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2018 IL App (3d) 150430-U

Order filed June 28, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0430
STEPHEN BAILEY,)	Circuit No. 05-CF-937
Defendant-Appellant.)	Honorable David A. Brown, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) Defendant was not prejudiced by trial court's improper entry of partial summary dismissal of defendant's postconviction petition, and thus no additional proceedings on the summarily dismissed claims were required. (2) Defendant made a substantial showing that counsel was ineffective for failing to interview defendant's father to investigate an alibi defense and/or call him as a witness at trial, and therefore claim warranted a third-stage evidentiary hearing.
- ¶ 2 Defendant Stephen Bailey was convicted of first degree murder (720 ILCS 5/9-1 (West 2006)) and sentenced to 40 years in prison. He filed a postconviction petition which was, in part, summarily dismissed. The trial court dismissed additional allegations at the second stage and

denied relief on the remaining claim following an evidentiary hearing. Defendant appeals, claiming that the trial court improperly entered a partial summary dismissal of his *pro se* petition and erred in dismissing his ineffective assistance of counsel claim at the second stage of the postconviction proceedings. We affirm in part and reverse and remand in part.

¶ 3 In September 2005, defendant, Louis Bailey, and Torlando McDonald were charged with first degree murder in the shooting death of Darren English. Defendant and Louis Bailey were tried jointly. At trial, McDonald testified pursuant to a plea agreement. In exchange for his testimony, the murder charges against him were dropped and he received a three-year sentence for obstruction of justice.

¶ 4 McDonald testified that on the day of the shooting he and several others had gathered at Lavinia Faulkner's house. Faulkner was English's girlfriend. English was packaging heroin on the floor in the living room when a fight broke out. Defendant and Louis Bailey confronted English about some money that had been stolen from defendant during a robbery a few weeks earlier. English initially denied knowing what defendant was talking about but then implied that Louis might have been involved. Defendant pointed a 9 mm handgun at English, but English again denied any knowledge of the robbery. Defendant then gave the gun to Louis and told him to shoot English. Louis tried, but the gun misfired. Louis and English struggled. The fight moved from the living room, into the bathroom, and then to the kitchen. McDonald heard shots fired in the bathroom and the kitchen. As the struggle moved to the kitchen, McDonald ran out the front door. He heard two more shots once he was outside.

¶ 5 Officer Joseph Gray testified that he responded to a 911 call at 2:45 a.m. on the morning of August 24, 2005. Gray arrived at Faulkner's house and found English lying on the ground in

the back yard. He had been shot and was bleeding from a gunshot wound on the right side of his head.

¶ 6 The jury found defendant guilty, and the trial court sentenced him to 40 years' imprisonment. On direct appeal, we rejected a claim that the State improperly presented other crimes evidence in the absence of a limiting instruction. In our order, we noted that the evidence against defendant was overwhelming. *People v. Bailey*, No. 3-08-0277 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 On August 9, 2010, defendant filed a *pro se* postconviction petition in which he alleged that (1) trial counsel was ineffective for failing to interview defendant's father, who had provided an affidavit stating that defendant was at his house during the shooting, (2) he had been prejudiced by the State's failure to test certain evidence, and (3) he was prejudiced by the prosecutor's misconduct in closing arguments. In the petition, defendant stated that on the morning of August 24, 2005, he was at his father's house playing video games until 4 a.m. Defendant attached his father's affidavit to the petition. His father averred that he and his son were playing video games until 4, and then both of them laid down to get some sleep. Defendant's father claimed that he saw defendant still sleeping on the couch at 7 a.m. when he left for work.

¶ 8 The trial court advanced the first claim to the second stage and appointed counsel but found the other two claims forfeited. In its written order, the court stated that defendant's claims regarding untested evidence and prosecutorial misconduct were "barred by the doctrine and are hereby dismissed."

¶ 9 On November 7, 2011, defendant filed a motion to supplement his petition. He asserted that the State had introduced false and coerced testimony from McDonald at trial. An affidavit

signed by McDonald was attached to the supplemental petition, stating that the detectives had threatened to charge him with murder unless he implicated defendant. McDonald averred that his story to the officers was false and that he was not with the group when English was shot.

¶ 10 The State filed a motion to dismiss, addressing defendant's claim that counsel was ineffective for failing to call defendant's father as a witness. Appointed counsel filed a Rule 651(c) certificate and requested leave to correct defendant's *pro se* supplemental filing. The trial court granted counsel's request and counsel filed a supplemental petition, which included the same affidavit from McDonald that was attached to defendant's original *pro se* petition. In the supplemental petition, counsel also argued that defendant was actually innocent based on two items of newly discovered evidence: (1) defendant's father's affidavit stated that, at all relevant times, defendant was at his house, and (2) McDonald's statements that his police interview was coerced and that he falsely testified at trial as to defendant's participation in the shooting.

