FIRST DIVISION
June 11, 2018

No. 1-15-1825

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. 05 CR 7785
	)	
DAVID BALLER,	)	Honorable
	)	Colleen Ann Hyland,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held*: Second-stage dismissal of defendant's postconviction petition was proper where defendant failed to make a substantial showing of prejudice on his claim that he received ineffective assistance of trial counsel.

¶ 2 Defendant David Baller appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2012). In the

petition, Mr. Baller, who was convicted of aggravated kidnapping, criminal sexual assault, and criminal sexual abuse, claimed that his trial counsel was ineffective for failing to have the State's DNA evidence examined and reviewed by a defense expert. On appeal, Mr. Baller contends that his petition should have advanced to an evidentiary hearing because it made a substantial showing of ineffective assistance of counsel. For the reasons that follow, we affirm.

¶ 3 A. BACKGROUND

¶ 4 Mr. Baller's conviction arose from the 2005 assault of C.P. in Orland Park. The underlying facts of the case are set forth in our decision on direct appeal. *People v. Baller*, No. 1-07-0375 (2008) (unpublished order under Supreme Court Rule 23). In order to place in context Mr. Baller's postconviction claim that his counsel was ineffective for failing to call an expert to rebut the State's DNA evidence, we will repeat many of those facts here.

¶ 5 At trial, C.P. testified that around 7:10 p.m. on February 7, 2005, she stopped at the office of her husband's home-building company in Orland Park, where she worked part-time. C.P. unlocked the door, went inside, and turned on her computer. As C.P. was flipping through the mail, she heard a man say, "I came to take the computer." C.P. looked at the man, who was right next to her. Though he was wearing a dark hooded mask, she could see that he had very light eyes. C.P. described the man as about 5'5" and stocky, in his late 30s or 40s, and, based on the color of the skin on his hands, white.

¶ 6 C.P. told the man he could take the computer and tried to walk around him, but he held up a fist and said he would break her face in half if she did not listen to him. He then told C.P. to go down the hallway to a back room. She obeyed, and then followed the man's directions to sit in a chair. Once C.P. was seated, the man directed her to lift up her shirt. C.P. said, "Please don't

do this," to which the man responded, "Shut up. I'll break your face in half." C.P. pulled up her shirt and bra. The man kissed or licked her breasts, produced a container of clear liquid, and squirted some into her hands. He then pulled out his penis, at which time C.P. noticed he had no pubic hair. The man told C.P. to masturbate him, which she did until he ejaculated. C.P. wiped her hands on her jeans. The man then directed her to stand up, pull her pants down, and lie on a desk. C.P. obeyed, and the man penetrated her vagina with his penis. After a short time, he directed C.P. to sit back down, squirted more liquid into her hands, and had her masturbate him a second time. While he was ejaculating, C.P. broke free, ran across the hall, and locked herself in a bathroom. After 20 or 30 minutes, during which she washed her hands and body, C.P. made her way to a different inner office, locked herself in, and called her family and the police. After the police arrived, C.P. was taken to the hospital in an ambulance. She was examined and a rape kit was conducted. C.P.'s clothing was taken for evidence.

¶ 7 In court, C.P. was shown a mask which she stated looked "like the mask that the intruder was wearing." She also identified a bottle that looked to her like the one her attacker used to squirt liquid into her hands.

¶ 8 The parties stipulated to the testimony of a doctor and a nurse who saw C.P. at the hospital and administered a sexual assault evidence collection kit during their treatment. The evidence the doctor and nurse collected from C.P. included vaginal swabs, anal swabs, hair combings, and C.P.'s clothing.

¶ 9 Approximately one month after the crime, on March 7, 2005, the Orland Park police got a call from the Flossmore police that they had Mr. Baller in custody and that he matched the description of the perpetrator. Sergeant Mitchell, of the Orland Park police, testified that Mr.

Baller appeared to be in his late 30s or early 40s, was white with a fair complexion, had green eyes and light brown eyelashes, weighed about 180 or 190 pounds, and had a pronounced beer belly.

