2019 IL App (1st) 172665-U

No. 1-17-2665

Order filed September 26, 2019

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 99 CR 27710
	)	
FRANK BURRELL,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Reyes and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in rejecting defendant's ineffective assistance of counsel claim. Defendant's trial counsel performed deficiently by failing to present evidence that would have significantly impeached the State's primary witnesses, and there is a reasonable probability that the omissions affected the result of defendant's trial.

¶ 2 Defendant Frank Burrell was convicted of first degree murder and sentenced to 32 years in prison. He filed a postconviction petition alleging that his trial counsel was ineffective for failing to investigate and present evidence that would have impeached the State's three primary

witnesses. After an evidentiary hearing, the circuit court denied relief. For the reasons that follow, we reverse the circuit court's judgment, vacate defendant's conviction, and remand for a new trial.

¶ 3 I. BACKGROUND

¶ 4 Rene Battle was shot and killed around 10:00 p.m. on July 7, 1999, as she rode in the front passenger seat of an SUV driven by her boyfriend Marc Davis. At defendant's bench trial, Davis testified that a small white car sped toward him from behind and pulled next to the passenger side of his SUV. The driver then rolled down his window and fired two shots at the SUV, one of which struck Battle in the head. Davis spoke with police shortly after the shooting and gave a generic description of the shooter, but he did not tell police that he recognized the shooter or any passengers in the shooter's car. Nearly a month later, for the first time, Davis identified defendant as the shooter and Jerry Morton and Marshawn Hatcher as passengers. Davis testified that he had known the men for several years and immediately recognized them at the time of the shooting, but that he initially withheld that information from police because he was worried about his family's safety and had not yet decided "what route [he] wanted to take." Davis denied that he was in a gang and insisted that he knew defendant, Morton, and Hatcher only through their "affiliation in the neighborhood."

¶ 5 Morton testified that he, Hatcher, and defendant were together on July 7, 1999, from 3:00 p.m. until just after the shooting, driving around in a white Chevy Beretta, with defendant at the wheel and Morton and Hatcher drinking alcohol and smoking marijuana. According to Morton, around 10:00 p.m., defendant noticed Davis's SUV, pulled alongside it, and fired two shots. Hatcher told a similar story, with a similar timeline, in a police statement and grand jury

testimony, both of which were admitted as substantive evidence when Hatcher claimed not to remember many details of the night in question. See 725 ILCS 5/115-10.1 (West 2002). The State also introduced evidence that defendant's grandmother owned a white Chevy Beretta.

¶ 6 Morton and Hatcher were not charged with any role in Battle's murder, and both men were impeached with several prior felony convictions. Contrary to Davis's testimony denying that he was in a gang, Morton testified that he and Davis were members of the same gang and that Davis was his "boss." Morton also testified that, less than two weeks before defendant's trial, prosecutors in another county dropped pending charges (for which he faced up to 30 years in prison) at the urging of the prosecutors in this case. The State argued that the charges were dismissed because Morton had been paralyzed six months earlier. The defense argued that the dismissal was a *quid pro quo* for Morton's testimony against defendant.

¶ 7 The defense called no witnesses and presented no evidence, focusing instead on attacking the credibility of the State's witnesses through cross-examination. In closing argument, defense counsel argued that Davis's failure to identify defendant immediately after the shooting constituted significant "impeachment by omission." And counsel urged the court to discredit Morton's testimony and Hatcher's out-of-court statements because each had a motive to lie to secure favorable treatment and appease Davis.

¶ 8 The trial judge acknowledged that the State's witnesses had been impeached in various respects, but he concluded that the testimony as a whole proved defendant's guilt beyond a reasonable doubt. We affirmed defendant's conviction on direct appeal, rejecting a challenge to the sufficiency of the evidence. See *People v. Burrell*, No. 1-03-0689 (2005) (unpublished order under Supreme Court Rule 23).

