2018 IL App (5th) 160528-U

NO. 5-16-0528



IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Marion County. |
| | ) | |
| v. | ) | No. 09-CF-339 |
| | ) | |
| KEITH KIRGAN, | ) | Honorable |
| | ) | Kevin S. Parker, |
| Defendant-Appellant. | ) | Judge, presiding. |

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Barberis and Justice Cates concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm the order of the circuit court of Marion County that dismissed the defendant's amended petition for postconviction relief at the second stage of proceedings; the petition failed to make a substantial showing of a constitutional violation because (1) the defendant's ineffective assistance of trial counsel claims fail because the the defendant has failed to make a substantial showing that a reasonable probability exists that the outcome of his bench trial would have been different had trial counsel's performance been different, (2) his ineffective assistance of appellate counsel claim fails because there were no meritorious ineffective assistance of trial counsel claims for appellate counsel to raise, and (3) he has failed to show that his purportedly "newly discovered evidence" is sufficiently conclusive that it would probably change the result on retrial. Therefore, the dismissal of his amended petition by the circuit court, without an evidentiary hearing, was proper.

¶ 2 The defendant, Keith Kirgan, appeals the order of the circuit court of Marion County that dismissed the defendant's amended petition for postconviction relief at the second stage of proceedings. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts underlying the defendant's conviction and sentence, following a bench trial, for criminal sexual assault were explained in detail in our disposition of his direct appeal. See *People v. Kirgan*, 2014 IL App (5th) 130185-U. In this disposition, we shall again set forward those facts necessary to understand the issues raised by the defendant in this appeal, which are derived from the testimony adduced at the defendant's bench trial and from the record on appeal, and are as follows. On April 5, 2009, the victim, W.P., who was then 17 years old, visited the home of her friends, Nikki Bray and Steven Kirgan, after having received parental permission to spend the night there. The three then traveled to the home of Steven's father, the defendant. At the defendant's home, the defendant offered Xanax to W.P., who took half of one pill. Nikki accepted, and ingested, a Xanax pill from the defendant as well. Out of earshot of the two young women, the defendant told Steven that the defendant had put something into the drinks he had given the young women, and that he planned to have sex with W.P. when she passed out. This led to an argument between Steven and the defendant, and the defendant eventually apologized. In their statements to police, both young women noted that the drinks provided to them by the defendant tasted strange. After learning that the defendant had put Xanax in their drinks, the young women dumped out the remainder of the drinks.

¶ 5 W.P. subsequently lay down on a pallet on the living room floor to watch a movie. She passed out approximately 20 minutes into the movie. Nikki also passed out on the living room floor. When W.P. regained consciousness, she realized that her pants and underwear had been pulled down, and she saw the naked defendant lying next to her, with his arm around her

shoulder. At approximately the same time, Steven entered the living room and observed his father lying naked next to the disrobed W.P. Steven "freaked out," got W.P. out to his car, then returned to the home and retrieved Nikki. Nikki then heard the defendant state that there had been a misunderstanding, and that all he and W.P. had done was "make out."

¶ 6 When Steven and the women arrived at the house of Steven's mother, Kim Barbee-Tucker, Steven was crying, upset, and bewildered, and told his mother that his father had done something Steven "couldn't believe." Barbee-Tucker took them all to the hospital, where W.P. reported that she was possibly sexually assaulted. Her clothing was collected as evidence, and Dr. Roberto Garcia examined her. Dr. Garcia did not detect physical injuries to W.P., but applied swabs from a sexual assault evidence collection kit to W.P.'s body. Specifically, he swabbed around W.P.'s vagina, then applied a swab to the "para anal" region of W.P., circling it "millimeters" around her anus; with a separate swab, he collected a separate sample from "just inside" her anus. He collected the external sample before the internal one, and tried not to touch the second swab to the external area before inserting it. Semen that matched that DNA profile of the defendant was found on W.P.'s underwear, on a swab of her leg or thigh area, and on the anal swabs. An expert forensic scientist testified that both anal swabs were light brown in color, indicating contact with fecal material.