¶ 10 At the police station, after he was arrested and given repeated *Miranda* warnings, Mr. Baller made an incriminatory statement that was published to the jury at his trial. He acknowledged that on February 7, 2005, he was in his truck in a parking lot in Orland Park when he saw a woman in the neighboring building. He went up to the front door wearing a mask, intending to expose himself to her. After exposing his penis, he found that the door was open, so he walked inside. He approached the woman, asked her "for a hand job," and suggested through his body language that she move to another office in the building. Mr. Baller took some lubrication from his pocket, squirted it in the woman's hand, and told her to masturbate him. He did not recall whether he ejaculated, but stated that the woman's top was up, exposing her breasts. Mr. Baller also did not remember whether he told the woman to remove or pull down her jeans. He stated that after he "finished," he ran outside, removed the mask, and drove home. Mr. Baller related that he had been dealing with the desire to expose himself as far back as he could remember. He stated that he was very sorry for the emotional and physical harm that he caused the woman and said he hoped he could receive medical treatment or intense counseling "to curb my desires." Most of this statement was written out by the police, but Mr. Baller added the following to the bottom of the statement in his own handwriting:

> "I wish I knew what made me do this. I hate living like two people torn all the time. I have three children whom I'm trying to set examples for. Please help me in my quest for recovery. I realize that after talking to the officers that this is a

> disease. I'm not a bad person. I love people and wish no one harm of any sort. The urges I have came back after counseling stopped. Again I stress the fact that I request help from you."

Mr. Baller signed the statement.

¶ 11 The Orland Park police asked Mr. Baller if he "was packing a lot of hair down in his genital region." Mr. Baller answered that he had very little because he shaved that area, because his partner liked it that way. Mr. Baller submitted to a buccal swab, which Sergeant Mitchell sealed and sent to the forensics lab. .In searching Mr. Baller's truck, the Orland Park police found a ski mask, a partially-full bottle of Astroglide personal lubricant, binoculars, a screwdriver, and two pairs of gloves. The police asked Mr. Baller if the mask in his truck was the same ski mask he wore when he assaulted C.P. and Mr. Baller said that it was

¶ 12 Katherine Sullivan, a forensic biologist with the Illinois State Police, testified for the State that she analyzed DNA that was extracted from a stain on C.P.'s jeans and from C.P.'s vaginal swabs. She compared that DNA with DNA profiles developed from C.P.'s and Mr. Baller's buccal swabs. With regard to the stain on the jeans, she testified as follows:

> "I did obtain DNA profiles from all of the samples that I tested. The first was the one stain from the jeans, my Exhibit No. 3A. And I have three parts of the results for that.
>
> The first result is in relationship to the non-sperm fraction in which I identified a mixture of DNA profiles that I interpreted as a mixture of two people. One male DNA profile was identified which matches the DNA profile of [Mr. Baller]. And that would be expected to occur in approximately 1 in 2.6 quintillion

> Black, 1 in 390 quadrillion Hispanics, or 1 in 270 quadrillion White unrelated individuals. Additionally, there I identified a female DNA profile from which [C.P.] could not be excluded.
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> ***
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> Additionally I tested the sperm fraction of that stain, my Exhibit No. 3A. And from that fraction I obtained a mixture of DNA profiles that I identified or interpreted as a mixture of at least three people. I was able to use that mixture only for exclusionary purposes though because it did not contain enough information over my threshold for me to be able to make any positive associations to any of the standards that were submitted.
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> ***
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> The third fraction was the mixed fraction where all of the DNA that might have been left over in the stain. And from the mixed fraction I identified a mixture of DNA profiles that I interpreted as a mixture of two people. And that mixture matches the combined profiles of [C.P.] and [Mr. Baller]. Assuming that one of those individuals is [C.P.], approximately 1 in 2.6 quintillion Blacks, 1 in 390 quadrillion Hispanics, or 1 in 270 quadrillion White unrelated individuals would not be able to be excluded as the second contributor."

¶ 13 On cross-examination, Ms. Sullivan acknowledged that certain chemicals or inert substances could break down DNA and make it undetectable in a sample, but explained that such degradation would not change the DNA profile. She clarified that when conducting DNA analysis on the stain on C.P.'s jeans, she tested 13 loci that had been established as "the core loci

by the FBI for use in the DNA index." Defense counsel questioned Ms. Sullivan regarding her use of the terms "match" and "cannot be excluded." She explained, "Well, match and cannot be excluded are similar statements. I believe in my results for the non-sperm fraction I said that the male profile was a match to [Mr. Baller], and I weighted it with the statistical random match probability." Defense counsel followed up by asking, "So even though these probabilities are large, all they say is that a person cannot be excluded, correct?" In response, Ms. Sullivan stated, "All the statistic really says is [it] just provides you with an opportunity to understand how rare or common the evidentiary profile is in the general population."

