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2018 IL App (4th) 150597-U

NO. 4-15-0597

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

March 6, 2018

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Champaign County
DONTRELL L. THOMPSON,	)	No. 11CF672
Defendant-Appellant.	)	
	)	Honorable
	)	Heidi N. Ladd,
	)	Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.  
Justices Knecht and DeArmond concurred in the judgment.

**ORDER**

¶ 1 *Held:* We grant appellate counsel's motion to withdraw and affirm the trial court's dismissal of defendant's amended postconviction petition.

¶ 2 In February 2015, defendant, Dontrell L. Thompson, filed an amended petition for postconviction relief, asserting claims of ineffective assistance of counsel and actual innocence. In July 2015, the trial court dismissed the amended postconviction petition at the second stage of proceedings.

¶ 3 Defendant filed a notice of appeal. However, the office of the State Appellate Defender (OSAD) has filed a motion to withdraw, asserting no meritorious claims can be raised on appeal. For the following reasons, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 4 I. BACKGROUND

¶ 5 In May 2011, defendant was charged with attempted first degree murder in the shooting of Tony Brock. 720 ILCS 5/8-4(a), 9-1 (West 2010). In February 2012, the case proceeded to a jury trial. We outline only the facts necessary to resolve this appeal.

¶ 6 A. The Jury Trial

¶ 7 Tyeeste Slaughter testified, on May 1, 2011, she was driving toward the Market Place Mall when a purple Chrysler Pacifica nearly hit her vehicle. Concerned about such erratic driving, Slaughter called the police. While on the phone with police, Slaughter followed the Pacifica to obtain the license plate information. The Pacifica parked in the mall parking lot, at which time Slaughter observed three men get out of the vehicle. One of the men—wearing a black-hooded sweatshirt—concealed a handgun on his person. Panicked that the Pacifica's occupants intended to confront her over following them, Slaughter drove away.

¶ 8 Based on Slaughter's call to police, mall security and the Champaign Police Department were on alert for both the Pacifica and the man in possession of the handgun. When mall security officer Roman Gordon received the report, he headed from his position in the food court toward the parking lot. Gordon saw three black males—later identified as Frank Day, defendant, and Brock—exiting the mall. Day was ahead of the other two males and walking quickly away. Defendant, who was wearing a black hooded sweatshirt, grabbed Brock, who was wearing a white shirt. Gordon observed defendant and Brock scuffle, and then Brock attempted to run away. According to Gordon, defendant pulled a handgun from his pocket and fired at Brock. Once Brock was on the ground, Gordon observed defendant (1) hit Brock with the handgun and (2) stand over Brock and fire his gun.

¶ 9 Scott Carter, another mall security officer, was in the parking lot when he heard a gunshot. When he turned toward the sound, he observed defendant fire his gun at Brock while Brock was attempting to flee.

¶ 10 Similarly, Robert King, a mall security officer, observed defendant fire his weapon at Brock twice. After a scuffle during which defendant hit Brock with the gun, King observed defendant fire at Brock from close range.

¶ 11 Numerous officers from the Champaign police department were also on the scene when gunshots were fired, as they were investigating the Pacifica parked in the mall parking lot. Officers John McAllister, Shane Standifer, and Thomas Petrelli heard gunshots, and ran toward the commotion. Lieutenant David Shaffer was off duty and visiting the mall with his family when he heard the shots. Officers McAllister, Standifer, and Shaffer observed defendant standing over Brock, raising a gun toward Brock's head. Officer Petrelli testified he saw defendant fire at Brock prior to Brock falling to the ground. As defendant raised his gun to fire again at Brock, Officers McAllister and Standifer fired their weapons, hitting defendant, who fell to the ground and dropped the gun. The gun was recovered, and no other weapons were found at the scene.

¶ 12 Frank Day testified defendant and Marquis Thompson were his cousins. According to Day, Marquis asked Day and defendant to help him find Brock, with whom Marquis had been in an altercation the night before. The three men drove around in the Pacifica until they found Brock, at which time they followed him to the mall. The men went into the mall and later observed Brock walking toward the parking lot from the food court. According to Day, Brock attempted to hit him, so Day ran. Day then heard shots fired behind him. Day admitted

he did not initially tell police the same story upon his arrest. Moreover, he was offered probation in a pending felony case if he testified against defendant.