¶ 9 Shortly thereafter, defendant filed a *pro se* postconviction petition, alleging that his trial counsel rendered ineffective assistance by failing to introduce evidence that would have established that he was at work on the day of the shooting from 6:30 p.m. to 8:30 p.m. and returned home just before 10:00 p.m. In supporting affidavits, defendant's uncle, Dino Malcolm, stated that he gave defendant's work timecard to trial counsel; and defendant's father, Frank Malcolm, stated that he told trial counsel that he was present when defendant arrived home. Defendant alleged that two other witnesses, Anthony Wilson and Mylan Mitchell, would have testified that they too were with defendant at his home at the time of the shooting, but defendant was unable to secure affidavits from them. Defendant further alleged (with supporting affidavits) that trial counsel failed to present favorable testimony from his grandmother, Jeanne Malcolm, who would have testified that she never allowed defendant to drive her car; and from David Boone, who would have testified that, one or two days after the shooting, he overheard Davis asking people to help him uncover the shooter's identity. The circuit court summarily dismissed the petition, but we reversed and remanded for further proceedings. See *People v. Burrell*, No. 1-06-1788 (2008) (unpublished order under Supreme Court Rule 23).

¶ 10 On remand, with appointed counsel, defendant filed a supplemental petition, reiterating his ineffective assistance claim and adding an affidavit from his employer, Robert Mack, in which Mack attested that his business records indicated that defendant worked from 6:25 p.m. until 8:45 p.m. on July 7, 1999. The circuit court again dismissed the petition, and we again reversed and remanded, concluding that defendant's claim warranted an evidentiary hearing. See *People v. Burrell*, 2014 IL App (1st) 120372-U.

¶ 11 At the evidentiary hearing, Boone testified that he was standing outside a barbershop in July 1999 when he overheard Davis tell several men that he was "trying to find out who tried to change him." Boone testified that, in this context, he understood "change" to mean "kill." About a week later, after one of the men present for the conversation with Davis told Boone that he was looking for defendant, Boone told defendant what he had heard. Trial counsel listed Boone as a potential witness on his pretrial discovery answer, but he testified that he did not remember ever speaking with Boone and could not recall why he had listed Boone as a potential witness. Dino testified that he twice arranged for potential witnesses, including Boone, to meet with trial counsel's investigator, but the investigator failed to show up for both meetings. Boone testified that he went to Dino's house to meet with the investigator, but the investigator did not appear. Defendant's postconviction lawyers tried to call the investigator as a witness at the evidentiary hearing, but the investigator evaded their numerous attempts to serve him with a subpoena. Trial counsel testified that, a few days before his own evidentiary hearing testimony, the investigator told him that he had not skipped any meetings and that it was the witnesses who had failed to appear. But trial counsel could not recall the investigator telling him about these missed meetings at the time.

¶ 12 Another witness, Sundiata Brown, testified that Davis told him and other fellow gang members, at an emergency gang meeting shortly after Battle's death, that he did not know who was responsible for the shooting. But Brown conceded that he did not reveal this information to anyone until 2014, when he and defendant were incarcerated at the same prison.

¶ 13 Davis, meanwhile, reiterated his trial testimony identifying defendant as the person who shot Battle and denied telling people after the shooting that he did not know who was

responsible. He conceded that he sought information about the shooting, but he claimed that he was only trying to determine whether it had been "sanctioned," not who carried it out.

¶ 14 Jeanne testified that she had owned a white Chevy Beretta in July 1999, but that she did not allow anyone else to drive it, and that defendant, in particular, had never borrowed it. She testified, moreover, that on Wednesdays (her day off of work) she would use the car to run errands. (The shooting occurred on a Wednesday.) She testified that she did not recall ever speaking with defendant's trial counsel or his investigator.[1] Dino testified that Jeanne was present for the two meetings that the investigator skipped. For his part, trial counsel testified that he did not recall speaking with Jeanne. When asked what he had done to investigate whether defendant had access to the car that was allegedly used in the shooting, counsel responded that "no definite car *** was ever specified" and stated that he did not recall the State's theory that it was defendant's grandmother's car. He later testified that he remembered testimony at trial that either defendant's grandmother or aunt had a white Beretta, but he could not recall taking any steps to investigate that issue.

¶ 15 Mack testified that he owned and operated a video and film production company for 37 years. In 1999, defendant worked for him as a part-time janitor three days per week. Defendant would generally arrive at work between 5:00 p.m. and 6:00 p.m., after everyone else had left for the day, and would work for two to two-and-a-half hours completing his janitorial tasks. Mack testified that he kept track of the time that his employees worked using a timecard

[1] Defendant asserts that Jeanne's vehicle registration demonstrates that her car had license plates on July 7, 1999, contradicting Davis's report to police that the shooter's car had no license plates. But the record contains only the car's certificate of title, not its registration. And nothing in the certificate of title, nor Jeanne's testimony, indicates that the car had license plates on the date in question.

system. Mack explained that employees would insert their timecard into the time clock to "punch in" when they arrived. Because Mack had agreed to pay defendant for a set number of hours per week even if he finished his work more quickly than anticipated, Mack allowed defendant to manually sign out at the end of his shifts (by handwriting his end time on the card) rather than mechanically punching out. Mack authenticated defendant's timecard for July 7, 1999, which showed that defendant punched in at 6:25 p.m. and signed out at 8:45 p.m.