¶ 7 At trial, Steven and Nikki testified that they did not recall making statements to the police consistent with the above facts, but they did not deny having made those statements. At the conclusion of the bench trial, the judge noted that Steven's and Nikki's inability to recall making statements to the police was "convenient" and stated that there was no doubt in his mind that what they told the police and Steven's mother, Kim Barbee-Tucker, was exactly what had happened. The judge found the defendant guilty of count I (criminal sexual assault) and count III (criminal sexual abuse). At sentencing, the judge ruled that count III merged with count I;

accordingly, the judge imposed a sentence on count I only, said sentence being 30 years in the Illinois Department of Corrections. On direct appeal, the defendant claimed the trial court erred because, according to the defendant, the court allowed the State to proceed at trial "on a charge that did not encompass the elements in the information," and because the defendant believed the court allowed "any act of sexual conduct, despite the specificity of the alleged sexual conduct in the charging document, to be included in Count III during closing arguments." The defendant also challenged the sufficiency of the evidence against him, and argued that the trial court erred when it allowed the defendant's first attorney to withdraw without making an inquiry as to why the State claimed it might call that attorney as a witness in the case. We rejected each of the defendant's arguments, and affirmed his conviction and sentence. See *Kirgan*, 2014 IL App (5th) 130185-U, ¶¶ 9-14.

¶ 8 Following the defendant's unsuccessful direct appeal, and pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)), the defendant filed a petition for postconviction relief, which was superseded on May 22, 2015, by the filing of the amended petition for postconviction relief (the petition) that is the subject of this appeal. In the petition, the defendant contended he was denied a fair trial because (1) his trial counsel was ineffective, (2) his appellate counsel was ineffective, and (3) the "main witness" against him, his son Steven Kirgan, subsequently "recanted his police statement, which was admitted as substantive evidence against" the defendant.

¶ 9 With regard to the alleged ineffectiveness of trial counsel, the defendant posited in the petition that trial counsel was ineffective because counsel (1) "failed to object to the testimony of Kim Barbee-Tucker on the basis that her testimony was hearsay," (2) failed to impeach Barbee-Tucker on the basis of her purported "dislike of the defendant, the history of their relationship, and her professional connection to the State's Attorney," (3) did not "argue the inconsistencies

among the various statements admitted into evidence," (4) did not "object to some of the emergency room director's testimony as it related to [the victim's] statements," and (5) failed to preserve the foregoing issues on appeal, because trial counsel failed to file a motion for a new trial.

¶ 10 With regard to the alleged ineffectiveness of appellate counsel, the defendant posited in the petition that the failure of appellate counsel to discover, brief, and argue the foregoing purported instances of ineffective assistance of trial counsel in turn constituted ineffective assistance of appellate counsel. The defendant further posited in the petition that appellate counsel was ineffective because counsel "did not frame the reasonable doubt argument correctly, because he relied on a misunderstanding of the law of penetration."

¶ 11 With regard to the alleged recantation of Steven Kirgan's police statement, the defendant posited in the petition that Steven Kirgan (1) "felt pressure from the hospital and the police department" to corroborate the account given by the victim, (2) intended to testify truthfully at trial but was "threatened" by the State's Attorney shortly before the trial, which in turn "caused" him "to be unwilling to tell the truth at the trial, and led to the admission of his police statement as substantive evidence" that the defendant now claims "was the single most damaging piece of evidence entered at trial," and (3) "has now recanted his trial testimony that he could not remember what happened." The defendant claimed in the petition that "[r]ecanted evidence can be considered newly discovered evidence." The defendant supported the allegations in the petition with an affidavit of Steven Kirgan in which he averred consistently with the allegations in the petition. Specifically, of relevance to this appeal, Steven Kirgan averred that he (1) testified untruthfully at the defendant's trial that he did not remember anything from the night in question, because in fact he did "remember many of the events of the evening, mostly those that occurred later in the night," (2) did not remember the defendant saying he drugged the girls

and intended to have sex with the victim, and (3) would have told what he "really remembered, which is different than what was in the police statements," had he not "been threatened by the police officers."