¶ 13 Defendant exercised his right to remain silent and waived his right to testify. Prior to accepting defendant's waiver, the trial court admonished defendant that the final decision was his alone, and that no one could force defendant to waive his right to testify.

¶ 14 During cross-examination, trial counsel asked Officer Chris Fowler, a member of the crime-scene unit, about the typical practice of testing a suspect for gunshot residue and sending evidence for fingerprint testing. The State presented no evidence that either test had been completed. During closing argument, trial counsel highlighted the lack of ballistic, fingerprint, and gunshot residue evidence to prove defendant was the one who fired the gun rather than a third party.

¶ 15 Following the presentation of evidence, the jury found defendant guilty. He was subsequently sentenced to 55 years' imprisonment. This court affirmed defendant's sentence on direct appeal. See *People v. Thompson*, 2013 IL App (4th) 120508-U.

¶ 16 B. Postconviction Proceedings

¶ 17 1. *Postconviction Petitions*

¶ 18 In May 2014, defendant filed a *pro se* petition for postconviction relief, alleging he was denied his right to a fair trial and received ineffective assistance of counsel during the course of his trial. In September 2014, defendant filed a second *pro se* petition, adding a claim of actual innocence. In December 2014, the trial court advanced the case to the second stage of postconviction proceedings and appointed counsel to represent defendant.

¶ 19 In February 2015, defendant filed an amended postconviction petition containing five allegations. First, the petition alleged trial counsel committed ineffective assistance of

counsel by not exercising all of defendant's peremptory challenges during *voir dire*, which resulted in a jury that included (1) two jurors who knew one of the witnesses, (2) two jurors whose relatives were police officers, and (3) a juror whose relative had been killed while in Africa. Transcripts of those portions of *voir dire* were attached to the petition.

¶ 20 The petition next alleged trial counsel was ineffective for failing to call Marquis Thompson and K.S. to testify that defendant was not the shooter, despite that information being available to counsel prior to the trial. Marquis's affidavit and K.S.'s statement to police were attached to the petition. In Marquis's affidavit, he stated he was at the mall with defendant when they observed another male in a black shirt shoot a man in a white shirt and then run away. Marquis said defendant approached the man in the white shirt to ensure it was not their cousin, Frank Day, at which time police arrived and wrongly presumed defendant was the shooter. Marquis denied any prior altercation with Brock or asking Day to help him locate Brock. He said defendant's trial counsel refused to return his calls about testifying.

¶ 21 The police report that memorialized K.S.'s statement stated that K.S., a 10-year-old boy, was in the parking lot with his mother when the shooting occurred. According to K.S., he observed a black male in a black-hooded sweatshirt shoot a male in a gray sweatshirt with a silver handgun before fleeing toward the mall. K.S. then ran back to his mother and witnessed no further events.

¶ 22 Third, the petition alleged trial counsel was ineffective by "forcing, threatening, coercing[,] and misleading" defendant to waive his right to testify, when defendant wanted to testify he was not the shooter and did not possess a firearm. Defendant's affidavit was attached to the petition, wherein he stated his attorney advised him not to testify because (1) he had nothing helpful to say, (2) the jury would not believe him, (3) his prior convictions would be

introduced, and (4) the State had insufficient evidence upon which to convict him. Defendant said he relied on trial counsel's expertise despite his desire to testify and that trial counsel scared him into waiving his right to testify.

¶ 23 Fourth, the petition alleged trial counsel was ineffective for not presenting additional information about the lack of fingerprints on the gun or gunshot residue on defendant's hands.

¶ 24 Finally, defendant asserted actual innocence based on K.S.'s statement to police, Marquis's affidavit, and the lack of conclusive laboratory evidence.

¶ 25 *2. Motion To Dismiss*

¶ 26 In March 2015, the State filed a motion to dismiss. As to the claims of ineffective assistance of counsel, the State argued defendant should have raised those issues on direct appeal and, therefore, his arguments were barred under the doctrine of *res judicata*. As to defendant's claim that trial counsel should have exercised his peremptory strikes, the State argued defendant failed to demonstrate any of those jurors' backgrounds prejudiced his case, particularly where they each told the trial court they would be fair jurors. As to defendant's trial counsel failing to call Marquis and K.S., the State argued it was reasonable for trial counsel to refrain from calling Marquis, a codefendant who, prior to defendant's trial, pleaded guilty to conspiring with defendant to batter one of the witnesses. Additionally, the State argued K.S. was 10 years old at the time of the offense, making him an unreliable witness that trial counsel could have reasonably chosen not to call.