¶ 16 Mack conceded that he did not personally see defendant at work that day. But he testified that the entries on defendant's timecards were made in the course of his company's regularly conducted business activities, and that he relied on those entries for payroll purposes. Mack testified that he was not aware of defendant ever making a false entry on his timecard. Nor could Mack recall a time when defendant's janitorial tasks had not been completed on a night that defendant claimed to have worked. Mack explained that, due to the need for a clean environment in the film business, it would have been readily apparent if defendant had not worked a scheduled shift.

¶ 17 Trial counsel testified that he received a copy of defendant's timecard from Dino prior to trial and spoke on the phone with someone at the company whom he presumed to be the owner. He asked the owner "some questions about *** who saw [defendant at work], things like that." He testified that he "probably" asked the owner whether he could authenticate the timecard, and he was "sure" that he asked the owner to explain what the entries on the timecard meant. Trial counsel testified that he did not believe the timecard had "any real value" because it did not establish an alibi for the time of the shooting, and because no one saw defendant at work that day and "anybody could have signed in or out" for him.

¶ 18 At the close of the hearing, defendant sought to introduce affidavits from Frank Malcolm and Anthony Wilson attesting that defendant was at home at the time of the shooting. He also sought to introduce an affidavit from Michael Threlkeld, another person who claimed to have heard Davis tell fellow gang members after the shooting that he did not know who the culprit was. Defendant's postconviction counsel did not explain why these witnesses could not testify in person. The State objected to the admission of the affidavits because it had no opportunity to cross-examine the affiants. The circuit court refused to consider the affidavits, citing the State's inability to cross-examine the witnesses.

¶ 19 After hearing closing argument, the circuit court entered a written order denying relief. The court recognized that, under *Strickland v. Washington*, 466 U.S. 668 (1984), defendant was required to show that trial counsel's performance was deficient, and that he was prejudiced by the deficiency. Taking defendant's contentions in turn, the court first held that trial counsel's failure to introduce defendant's timecard was not prejudicial. Despite finding Mack's testimony about the timecard credible, the court concluded that it was not "more likely than not" that defendant was at work during the period indicated on the timecard because Mack had not personally seen defendant at work. The court likewise discounted the relevance of Jeanne's proposed testimony because it "would not have necessarily precluded the inference that [defendant] had access to a white vehicle." Finally, the court held that trial counsel could not be faulted for failing to present testimony from Brown and Boone because their potential testimony was not known to counsel before trial. With respect to Boone, the court acknowledged that counsel "was aware of Boone's existence *** as a potential witness," but it concluded that counsel's failure to call Boone was not deficient because counsel was not aware of the "content"

of Boone's potential testimony. In any event, the court held that trial counsel's failure to call Boone was neither deficient nor prejudicial because Boone's testimony would not have been "relevant to an alibi defense" but instead would have served only to impeach Davis's credibility.

¶ 20 II. ANALYSIS

¶ 21 As a preliminary matter, defendant contends that the circuit court erred in refusing to consider affidavits from Malcolm, Wilson, and Threlkeld. Under the Post-Conviction Hearing Act, a circuit court "may receive proof by affidavits, depositions, oral testimony, or other evidence." 725 ILCS 5/122-6 (West 2018). But a "circuit court has wide discretion to limit the type of evidence it will admit at a postconviction evidentiary hearing," *People v. Morgan*, 212 Ill. 2d 148, 162 (2004), and we will not reverse such an evidentiary ruling "unless it constitutes an abuse of discretion," *People v. Thompkins*, 181 Ill. 2d 1, 12 (1998). In refusing to consider defendant's proffered affidavits, the circuit court was justifiably concerned about the State's inability to cross-examine the affiants. Cross-examination is "central to our adversarial system of justice," *People v. Safford*, 392 Ill. App. 3d 212, 224 (2009), and serves as "the principal means by which the believability of a witness and the truth of his testimony are tested," *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Because defendant offered no reason for proceeding by way of affidavit rather than live testimony, we cannot say that the circuit court abused its discretion in refusing to admit the affidavits.