¶ 14 In closing, the prosecutor argued that Mr. Baller matched the description C.P. gave to the police, in that he was the same "approximate height, weight, a male white, with little or no shaved pubic hair, something [Mr. Baller] admitted to the police 30 days later when he was arrested. Fair skin, green eyes, light eyelashes, a beer belly[.]" The prosecutor further argued that when Mr. Baller was arrested, he was in possession of "his very own portable traveling rape kit," which included binoculars, gloves, a ski mask, a half-empty bottle of Astroglide personal sexual lubricant, and a screwdriver. She emphasized that Mr. Baller confessed to the police and read parts of the statement to the jury. The prosecutor then addressed the DNA evidence, which she characterized as an "insurmountable mountain." She stated that DNA was "fantastic evidence," that the DNA sample had not been degraded, that the DNA on C.P.'s jeans matched Mr. Baller, and that DNA "is a very powerful piece of evidence." The prosecutor also stated that "the likelihood of that DNA of the defendant's occurring within the population on this planet we live in is 1 in 270 quadrillion. That is an astronomical number." The prosecutor concluded by asking the jury to find Mr. Baller guilty on all counts.

¶ 15 Defense counsel responded that the evidence did not support the theory that Mr. Baller was the perpetrator of the assault on C.P. Counsel observed that C.P. had not made an identification of her assailant; noted discrepancies between her description and Mr. Baller's physical characteristics, as well as discrepancies between the mask found in Mr. Baller's truck and the one described by C.P.; and argued that the items in Mr. Baller's truck were not incriminating. Counsel criticized the format of Mr. Baller's confession, noting that it was not audio or video recorded, or even written in Mr. Baller's own hand. Counsel then addressed the DNA evidence, asserting that the State's DNA expert "wasn't quite being straightforward with you" because, at certain loci, Mr. Baller could not have been the contributor, and therefore those loci "indicate[d] a perpetrator other than" Mr. Baller. Counsel further stated, "[DNA] is a tremendous tool because it eliminates people or shows other possibilities, and therefore exonerates people who might otherwise have been convicted. DNA is an important tool, an important tool. And in this particular case, it's done its job. It's worked." Finally, counsel highlighted weaknesses in the State's case, reminded the jurors of the presumption of innocence, and urged that they find Mr. Baller not guilty.

¶ 16 In rebuttal, the prosecutor acknowledged that C.P. had not given a perfect description of Mr. Baller. With regard to the DNA evidence, he stated, "It's number 270 quadrillion, an astronomical number. How many zeros go after 27? Talk about a rare occurrence. Almost beyond comprehension. Those of you who have taken higher math maybe understand just how big a number that is." The prosecutor also noted other evidence in the case, including Mr. Baller's statement, the "rape kit" in his truck, and his shaved pubic hair, and asked the jury to find Mr. Baller guilty.

¶ 17 Following deliberations, the jury found Mr. Baller guilty of two counts of aggravated criminal sexual assault, one count of aggravated kidnapping, and four counts of aggravated criminal sexual abuse. The trial court subsequently merged various counts and imposed an aggregate sentence of 50 years' imprisonment.

¶ 18 On direct appeal, we found that the State failed to prove beyond a reasonable doubt that Mr. Baller threatened C.P.'s life. Accordingly, we reduced his convictions for aggravated criminal sexual assault and aggravated criminal sexual abuse to non-aggravated offenses, and remanded for resentencing on the reduced convictions. *People v. Baller*, No. 1-07-0375 (2008) (unpublished order under Supreme Court Rule 23). The trial court thereafter resentenced Mr. Baller to a total of 40 years in prison: a term of 25 years' imprisonment for aggravated kidnapping, a consecutive term of 15 years' imprisonment for criminal sexual assault, and two concurrent terms of 3 years' imprisonment for the two convictions of criminal sexual abuse.

¶ 19 In 2012, Mr. Baller filed a *pro se* postconviction petition, which included a claim that his trial counsel was ineffective for failing to have the DNA evidence examined and reviewed by a defense DNA expert. In support of his petition, Mr. Baller attached a letter, dated August 31, 2011, from two molecular biologists with a company called "Independent Forensics." The authors indicated they had reviewed Mr. Baller's "case folder" from the Illinois State Police Crime Laboratory, including the laboratory's test results and conclusions. Among other things, the authors reviewed the laboratory's conclusion that DNA extracted from a stain on C.P.'s jeans "matches" Mr. Baller's DNA profile, and that this profile would be expected to occur in approximately 1 in 2.6 quintillion black, 1 in 390 quadrillion Hispanic, or 1 in 270 quadrillion white unrelated individuals.