¶ 27 As to defendant's claim that trial counsel coerced him into waiving his right to testify, the State argued the record rebutted defendant's argument, as the trial court carefully admonished defendant about his right to testify. As to defendant's claim that trial counsel failed

to properly challenge the lack of laboratory results, the State pointed out trial counsel argued about the lack of gunshot-residue and fingerprint evidence during closing arguments. Finally, the State argued defendant's claim of actual innocence, which was premised on defendant's assertion that he had not seen the various witness statements or police reports prior to his trial, failed to show that newly discovered evidence would exonerate him.

¶ 28

### *3. The Trial Court's Ruling*

¶ 29

In July 2015, the trial court entered an order granting the State's motion to dismiss. The court first determined defendant forfeited his ineffective-assistance arguments by failing to raise them on direct review. Nevertheless, the court also considered the merits of defendant's arguments. As to the jury selection, the court noted trial counsel used five of seven peremptory challenges, and the record demonstrates all of the jurors defendant now challenges indicated they could be fair and impartial despite their personal experiences.

¶ 30

As to the claim regarding trial counsel's failure to call Marquis, the trial court concluded the decision fell squarely in the realm of trial strategy. Seven witnesses, including four police officers and three mall security officers, identified defendant as the shooter. Defendant was shot by Officer McAllister after defendant pointed his gun at another officer. Defendant's gun was recovered where he dropped it on the ground. Witness Day testified that Marquis and the victim had recently been in an altercation, and that defendant and Marquis were following the victim the day of the shooting. Because of Marquis's involvement in the events, the trial court found it reasonable that trial counsel would choose not to call Marquis as a witness. The court also determined defendant failed to show he was prejudiced by Marquis's omission as a witness given the overwhelming evidence of defendant's guilt.

¶ 31 As to the claim that trial counsel should have challenged the laboratory evidence, the trial court noted the reports were inconclusive and did not eliminate defendant as the shooter. Questioning witnesses on the matter would only draw attention to the fact that witnesses observed defendant shooting the firearm and the firearm was recovered from the ground near defendant. Additionally, the court determined it was trial strategy for trial counsel to wait until closing argument to highlight the deficient laboratory reports. Moreover, given the overwhelming evidence of guilt, defendant could not show prejudice.

¶ 32 As to defendant's claim that he was prevented from testifying as to his innocence, the trial court found the statement "taxe[d] the gullibility of the credulous" and lacked any basis in fact due to the overwhelming evidence of defendant's guilt. The court noted seven witnesses testified that defendant was apprehended after they observed him shoot the victim, who was on the ground. Moreover, taking defendant's affidavit as true, the court found trial counsel's statements to constitute an assessment of the case and his advice to defendant, not efforts to threaten, coerce, or mislead defendant regarding his right to testify. Defendant's assertion was also rebutted by the record, where the court admonished him as to his right to testify, but he still indicated his desire to waive that right.

¶ 33 As to the claim of actual innocence, the court found defendant's claim revolved around police reports that were available at the time of his trial; thus, he failed to provide newly discovered evidence. Moreover, K.S.'s statement did not exonerate defendant, nor did defendant provide an affidavit with K.S. offering exonerating evidence.

¶ 34 C. Notice of Appeal

¶ 35 Defendant filed a timely notice of appeal and the trial court appointed OSAD to represent defendant. In August 2017, OSAD filed a motion for leave to withdraw, attaching to



its motion a brief conforming to the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). This court allowed defendant leave to file additional points and authorities by September 22, 2017. Defendant has not done so. After examining the record, we grant OSAD's motion to withdraw and affirm the trial court's dismissal of defendant's amended postconviction petition.