¶ 22 We now turn to the merits of defendant's ineffective assistance claim. To prevail, defendant must show that his trial counsel's performance was deficient, and that the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is established by showing that "counsel's representation fell below an

objective standard of reasonableness." *Id.* at 688. When assessing counsel's performance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. In other words, defendant "must overcome the presumption that, under the circumstances, [counsel's] challenged action[s] might be considered sound trial strategy." (Internal quotation marks omitted.) *Id.* To demonstrate prejudice, defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of [his trial] would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

¶ 23 Both parties assert that we should review the circuit court's decision to deny relief on defendant's ineffective assistance claim for manifest error, meaning "error that is clearly evident, plain, and indisputable." (Internal quotation marks omitted.) *People v. Beaman*, 229 Ill. 2d 56, 73 (2008). But *Strickland*'s performance and prejudice prongs present mixed questions of law and fact. *Strickland*, 466 U.S. at 698. We thus apply "a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel's actions support an ineffective assistance claim." *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008); see also *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66; *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 130; *People v. Westmoreland*, 2013 IL App (2d) 120082, ¶ 27.

¶ 24 Applying this standard, we conclude that the circuit court erred in rejecting defendant's ineffective assistance claim. We start with trial counsel's failure to investigate and present

testimony from Boone about Davis's statement that he did not know the identity of the shooter.[2] It is undisputed that trial counsel was aware that Boone was a potential defense witness, as counsel listed Boone as such on his pretrial discovery answer. The circuit court excused counsel's failure to call Boone as a witness because there is no evidence that counsel was aware of the *content* of Boone's potential testimony. But that is precisely the reason that counsel's performance was deficient. Defense lawyers have "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. That duty "includes the obligation to independently investigate any possible defenses," *People v. Domagala*, 2013 IL 113688, ¶ 38, and to "explore all readily available sources of evidence that might benefit their clients," *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). In light of his knowledge that Boone was a potential defense witness, trial counsel had the professional duty to take reasonable steps to interview Boone and learn whether he had information that might be valuable to defendant's defense. Only then could counsel make a reasonable strategic decision whether to present Boone's testimony at trial. See *Hall v. Washington*, 106 F.3d 742, 749 (7th Cir. 1997) (strategic decision not to call a witness "can rationally be made *** only after some inquiry or investigation by defense counsel"). Yet counsel testified at the evidentiary hearing that he could not recall ever speaking with Boone. And while counsel may have instructed his investigator to interview Boone, both Dino (whom the circuit court expressly credited as reliable) and Boone testified that the investigator never did so.

[2] We find no error in the circuit court's conclusion that trial counsel was not deficient for failing to investigate and present similar testimony from Brown. Brown testified that he did not tell anyone prior to trial about Davis's statements, and defendant offers no explanation of how a reasonable investigation would have led counsel to discover Brown.

¶ 25 Trial counsel's failure to present testimony from Jeanne about defendant's lack of access to her car was deficient for the same reason. The circuit court held that counsel's failure to call Jeanne was reasonable because Jeanne's testimony "would not have necessarily precluded the inference that [defendant] had access to a white vehicle." But again, trial counsel testified that he did not recall ever speaking with Jeanne or taking any steps to investigate whether defendant would have had access to her car on the night of the shooting. In the absence of any investigation by counsel, we cannot attribute his decision not to call Jeanne to trial strategy. See *Hall*, 106 F.3d at 749. The State contends, alternatively, that counsel could have reasonably determined that a factfinder would discount Jeanne's testimony due to her relationship with defendant. But counsel did not say that he decided against calling Jeanne for that reason, and we will "not construct strategic defenses which counsel does not offer." *People v. Popoca*, 245 Ill. App. 3d 948, 959 (1993); see also *Wiggins v. Smith*, 539 U.S. 510, 526-27 (2003) (refusing to accept "a *post hoc* rationalization of counsel's conduct").