¶ 12 On June 18, 2015, the State filed a motion to dismiss the petition, wherein the State contended that the doctrines of *res judicata* and waiver barred the defendant's claims of ineffective assistance of trial counsel, and that the claims of ineffective assistance of appellate counsel did not save the claims because the defendant failed to demonstrate "either that counsel's performance was deficient or that the claimed deficiency prejudiced" the defendant, and that the petition did not demonstrate "that any such instances, if raised, would have resulted in a reversal of [the] defendant's conviction." The State further alleged that "these claims are flawed in that each fails to make the substantial showing required" to entitle the defendant to a third-stage evidentiary hearing under the Act. With regard to the final issue raised in the petition, the State contended that none of the allegations made by Steven Kirgan with respect to his testimony at trial would have been sufficient to prevent his earlier statement to the police from being admitted at trial and that, "[i]n short, even with this new testimony, the result would have been the same," in that the trier of fact "would have been left with the question whether to believe the testimony of Steven Kirgan or the statement he made to the police."

¶ 13 On December 1, 2016, the circuit court issued an order in which it ruled, *inter alia*, that the petition, for purposes of surviving a second-stage motion to dismiss, "failed to demonstrate sufficient facts which, if true, make a showing of a constitutional violation" that would entitle the defendant to a third-stage evidentiary hearing. Accordingly, the circuit court granted the State's motion to dismiss, and dismissed the petition. This timely appeal followed. Additional facts will be provided as necessary below.

¶ 14 ANALYSIS

¶ 15 The Act provides a three-stage procedure by which a defendant who alleges he or she has suffered a deprivation of his or her constitutional rights may collaterally attack the judgment against the defendant. *People v. Demitro*, 406 Ill. App. 3d 954, 956 (2010). At the second stage of proceedings, the State may move to dismiss a defendant's petition or may answer the allegations raised therein. *Id*. "To withstand a second-stage motion to dismiss, the defendant must make a substantial showing that [the defendant's] constitutional rights have been violated, taking all well-pled facts as true." *Id*. This court "may affirm the decision of the circuit court on any grounds substantiated by the record, regardless of the circuit court's reasoning." *Id*.

¶ 16 On appeal, the defendant contends the circuit court erred when the court dismissed the petition at the second stage of proceedings. The defendant claims in his opening brief on appeal that the petition made a substantial showing of a constitutional violation, in that the defendant's "allegations are not refuted by the record and are supported by affidavits and the record." With regard to the ineffective assistance of trial counsel claims, the parties agree that to prevail on such a claim, a defendant must demonstrate both that (1) trial counsel's performance fell below an objective standard of reasonableness (the performance prong) and (2) trial counsel's substandard performance created a reasonable probability that, but for the errors of trial counsel, the result of the proceeding in question would have been different (the prejudice prong). See, *e.g.*, *People v. Williams*, 2016 IL App (1st) 133459, ¶ 27. The failure to prove either prong precludes a finding of ineffective assistance of trial counsel. *Id*. ¶ 28. Moreover, the prejudice that must be shown to satisfy the second prong is "actual prejudice ***, not mere speculation as to prejudice." (Internal quotation marks omitted.) *Id*. Accordingly, "at the second stage of the proceedings under the Act, [the] defendant has the burden to make a substantial showing that a

reasonable probability exists that the outcome of the proceedings would have been different had [trial] counsel's performance been different." *Id*.

¶ 17 In support of his ineffective assistance of trial counsel claims, the defendant contends trial counsel had no "sound strategy and he is not insulated from a finding that he provided ineffective assistance in this case." According to the defendant, trial counsel first erred when he failed to object, at the defendant's bench trial, to the testimony of Kim Barbee-Tucker—the mother of Steven Kirgan—on the basis of hearsay. During the testimony in question, Barbee-Tucker testified that Steven told her, *inter alia*, that the defendant had drugged the victim and that Steven could not believe he had done that. The defendant claims "[t]his statement was inadmissible hearsay" that was not subject to any exception to the rules barring hearsay.