¶ 36

## II. ANALYSIS

¶ 37 OSAD argues no colorable argument can be made to support defendant's contention that the trial court erred in dismissing his amended petition for postconviction relief. Specifically, in its motion to withdraw, OSAD outlines the following claims for review: (1) trial counsel provided ineffective assistance of counsel by failing to use all of defendant's peremptory challenges during *voir dire*; (2) trial counsel was ineffective for failing to call K.S. and Marquis as witnesses; (3) trial counsel was ineffective for coercing, threatening, or misleading defendant so that defendant would not testify; (4) trial counsel was ineffective for not introducing additional evidence about the lack of laboratory results; and (5) defendant made a sufficient claim of actual innocence.

¶ 38 At the second stage of a postconviction proceeding, a defendant's petition must demonstrate a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). All well-pleaded facts not positively rebutted by the record must be taken as true. *Id.* With that standard in mind, we address OSAD's motion to withdraw on the basis that no meritorious claims can be made on appeal.

¶ 39

### A. Ineffective Assistance of Counsel

¶ 40 To demonstrate ineffective assistance of counsel, defendant must show counsel's (1) performance fell below an objective standard of reasonableness; and (2) deficient performance resulted in prejudice to the defendant such that, but for counsel's errors, the result of

the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). If a defendant fails to prove either prong of the *Strickland* test, his claim for ineffective assistance of counsel must fail. *People v. Sanchez*, 169 Ill. 2d 472, 487, 662 N.E.2d 1199, 1208 (1996). As to the first prong, there is a strong presumption that trial counsel's conduct was the product of sound trial strategy, which is immune from claims of ineffective assistance of counsel. *People v. Davis*, 2014 IL App (4th) 121040, ¶ 19, 22 N.E.3d 1167.

¶ 41

1. *Peremptory Challenges*

¶ 42 OSAD asserts defendant can make no colorable claim of ineffective assistance of counsel as it relates to the use of peremptory challenges during *voir dire*. "[D]ecisions made during jury selection involve trial strategy to which courts should be highly deferential." *People v. Manning*, 241 Ill. 2d 319, 333, 948 N.E.2d 542, 550 (2011). The reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." (Internal quotation marks omitted). *Id.* at 334 (quoting *Strickland*, 466 U.S. at 689). Nothing in the record or in defendant's postconviction petition overcomes the presumption that trial counsel's decisions during *voir dire* were a matter of trial strategy, particularly where trial counsel used five of seven peremptory challenges and defendant fails to explain how trial counsel could have excused all five jurors he now challenges.

¶ 43

Moreover, defendant fails to demonstrate prejudice. To establish prejudice, defendant must show the jurors that trial counsel failed to strike were biased in reaching their decision. See *People v. Metcalfe*, 202 Ill. 2d 544, 562-63, 782 N.E.2d 263, 275 (2002). All of the jurors in question affirmed they would not be influenced by bias, prejudice, or emotion in

reaching a verdict. Defendant attached no affidavits from the jurors or otherwise provided any support for his assertion that the jurors were biased against him. Accordingly, defendant fails to demonstrate the result of the proceedings would have been different if the jurors in question had been excused. Thus, defendant failed to make a substantial showing of a constitutional deprivation on this issue.

¶ 44

## 2. Witnesses

¶ 45 OSAD contends no colorable claim can be made that trial counsel was ineffective for failing to call two witnesses: Marquis and K.S. As to K.S., neither defendant's *pro se* petitions nor the amended petition included an affidavit from K.S.; instead, defendant attached a copy of the police report that included K.S.'s statement to police. If a defendant challenges his trial counsel's failure to investigate and call a witness, he must first attach to his postconviction petition an affidavit from the proposed witness. *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1, 13 (2000). "In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.* Thus, attaching K.S.'s statement from an unsigned, unsworn police report is insufficient to support a claim that trial counsel was ineffective for failing to call the proposed witness.

¶ 46 As to Marquis, defendant has failed to demonstrate prejudice. In Marquis's affidavit, he stated (1) he observed the shooting, (2) defendant was not the shooter, (3) he did not know the victim, (4) he never conspired to injure the victim, and (5) his calls to defendant's attorney were never returned. Even if Marquis testified consistently with his affidavit, defendant has not made a substantial showing that the testimony would have affected his trial. Seven witnesses—three mall security officers and four police officers—identified defendant as the

shooter, observed him to be in possession of a firearm, and apprehended him immediately on the scene. In light of this evidence, defendant has failed to demonstrate a substantial constitutional deprivation on this issue.