¶ 11 Following a second stage hearing, the trial court dismissed defendant's claim that trial counsel was ineffective for failing to interview defendant's father before trial. The court considered counsel's assessment to be a sound strategic decision because the father's relationship with his son would have brought his credibility question. The court also noted that in his petition, defendant only alleged that he was at the house until 4 a.m., but his father's affidavit averred that defendant was there until 7 a.m.

¶ 12 Although the court dismissed the ineffective assistance claim, it advanced defendant's claim of actual innocence based on McDonald's affidavit to the third stage. At the evidentiary hearing, McDonald testified that he memorized a statement given to him by the detectives investigating the case, that the police promised not to charge him, and that the officers coerced him into giving the statements in which he implicated defendant and Louis Bailey. On cross-

examination, he admitted that he was charged with murder and later accepted a conviction on a lesser felony. The trial court denied defendant's petition, finding that McDonald's testimony was not credible.

¶ 13

ANALYSIS

¶ 14

I

¶ 15

Defendant first argues on appeal that trial court erred in entering a partial summary dismissal of his postconviction petition.

¶ 16

The trial court may not summarily dismiss some claims in a petition but allow other claims to advance to the next stage of post-conviction proceedings. *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). However, even if the trial court entered an improper partial summary dismissal, remand for further proceedings in the trial court is not necessary if “[t]he record affirmatively shows that defendant was not prejudiced by the entry of the partial summary dismissal under [the] facts.” *Id.* at 375.

¶ 17

In *Rivera*, defendant's petition alleged six violations of his constitutional rights. The trial court dismissed four claims as frivolous and patently without merit but held that defendant's two remaining allegations stated the gist of a meritorious claim. As a result, the trial court advanced only two claims to the second stage of the postconviction proceedings. *Rivera*, 198 Ill. 2d at 366. On appeal, we disagreed with the trial court and held that the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 1998)) does not provide the circuit court with a right to partially select a portion of the claims in a petition for second-stage review, while summarily adjudicating the remaining contentions at the first stage. We held that, instead, the Act requires that the entire petition be either summarily dismissed or alternatively be advanced in its entirety

to the second stage of postconviction proceedings. *People v. Rivera*, 315 Ill. App. 3d 454, 458 (2000).

¶ 18 Our supreme court agreed. It held that summary partial dismissals of postconviction petitions made during the first stage of a postconviction proceeding were not permitted under the Act. However, the court held that we erred in remanding the matter to the trial court for further proceedings because the record showed that Rivera was not prejudiced by the entry of the partial summary dismissal of some of his claims in his petition. *Rivera*, 198 Ill. 2d at 374-75. The supreme court allowed the trial court's partial summary dismissal to stand and remanded the case to us to consider the other issues Rivera raised on appeal. *Id.* at 375-76.

¶ 19 *Rivera* is directly on point. Here the trial court summarily dismissed defendant's claims that he was prejudiced by untested evidence and improper closing arguments. The court found that these claims were barred by the doctrine of forfeiture. The trial court then docketed the claim that counsel was ineffective and appointed counsel. Appointed counsel filed a supplemental petition for relief on behalf of defendant specifically stating, "[t]his Supplemental Petition incorporates by reference each and every allegation contained in the Petitioner's Petition for Post-Conviction Relief filed on August 9, 2010, as if set forth verbatim herein." The supplemental petition also re-alleged the ineffective assistance of counsel claim that had survived the summary dismissal stage. At the second-stage hearing, appointed counsel did not raise or address the two claims that the trial court had summarily dismissed at the first stage of the proceedings. Counsel had the opportunity and incorporated the allegations in the supplemental petition, but chose not to raise them again at the hearing. Thus, defendant was not prejudiced by the trial court's summary dismissal of the two claims. Accordingly, we affirm the trial court partial summary dismissal under *Rivera*.

¶ 20 Defendant contends that, unlike the defendant in *Rivera*, he was prejudiced by the partial summary dismissal because he was not allowed to re-allege the dismissed claim in his amended petition. He argues that the court's summary dismissal here contained no indication that he would be allowed to re-allege the dismissed claims and contends that the language in the summary dismissal was a final judgment on the merits of the dismissed claims.

¶ 21 In this case, the trial court's ruling did not result in prejudice. Postconviction counsel did raise the summarily dismissed claims in his supplemental petition when he stated that he incorporated everything alleged in the defendant's *pro se* postconviction petition. The record shows that counsel chose not to argue those claims at the second stage hearing. The record does not demonstrate that defendant was barred from re-alleging them in the amended petition or that defendant was prevented from discussing the dismissed claims with appointed counsel in preparation for the second-stage hearing. Thus, it is unnecessary to remand the case for new second stage proceedings.

¶ 22 II

¶ 23 Defendant also contends that the trial court erred in dismissing his ineffective assistance of counsel claim at the second stage of the postconviction proceedings. He maintains that counsel's failure to interview his father to investigate an alibi defense and his refusal to call his father to testify as an alibi witness at trial were unsound decisions that warrant a third-stage evidentiary hearing.