¶ 18 The State, on the other hand, contends that regardless of the admissibility, or lack thereof, of Barbee-Tucker's testimony, the defendant cannot demonstrate prejudice because the testimony in question "was completely cumulative of unchallenged evidence that Steven made three separate statements to police recounting all the events of the night in question, including [the] defendant's drugging" of both the victim and of Steven's now-wife, Nikki. The State points out that the "evidence was corroborated by Nikki's substantively admitted statement" regarding the drugging, by the victim's testimony regarding the drugging and subsequent sexual assault of her by the defendant, and by proof that the victim "tested positive for Xanax and [the] defendant's semen at the hospital." The State posits that, accordingly, the defendant has failed to demonstrate a reasonable probability of a different outcome to the defendant's bench trial if the trial judge "heard the unchallenged evidence of Steven's three prior statements to police, but did not learn that he made a fourth essentially identical statement to his mother that he could not believe [the] defendant drugged the girls." We agree, and further agree with the State's argument that the three unchallenged statements provided more detail than Barbee-Tucker's testimony and

were far more damaging, again rendering it impossible for the defendant to show that he was prejudiced by trial counsel's failure to object to Barbee-Tucker's testimony. Accordingly, in light of the evidence presented at the defendant's bench trial, discussed in detail above, we do not conclude that the defendant has made a substantial showing that a reasonable probability exists that the outcome of the bench trial would have been different had trial counsel's performance been different on this point. See, *e.g., Williams*, 2016 IL App (1st) 133459, ¶ 28.

¶ 19 The defendant next contends trial counsel erred when he failed to impeach Barbee-Tucker based upon "her dislike of [the] defendant, the history of their relationship, and her professional connection to the State's Attorney," matters alleged by Steven Kirgan in the affidavit attached to the petition. The State responds that, *inter alia*, the defendant has again failed to satisfy the prejudice prong of his ineffective assistance of trial counsel claim. We agree. As the State points out, Barbee-Tucker's role on the night of the crime was minimal—she took the victim to the hospital after learning of the purported sexual assault, where physical evidence that helped to substantiate the victim's claims was gathered. That evidence, and other evidence of the defendant's guilt, was produced at the bench trial from many witnesses other than Barbee-Tucker. Attempting to impeach Barbee-Tucker's general credibility because of her dislike of the defendant, their stormy relationship, and the fact that Barbee-Tucker worked at a child advocacy center and sometimes interacted with the State's Attorney, would not have changed any of the facts that led to the defendant's conviction. There is simply no possibility, let alone a substantial showing of a reasonable probability, that the outcome of the defendant's bench trial would have been different had trial counsel's performance been different on this point. See, *e.g., id.*

¶ 20 The defendant also contends trial counsel erred because counsel "failed to argue the inconsistencies among the various statements admitted into evidence." The State counters that the alleged inconsistencies relate to "collateral matters" about the drugging of the victim and

Nikki. Although we agree with the defendant that matters relating to the drugging, while not directly related to the elements the State was required to prove, were important to the overall context of the case and thus cannot be dismissed as wholly collateral, we do not agree with the defendant that he has made a substantial showing of a reasonable probability that the outcome of the defendant's bench trial would have been different had trial counsel's performance been different on this point. See, *e.g.*, *id.*

¶ 21 First, as the State aptly notes, this court has recognized that the decision of trial counsel "to argue a certain theory in closing arguments is a classic example of trial strategy" that this court must be reluctant to second-guess. *People v. Brown*, 2017 IL App (3d) 140921, ¶ 26. That is because this court's " 'scrutiny of counsel's performance must be highly deferential' " in light of the fact that " '[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.' " *People v. McGath*, 2017 IL App (4th) 150608, ¶ 38 (quoting *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). The Illinois Supreme Court has ruled that a reviewing court must evaluate trial counsel's performance on the basis of trial counsel's perspective at the time, not through the lens of hindsight. *Id*. We must indulge a *strong* presumption that the actions of trial counsel fall within the wide range of reasonable professional assistance, which means that a defendant must overcome the presumption that the challenged action or inaction by trial counsel, under the circumstances, might be considered sound trial strategy. *Id.* This renders the strategic decisions of trial counsel virtually unchallengeable. *Id*.