¶ 20 The authors agreed that the results of the laboratory's DNA analysis "demonstrate that [Mr. Baller] is the likely contributor" to the DNA derived from the stain on C.P.'s jeans, and opined that it was "correct and accurate" for the laboratory to state that Mr. Baller "cannot be excluded" from that evidence sample. However, the authors criticized the laboratory's "matching statement," writing as follows:

> "The numerical calculation, *i.e.*, the frequency of the observed DNA result[,] was calculated according to currently accepted standards – however it is misleading and deceptive to convert this to a probability for an audience with little or no experience with population statistics. In order to make a matching statement, the probability has to be exceedingly high (in fact there is no standard for just how high it should be) as infrequent events happen often.
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> A complete DNA profile in the U.S. requires unambiguous results from thirteen (13) loci. Here, thirteen (13) loci were used to identify one person from all others. The formal comment that [Mr. Baller's] identical twin brother would have the same DNA profile has to be mentioned.
>
> In summary, our review of the provided documentation mostly agrees with the conclusions derived from the DNA analysis by Illinois State Police, Joliet, however overstated their statistical calculations. The correct identity statement should be that [Mr. Baller] cannot be excluded as the DNA contributor from the evidence samples in these cases."

¶ 21 The trial court found that Mr. Baller had presented the gist of a constitutional claim, advanced the petition to second-stage proceedings, and appointed the Cook County Public

Defender to represent him. Counsel filed an amendment to the *pro se* petition, alleging that trial counsel was ineffective for failing to consult and call as a witness an expert with respect to the DNA evidence. Postconviction counsel argued that the State used the testimony of its own DNA expert, Ms. Sullivan, extensively in closing argument to emphasize that Mr. Baller's DNA was a "match" and to highlight the outrageous statistical impossibility of anyone else having that DNA profile. According to postconviction counsel, trial counsel was ineffective because he only briefly challenged Ms. Sullivan's use of the word "match" to describe the statistical elements at work, and never consulted or retained an expert either as to DNA or DNA statistical analysis. Postconviction counsel argued that had trial counsel consulted with an expert in DNA or DNA statistical analysis, he could have challenged the State's position regarding the DNA evidence. Attached to the amendment was the letter from the molecular biologists at Independent Forensics, as well as an affidavit from one of the letter's authors, attesting to the letter's accuracy and stating that if called to testify, he would fully support the contents, conclusions, and summaries contained in the letter.

¶ 22 The State filed a motion to dismiss. Following a hearing, the trial court granted the State's motion and dismissed the amended petition.

¶ 23 B. JURISDICTION

¶ 24 The trial court granted the State's motion to dismiss Mr. Baller's amended postconviction petition on June 26, 2015, and Mr. Baller timely filed his notice of appeal the same day. Jurisdiction is proper under article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Supreme Court Rules 606 and 651, governing criminal appeals and appeals from final judgments in postconviction proceedings (Ill. S. Ct. R. 606 (eff. Dec. 11, 2014); R. 651(a)

(eff. Feb. 6, 2013)).

¶ 25 C. ANALYSIS

¶ 26 On appeal, Mr. Baller contends that he made a substantial showing that his trial counsel was ineffective for failing to consult with and present the testimony of a DNA expert who would have countered Ms. Sullivan's testimony that Mr. Baller was a "match" to the DNA evidence, and who would have explained the problems with the probability statistics used by Ms. Sullivan in her testimony. Mr. Baller asserts that, although defense counsel made efforts to cross-examine Ms. Sullivan and argued in closing that the DNA evidence was not persuasive, those efforts were unsuccessful because they had no support. He maintains that a defense expert would have testified that "match" was an improper term and that the "one in 270 quadrillion statistic" was "misleading and deceptive," and that this testimony would have supported the defense theory of misidentification. Mr. Baller argues that there was no strategic reason to fail to present a defense expert, and that he was prejudiced by his counsel's failure to do so because DNA evidence was crucial to the State's case, as evidenced by the prosecution's closing arguments, and because DNA evidence carries a special aura of certainty and mystic infallibility.

¶ 27 In cases, like this one, where the defendant does not face the death penalty, the Post-Conviction Hearing Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Mr. Baller's petition was dismissed at the second stage. At this stage, all factual allegations that are not positively rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). The granting of the State's motion to dismiss is warranted if the petition's allegations, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183

Ill. 2d 366, 382 (1998). In other words, a defendant is entitled to proceed to a third-stage evidentiary hearing on his petition only if the allegations in the petition, supported by the trial record and affidavits, make a substantial showing of a violation of constitutional rights. *Id*. at 381. Our review at the second stage is *de novo*. *Id*. at 388, 389.