¶ 24 The Post-Conviction Hearing Act provides a three-stage process by which an incarcerated person may establish that a constitutional violation occurred at trial. 725 ILCS 5/122-1 *et seq.* (West 2010)); *People v. Griffin*, 178 Ill. 2d 65, 72-73 (1997). At the second stage of a postconviction proceeding, the State is required to either answer the pleading or move to

dismiss. 725 ILCS 5/122-5 (West 2010). If the State files a motion to dismiss, the court rules only on the legal sufficiency of the petitioner's allegations. *People v. Domagala*, 2013 IL 113688, ¶ 35. The trial court must then determine whether the allegations in the petition and any accompanying documentation, taken as true, make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). At the second stage, the court must assume the truth of the allegations contained in the petition and attached documents unless they are positively rebutted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). If no such showing is made, the petition is dismissed. Where a substantial showing of a constitutional violation has been established, however, the petition advances to a third-stage evidentiary hearing. *Edwards*, 197 Ill. 2d at 246.

¶ 25 Ineffective assistance of counsel claims are cognizable in a postconviction petition. To merit an evidentiary hearing on an ineffective assistance claim, the defendant must make a substantial showing that counsel's performance was deficient, and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Under the prejudice prong of the *Strickland* test, the question is not whether a different verdict would have been reached at trial, but whether counsel's performance undermined confidence in the outcome. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). At the second stage of a postconviction proceeding, an unrebutted allegation of incompetence on the issue of trial strategy is sufficient to warrant an evidentiary hearing. *People v. Cabrera*, 326 Ill. App. 3d 555, 564-65 (2001). When the record is unclear concerning trial counsel's decision not to call alibi witnesses, the defendant is entitled to an evidentiary hearing on that issue. *People v. Cleveland*, 2012 IL App (1st) 101631, ¶¶ 60-61.

¶ 26 In this case, it is difficult to conclude that failing to interview defendant's father and refusing to call him as an alibi witness at trial constituted reasonable trial strategy. In general, we give trial counsel great deference in making strategic decision. However, the record provides little to support counsel's decision not to call any witnesses or present any evidence at trial. Given the evidence mounted against defendant, trial counsel was obligated to investigate any potential alibi. The father's affidavit, taken as true as it must be at this stage of the proceedings, declared that his son was at his house at the time the shooting occurred. He also alleged that counsel never talked to him or called him to testify, even though he was available to testify and his potential testimony was known to counsel. The truth of the allegations in his father's affidavit as well as those in defendant's petition is not positively rebutted by the record. Thus, defendant made a substantial showing that counsel's performance was deficient.

¶ 27 Moreover, in the absence of a demonstration of reasonable trial strategy, defendant is entitled to an evidentiary hearing on that issue. See *Cabrera*, 326 Ill. App. 3d at 564; *Cleveland*, 2012 IL App (1st) 101631, ¶ 60 (failure to call alibi witnesses at trial demonstrated prejudice and warranted a third-stage evidentiary hearing). In this case, the record does not support a second stage conclusion that counsel made a sound strategic decision. In general, courts do not view family testimony as inherently suspect as they do accomplice testimony. See, e.g., *People v. Williams*, 147 Ill. 2d 173, 232-33 (1991). And courts have frequently found that there is no good reason not to call a family member to testify if the testimony is relevant to the defendant's case. *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999) (evidentiary hearing required on postconviction claim that counsel was ineffective for failing to call defendant's mother); *People v. Skinner*, 220 Ill. App. 3d 479, 486-87 (1991) (counsel ineffective for failing to call defendant's mother and father to testify; court specifically rejected counsel's claim that declining to call witnesses was

trial strategy); *People v. O'Banner*, 215 Ill. App. 3d 778, 791 (1991) (counsel ineffective for failing to call defendant's son to testify on defendant's behalf).

¶ 28 Here, presenting defendant's father as an alibi witness would not have been harmful to defendant's case. Defendant's father was prepared to testify that defendant was at his house during the time when the crime was committed. Officer Gray testified that the 911 call was made at 2:45 a.m. Defendant's father averred that he was playing video games with defendant that morning until 4 a.m. and that defendant was sleeping on his couch when he left at 7 a.m. Thus, defendant's father could have provided relevant testimony that defendant was with him when English was murdered. Without hearing from counsel, it is impossible to determine what reasons lead to his decision not to investigate the father's potential testimony or not to use him as an alibi witness at trial. See *Cleveland*, 2012 IL App (1st) 101631, ¶ 60 (failure to call alibi witness warranted third-stage hearing on ineffective assistance of counsel claim where no explanation was offered to support argument that it was a strategic decision). We therefore reverse the trial court's second-stage dismissal of defendant's ineffective assistance of counsel claim and remand for an evidentiary hearing.

¶ 29 CONCLUSION

¶ 30 We affirm the trial court's partial summary dismissal of defendant's *pro se* postconviction petition. The trial court's order dismissing defendant's ineffective assistance of counsel claim at the second stage is reversed and remand for further postconviction proceedings.

¶ 31 Affirmed in part and reversed in part; cause remanded.