¶ 22 Here, the "inconsistencies" the defendant claims his trial counsel should have argued, although not wholly collateral, amount to quibbling about details such as whether Steven told W.P. that the defendant put "something" in her drink or put Xanax in her drink, and "different

versions of where defendant claimed he was when he left Steven alone in the kitchen." It is not surprising that trial counsel focused his closing argument on details that he believed would lead to the acquittal of the defendant, rather than these kinds of minor details. As the State points out, whether Steven said it was Xanax or some other substance that was placed in the victim's drink is not of much relevance to the issue of whether the defendant subsequently sexually assaulted the victim after she passed out. Thus, there is no basis to conclude that omitting these "inconsistencies" from closing argument was unsound strategy on the part of trial counsel.

¶ 23 With regard to prejudice, as the State again aptly notes, in this case the trial judge noted that he had taken "extensive trial notes" which he had reviewed before finding the defendant guilty. Moreover, the defendant has been unable to point to any basis in the record to conclude the trial judge did not properly consider all the evidence before him, including the alleged inconsistencies. Thus, we agree with the State that trial counsel's failure to include the alleged inconsistencies in his closing argument "cannot have resulted in the trial court not considering that evidence." See, *e.g.*, *People v. Bowie*, 36 Ill. App. 3d 177, 180 (1976) (only where record on appeal affirmatively shows that trial judge did not remember or consider the crux of the defense when entering judgment is defendant deprived of fair trial). In light of the nature of the alleged inconsistencies, when compared to the other evidence of the defendant's guilt, and in light of the presumption, supported by the record in this case, that the trial judge properly considered all the evidence adduced during the bench trial, there is simply no basis to conclude that the defendant has made a substantial showing that a reasonable probability exists that the outcome of the bench trial would have been different had trial counsel's performance been different on this point. See, *e.g., Williams,* 2016 IL App (1st) 133459, ¶ 28.

¶ 24 The defendant next contends trial counsel erred because counsel did not object to "some of the emergency room director's testimony as it related to [the victim's] statements," because

much of that testimony "was inadmissible." In particular, the defendant claims trial counsel should have "objected to the admission of the medical personnel's testimony regarding identity of the perpetrator." However, as the State points out, the emergency room director, Deborah Reiter, never testified to the identity of the perpetrator. She testified, on cross-examination by the defendant, that the victim told her that the victim woke up with "a grown naked man laying next to her." There is no merit to the claim that testimony about "a grown naked man" is synonymous with testimony identifying said man as the defendant, particularly as the trial judge knew very well that Reiter was merely recounting what was told to her by the victim, and was not herself someone who was present at the scene of the sexual assault and able to identify the perpetrator.

¶ 25 Next, the defendant claims that trial counsel's failure to file a motion for a new trial was ineffective because it failed to preserve the foregoing issues for the defendant's direct appeal. However, as explained in detail above, none of the foregoing issues are meritorious. Accordingly, there is no basis to conclude that the defendant has made a substantial showing that a reasonable probability exists that the outcome of the trial court proceedings would have been different had trial counsel filed a motion for a new trial, or that the defendant would have prevailed in his direct appeal had these meritless issues been preserved and presented to this court at that time. See, *e.g.*, *id.* Having found no individual errors, we likewise reject the defendant's belated attempt, raised for the first time in his reply brief, to claim cumulative error. We also reject the defendant's claim that appellate counsel was ineffective for failure to raise, in the defendant's direct appeal, ineffective assistance of trial counsel—there was no meritorious ineffective assistance of trial counsel claim for appellate counsel to raise, and appellate counsel is not ineffective when appellate counsel fails to raise meritless claims. See, *e.g.*, *id.* ¶¶ 27-28, 33, 50. With regard to the defendant's claim that appellate counsel failed to raise these claims "because he focused so much on his reasonable doubt argument," which the defendant claims

was "based on a misunderstanding of the applicable law," the defendant presents no developed argument, or citation to authority, on this point, and accordingly has forfeited consideration of it. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (argument must contain the contentions of the appellant, the reasons therefor, and the citation of authorities; points not argued in an opening brief are forfeited and shall not be raised in the reply brief, in oral argument, or in a petition for a rehearing).

