that he had not agreed to pursue a strategy of self-defense and had felt forced to plead guilty. The defendant claimed that MacElroy had been no help to him whatsoever.

¶ 11 MacElroy testified that she recalled representing the defendant and remembered several specific facts of the case. She also recalled that the defendant had reported her to the Attorney Registration and Disciplinary Commission (ARDC), raising allegations similar to those set forth in his postconviction petitions. MacElroy testified that when she and the defendant had discussed the State's evidence against him, he had advised her that he had been in Florida on July 20, 2009, and that Patsy and Wysinger would confirm his alibi. MacElroy explained that she had subsequently spoken with Patsy about the defendant's alibi, "in person," at the public defender's office. MacElroy recalled that the conversation had occurred in "the hallway directly in front of [her] secretary's desk" and that her investigator might have been present as well. When MacElroy spoke with Patsy, Patsy "gave a completely different story than what [the defendant] told [MacElroy] she was going to give." MacElroy testified that Patsy had advised that the defendant had moved to Florida "on or immediately following his birthday." Because the events in question had occurred "several days prior to his birthday," MacElroy determined that the defendant's alibi defense was not viable. MacElroy testified that she had later told the defendant that his alibi "wasn't really going to work" and that his move to Florida could be used as evidence of flight. MacElroy could not recall whether she had ever spoken with Wysinger, but she did recall making numerous attempts to contact her. MacElroy also stated that at some point, the defendant had advised that he did not want Wysinger to

have to return to Illinois to testify. MacElroy recalled that she might have talked to Antriala on the telephone but had been unable to actually locate her.

¶ 12 MacElroy testified that she had asked the defendant about the stops he had made while driving to Florida, explaining that in-store surveillance videos and paper receipts would support his claim as to when he had moved there. In response, the defendant had stated that he could not remember any of the places he had stopped and had used cash to pay for his gas. MacElroy indicated that after spending "several weeks" exploring the defendant's alibi, she could find "absolutely zero evidence" that he had been in Florida on July 20, 2009.

¶ 13 MacElroy testified that eventually the defendant had become less concerned about attempting to prove his innocence and that the focus of their discussions had centered around "the amount of time that the State was requesting." She indicated that a self-defense strategy was considered because there was evidence that Garner was a drug dealer, and the State did not believe that he was "necessarily an upstanding citizen." MacElroy further indicated that although the defendant "thought that self[-]defense was a lot riskier," her suggestion of a self-defense claim had bolstered her bargaining position with the State. MacElroy candidly opined that she had been able to negotiate "an excellent deal in this particular case" and that the defendant's allegations against her were "outrageous." MacElroy further noted that she had never been required to respond to the defendant's ARDC complaint. As for her inability to clearly recall all of the specifics of the case, MacElroy indicated that she had not had the opportunity to review her case file prior to the hearing because she had just received notice of the hearing that day.

¶ 14 On September 5, 2014, the trial court entered a written order denying the defendant's amended petition for postconviction relief. The court determined that the defendant had not been coerced into pleading guilty and that MacElroy had refuted his claims that she had failed to investigate his alibi defense. On September 18, 2014, the defendant filed a timely notice of appeal.

¶ 15 DISCUSSION

¶ 16 On appeal from the trial court's denial of his amended petition for postconviction relief, the defendant does not challenge the court's determinations that he had not been coerced into pleading guilty and that MacElroy had refuted his claims that she had failed to investigate his alibi defense. The defendant rather argues that he was denied the reasonable assistance of counsel at the evidentiary hearing. We disagree.

¶ 17 It is well established that the Act requires that appointed postconviction counsel provide a defendant a reasonable level of assistance in postconviction proceedings. *People v. Turner*, 187 Ill. 2d 406, 410 (1999). The reasonable level required by the Act is not, however, coextensive with the level of assistance required under *Strickland v. Washington*, 466 U.S. 668 (1984), which is generally used to evaluate ineffective-assistance-of-trial-counsel claims. *People v. Hotwagner*, 2015 IL App (5th) 130525, ¶¶ 34, 37. Nevertheless, "if postconviction counsel's performance cannot be deemed deficient under *Strickland*, it cannot be said that counsel failed to provide the reasonable level of assistance required under the Act." *Id.* ¶ 37.