¶ 47

### 3. *Right To Testify*

¶ 48 OSAD next asserts no colorable claim can be made that trial counsel was ineffective for interfering with defendant's right to testify. "[T]he decision to exercise or waive the right to testify belongs solely to the defendant." *People v. Palmer*, 2017 IL App (4th) 150020, ¶ 17, 74 N.E.3d 1198. Where the defendant alleges his trial counsel denied him the right to testify, we accept those well-pleaded allegations as true, unless those allegations are positively rebutted by the record. *Id.* ¶ 21.

¶ 49

First, we note the trial court admonished defendant on the record about his right to testify—including that no one could force him to waive his right—and defendant affirmatively indicated he sought to waive that right. Thus, defendant's argument that trial counsel coerced, threatened, and misled him is affirmatively rebutted by the record. Second, defendant's affidavit stated trial counsel told defendant (1) not to testify, (2) he had nothing helpful to say, (3) the jury would not believe his testimony, (4) his prior convictions would be introduced to impeach him, and (5) the evidence was insufficient to support a conviction. As the court found, these statements constitute an assessment of the case and trial counsel's advice to defendant, not efforts to threaten, coerce, or mislead defendant regarding his right to testify. Thus, defendant's allegations are positively rebutted by the record and he has failed to demonstrate a substantial constitutional violation on this issue.

¶ 50

### 4. *Laboratory Results*

¶ 51 OSAD argues defendant has raised no colorable claim that trial counsel was ineffective for failing to introduce additional evidence regarding the lack of fingerprint and gunshot-residue evidence.

¶ 52 An attorney's decision to challenge the lack of physical evidence during argument rather than calling a member of the police crime laboratory to testify is a matter of trial strategy. *Enis*, 194 Ill. 2d at 394. Here, trial counsel did just that, choosing to call attention to the lack of physical evidence during closing argument rather than calling a witness to testify about the laboratory reports. Moreover, trial counsel laid the foundation for this argument during his cross-examination of the crime-scene analyst, who testified it was normal procedure to collect evidence for processing gunshot-residue and fingerprint testing. Thus, trial counsel's decision was trial strategy and not deficient.

¶ 53 Moreover, with numerous witnesses who observed defendant discharge the firearm and the firearm being recovered from the ground after defendant dropped it, defendant cannot show the State's failure to provide gunshot-residue and fingerprint evidence prejudiced him. Accordingly, defendant has failed to demonstrate a substantial constitutional deprivation on this issue.

¶ 54 **B. Actual Innocence**

¶ 55 Finally, OSAD asserts no colorable argument can be made to support defendant's claim of actual innocence. "[T]he due process clause of the Illinois Constitution affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence." *Ortiz*, 235 Ill. 2d 319, 331. The evidence must be of such a conclusive nature that it would likely change the outcome of the trial. *Id.* at 333. Newly

discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *Id.* at 334.

¶ 56 Here, defendant's claim of actual innocence rests largely on K.S.'s statement to police, which was contained in the police report available to trial counsel prior to the trial. Defendant also raises issues regarding Marquis's statement and the lack of laboratory evidence. None of this evidence is newly discovered. Regardless, the evidence is not of such a conclusive nature that it would likely change the outcome of the trial. Not only did defendant fail to attach an affidavit outlining how K.S. would have testified, but K.S.'s statement in the police report was only a partial recounting of events from the eyes of a 10-year-old boy. Marquis's affidavit was both self-serving and demonstrated a bias in favor of defendant, his cousin. As noted above, the lack of laboratory evidence was considered by the jury in reaching its decision. Thus, defendant has failed to demonstrate a claim of actual innocence.

¶ 57 Because defendant has failed to prove a substantial constitutional deprivation, the trial court did not err in dismissing the amended postconviction petition. Accordingly, we agree with OSAD that the case presents no meritorious issues for review.

¶ 58 III. CONCLUSION

¶ 59 Based on the foregoing, we grant OSAD's motion to withdraw and affirm the trial court's dismissal of defendant's postconviction petition.

¶ 60 Affirmed.