¶ 26 The defendant's final contention in this appeal is that the petition and accompanying affidavit of Steven Kirgan presented "newly discovered evidence" that entitles the defendant to a third-stage evidentiary hearing under the Act. On appeal, the defendant posits, as he did in the petition, that Steven Kirgan (1) "felt pressure from the hospital and the police department" to corroborate the account given by the victim, (2) intended to testify truthfully at trial but was "threatened" by the State's Attorney shortly before the trial, which in turn "caused" him "to be unwilling to tell the truth at the trial, and led to the admission of his police statement as substantive evidence" that the defendant now claims "was the single most damaging piece of evidence entered at trial," and (3) "has now recanted his trial testimony that he could not remember what happened." The defendant claimed in the petition, and claims on appeal, that "[r]ecanted evidence can be considered newly discovered evidence," and that he could not have discovered the evidence earlier because his trial counsel did not speak to Steven, and because Steven's attorney advised Steven "to exercise his own right not to incriminate himself."

¶ 27 However, as the State points out, this court has held that the hallmark of an actual innocence claim based on newly discovered evidence is the total vindication or exoneration of the accused, rather than a mere challenge to the sufficiency of the evidence used to convict the defendant, because "it is well-established that sufficiency of the State's evidence is not a proper issue for a postconviction proceeding." *People v. Evans*, 2017 IL App (1st) 143268, ¶ 30.

Moreover, at the second stage of proceedings under the Act, to obtain relief on an actual innocence claim based on newly discovered evidence, a defendant bears the burden of presenting evidence that is, *inter alia*, "sufficiently conclusive that it would probably change the result on retrial." *Id.* ¶ 32. Affidavits presented at the second stage of proceedings must meet this standard of being sufficiently conclusive. *Id.* ¶ 39 (citing *People v. Sanders*, 2016 IL 118123, ¶ 47 ("the conclusiveness of the new evidence is the most important element of an actual innocence claim")).

¶ 28 As explained above, in his affidavit, Steven Kirgan averred that he (1) testified untruthfully at the defendant's trial that he did not remember anything from the night in question, because in fact he did "remember many of the events of the evening, mostly those that occurred later in the night," (2) did not remember the defendant saying he drugged the girls and intended to have sex with the victim, and (3) would have told what he "really remembered, which is different than what was in the police statements," had he not "been threatened by the police officers." Thus, there is nothing in Steven Kirgan's affidavit that totally vindicates or exonerates the defendant; to the contrary, the facts in the affidavit, taken as true as they must be at this point in the proceedings, merely attempt to challenge the sufficiency of the evidence against the defendant. Steven Kirgan's affidavit, at most, purports that (1) Steven did not remember the defendant announcing his intent to have sex with the victim, rather than that the defendant actually did not make such an announcement, and (2) if not intimidated, Steven would have "told what [he] really remembered, which is different than what was in the police statements," but never avers as to what that testimony would have been or how it would have advanced the actual innocence of the defendant. Again, put simply, Steven Kirgan's affidavit does not totally vindicate or exonerate the defendant, and is insufficient to meet the defendant's burden at the

second stage of proceedings under the Act that his "newly discovered evidence" is sufficiently conclusive that it would probably change the result on retrial. See *id.* ¶ 32.

¶ 29 CONCLUSION

¶ 30 For the foregoing reasons, we affirm the order of the circuit court of Marion County that dismissed the defendant's petition for postconviction relief at the second stage of proceedings.

¶ 31 Affirmed.