¶ 28 The standard for determining whether a defendant was denied the effective assistance of counsel is the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Hall*, 217 Ill. 2d at 334-35. A defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland*, 466 U.S. at 687. We may address the requirements in either order. *Id.* at 526-27.

¶ 29 Here, we need not determine whether counsel's performance fell below an objective standard of reasonableness because Mr. Baller has not made a substantial showing of prejudice. If defense counsel in this case had presented a DNA expert to testify that it was improper for Ms. Sullivan to say that Mr. Baller's DNA was a "match" to the DNA on C.P.'s jeans, that it was only accurate to say Mr. Baller "could not be excluded" as a contributor, and that the statistical probabilities cited by Ms. Sullivan were "misleading and deceptive," we do not find there to be any reasonable probability that the result of this trial would have been different.

¶ 30 This is not a case where the only evidence against the defendant was DNA. Rather, three additional types of evidence supported the State's claim that Mr. Baller was the perpetrator. First, C.P. provided a detailed physical description of her attacker that was consistent with Mr. Baller's appearance. At the hospital shortly after the assault, C.P. described her assailant as a white man in his late 30s or early 40s, about 5'5" or 5'6" tall, approximately 180 pounds, with a

pronounced beer belly, a fair complexion, green eyes, and light brown eyelashes. A month later, when Mr. Baller was taken into custody, the police sergeant who interviewed him noted that he was white with a fair complexion, in his late 30s or early 40s, about 180 or 190 pounds, with a pronounced beer belly, green eyes, and light brown eyelashes. In addition, C.P. described her attacker as having no pubic hair, a specific detail that Mr. Baller confirmed was true of him when he acknowledged to the police that he shaved his genital region.

¶ 31 Second, circumstantial physical evidence implicated Mr. Baller. C.P.'s assailant wore a ski mask and squirted a clear liquid into her hands from a container he pulled from his pocket. When Mr. Baller was arrested, he had a ski mask and a half-full bottle of Astroglide personal lubricant in his truck. While the recovered mask did not exactly match the description of the mask C.P. said her attacker wore, Mr. Baller admitted to the police in his statement that it was the mask he wore when he assaulted C.P.

¶ 32 And finally, Mr. Baller confessed. In his statement, which was reduced to writing by the police, he recounted the details of the assault. Mr. Baller not only signed the statement, but also added a paragraph to the bottom in his own handwriting, stating that "this is a disease," relating that his "urges *** came back after counseling stopped," and asking for help in his "quest for recovery."

¶ 33 Beyond the existence of ample non-DNA evidence of Mr. Baller's guilt, we further note that his proposed DNA experts from Independent Forensics would not have really contradicted Ms. Sullivan's testimony. Rather, they would have agreed with her overall conclusions while offering alternate semantics and slightly different interpretations of the statistics. In their letter, Mr. Baller's proposed DNA experts criticized the use of the term "match," instead of the phrase

"cannot be excluded," for the relationship between Mr. Baller's DNA and the DNA found in the stain on C.P.'s jeans. All the same, they agreed with Ms. Sullivan that Mr. Baller was "the likely contributor" of that DNA. Also, although the proposed experts opined that it was "misleading and deceptive" to present probabilities to the jury, they nevertheless observed that the numerical calculation made by the crime lab, "*i.e.*, the frequency of the observed DNA result[,] was calculated according to currently accepted standards." In closing in their letter, the proposed experts specifically stated that they "mostly agree[d] with the conclusions derived from the DNA analysis by Illinois State Police." We agree with the State that the proffered testimony of these defense experts would not have significantly undermined the DNA evidence that the State presented at trial.

¶ 34 In light of the nature of the proposed testimony and the abundant non-DNA evidence of Mr. Baller's guilt that was presented at trial, we cannot conclude that there was a reasonable probability that, but for defense counsel's failure to present a DNA expert, the result of Mr. Baller's trial would have been different. *Strickland*, 466 U.S. at 694. Mr. Baller has failed to make a substantial showing of ineffective assistance of counsel. The trial court did not err in granting the State's motion to dismiss the postconviction petition.

¶ 35 C. CONCLUSION

¶ 36 For the reasons explained above, we affirm the judgment of the circuit court dismissing Mr. Baller's amended postconviction petition.

¶ 37 Affirmed.