¶ 18 To succeed on a claim that a defendant was denied the effective assistance of counsel under *Strickland*, 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). "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). "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). Additionally, a defendant "cannot rely on speculation or conjecture to justify his claim of incompetent representation" (*People v. Holman*, 164 Ill. 2d 356, 369 (1995)), and "the fact that another attorney with the benefit of hindsight would have handled the defendant's case differently does not establish that trial counsel's performance was deficient" (*People v. Lemke*, 384 Ill. App. 3d 437, 447 (2008)).

¶ 19 Here, the defendant first contends that postconviction counsel failed to provide a reasonable level of assistance by failing to object to MacElroy's testimony regarding her conversation with Patsy. Emphasizing that MacElroy did not specify the exact date and time of the conversation, the defendant suggests that had counsel lodged an objection on foundational grounds, MacElroy's testimony regarding the substance of the conversation would not have been admitted. See *People v. Harris*, 333 Ill. App. 3d 741, 750 (2002) (noting that "the basic foundation prerequisites for admitting in evidence the content of a conversation" include "when the conversation occurred"). As the State notes, however, it is speculation to presume that if asked to do so, MacElroy could not have provided a

more specific timeframe as to when the conversation occurred or that the trial court would have deemed the contents of the conversation inadmissible had MacElroy been unable to do so. See *People v. Jones*, 2012 IL App (1st) 093180, ¶ 52 (observing that although "[t]he rules of evidence are not abandoned during an evidentiary hearing on a postconviction petition[,] [w]hether or not evidence is admitted during any hearing is within the sound discretion of the trial court"); *People v. Rodriguez*, 313 Ill. App. 3d 877, 888 (2000) (rejecting the defendant's ineffective-assistance-of-counsel claim by noting that the defendant had failed to demonstrate that the State could not have cured its foundational deficiency if given the opportunity to do so). The defendant is therefore unable to establish that he was prejudiced by postconviction counsel's failure to object. See *Rodriguez*, 313 Ill. App. 3d at 888.

¶ 20 The defendant next argues that postconviction counsel failed to provide a reasonable level of assistance by failing to adequately cross-examine MacElroy. The defendant maintains that counsel "failed to exploit weaknesses in MacElroy's testimony that would have undermined her credibility." The defendant observes, for example, that although MacElroy testified that she thought that Garner had been shot in "the neck or chest or throat area," postconviction counsel failed to confront her with the fact that Garner had been shot in the shoulder. In response, the State suggests that the defendant essentially faults counsel for failing to impeach MacElroy on irrelevant and tangential matters. We agree and conclude that the defendant is again unable to establish prejudice.

¶ 21 "The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing

court." *People v. Pecoraro*, 175 Ill. 2d 294, 326-27 (1997). A defendant "can only prevail on an ineffectiveness claim by showing that counsel's approach to cross-examination was objectively unreasonable." *Id.* at 327. "If the cross-examination was objectively unreasonable, it can amount to ineffective assistance if the defendant suffered prejudice." *People v. Peacock*, 359 Ill. App. 3d 326, 340 (2005).

¶ 22 Here, postconviction counsel's cross-examination of MacElroy was not objectively unreasonable. Counsel cross-examined her regarding her inability to recall whether she had spoken with Antriala or Wysinger; her failure to recall whether she had interviewed any of the State's witnesses; the persistence of the defendant's assertions that he had been in Florida on July 20, 2009; the circumstances of her meeting with Patsy; and the defendant's disagreement over possibly advancing a self-defense claim. Counsel also had MacElroy acknowledge that she had told the defendant that "jurors frequently aren't that receptive of alibis when they're given by family members." Ultimately, however, the relevant inquiry at the hearing was whether MacElroy had investigated the defendant's alibi defense. The trial court was presented with contrasting evidence on the issue and obviously found that MacElroy's testimony was credible and that the defendant's and Patsy's was not. At an evidentiary hearing on a postconviction petition, credibility determinations are properly made by the trial court, and in the present case, "we have no basis in the record for second-guessing the trial court's judgment." *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1036 (2011). Under the circumstances, we find that there is not a reasonable probability that attempts to exploit what the defendant characterizes as weaknesses in MacElroy's testimony would have changed the outcome,

and as previously stated, "the fact that another attorney with the benefit of hindsight would have handled the defendant's case differently does not establish that trial counsel's performance was deficient." *Lemke*, 384 Ill. App. 3d at 447.

¶ 23 CONCLUSION

¶ 24 For the foregoing reasons, we conclude that the defendant was not denied the reasonable assistance of counsel at the evidentiary hearing on his amended petition for postconviction relief. Accordingly, the defendant's request for a new hearing is denied, and the trial court's judgment denying his petition is affirmed.

¶ 25 Affirmed.