¶ 26 Trial counsel's failure to present evidence of defendant's timecard is a closer question. The circuit court appears to have accepted trial counsel's testimony that he reviewed the timecard and talked with Mack before deciding not to present the timecard at trial. As this finding is not against the manifest weight of the evidence, we must defer to it. Defense counsel's strategic decisions are "virtually unchallengeable" if they are "made after [a] thorough investigation of [the] law and facts relevant to plausible options." *Strickland*, 466 U.S. at 690. But "virtually unchallengeable" is not the same as completely unchallengeable. Ultimately, "[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). Thus, even a "tactical decision[ ]

may be deemed ineffective" if it "result[s] in counsel's failure to present exculpatory evidence of which he is aware." *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

¶ 27 Even with due deference to trial counsel's strategic choices, we conclude that his decision not to introduce evidence of defendant's timecard was unreasonable. Trial counsel testified that he discounted the timecard's value to defendant's defense because it did not show that defendant was at work at the time of the shooting, because no one had personally seen defendant at work, and because someone else might have been able to sign in and out for him. But these reasons are inconsistent with counsel's own strategy at trial and with Mack's testimony about the reliability of the timecard. Evidence directly contradicting the timeline of events provided by Morton and Hatcher—demonstrating that defendant was at work, rather than joyriding with them, for a two-hour period preceding the shooting—would have substantially advanced trial counsel's strategy of attacking the credibility of the State's eyewitnesses. And any questions about the reliability of defendant's timecard could have been addressed at trial by testimony from Mack authenticating the timecard as a business record and explaining that he had never had any reason to suspect that defendant made false entries on his timecards. Notably, nothing in the record suggests that counsel could have reasonably determined that introducing the timecard might do more harm than good. See, *e.g.*, *People v. Velasco*, 2018 IL App (1st) 161683, ¶¶ 143-45 (decision not to call alibi witnesses was reasonable where doing so "posed a serious risk of damaging petitioner's case" by opening the door to admission of his prior, false alibis); *People v. Meyers*, 2016 IL App (1st) 142323, ¶ 29 (decision not to call alibi witness was a reasonable means of avoiding introduction of defendant's contradictory post-arrest statements). For all of these reasons, we

conclude that defendant has "overcome the presumption" that counsel's failure to present his timecard was a reasonable trial strategy. *Strickland*, 466 U.S. at 689.

¶ 28 We also conclude that there is a reasonable probability that the result of defendant's trial would have been different absent counsel's deficiencies. *Strickland*, 466 U.S. at 694. The State's case rested entirely on the eyewitness testimony (or out-of-court statements) of Davis, Morton, and Hatcher. Davis's testimony identifying defendant was perhaps the most important piece of the State's case, as he was the sole eyewitness with no apparent motive to lie and seemingly every reason to correctly identify the person who shot his girlfriend. He testified that he had known defendant for several years and immediately recognized him as the shooter. And while trial counsel argued that Davis's month-long delay in identifying defendant to police undermined his credibility, Davis plausibly explained that the delay was due to fear for his family's safety and uncertainty about how to proceed. Boone's testimony that he overheard Davis seeking help identifying the shooter days after the shooting would have directly contradicted Davis's contention that he recognized defendant immediately and would have significantly undermined Davis's credibility and the value of his identification testimony. The circuit court discounted the prejudicial effect of counsel's failure to call Boone at trial because Davis adhered to his trial testimony at the evidentiary hearing and denied having made the statement attributed to him by Boone. But in a case that hinged on Davis's credibility, it is difficult to overstate the damage caused by failing to tee up this credibility contest for the factfinder at trial.[3]

¶ 29 Trial counsel's failure to introduce defendant's timecard was similarly prejudicial. Evidence that defendant was at work from 6:25 p.m. to 8:45 p.m. on the night of the shooting

[3] Notably, although the circuit court judge below was also the factfinder at trial, he did not resolve this credibility dispute in his order denying postconviction relief.

would have significantly undermined the credibility of the State's remaining eyewitnesses, Morton and Hatcher, by directly contradicting their contention that defendant was with them from 3:00 p.m. until 10:00 p.m. The circuit court was not persuaded that it was "more likely than not" that defendant was at work for the period indicated on his timecard because Mack did not have personal knowledge of that fact. But Mack's evidentiary hearing testimony, which the circuit court found credible, bolstered the timecard's reliability even in the absence of Mack's personal knowledge. In any event, it is not defendant's burden to establish the timecard's accuracy by a preponderance of the evidence, nor to show that it is more likely than not that he would have been acquitted had the timecard been presented at trial. Rather, defendant need only show "a reasonable probability" that, had counsel introduced the timecard (and presented Boone's testimony), "the factfinder would have had a reasonable doubt respecting [his] guilt." *Strickland*, 466 U.S. at 695.

¶ 30 Although neither Boone's testimony nor defendant's timecard establishes an alibi for defendant, the "impeachment value" of this evidence "can hardly be overestimated." *People v. Salgado*, 263 Ill. App. 3d 238, 247 (1994). With no physical evidence connecting defendant to the shooting and no evidence of motive, the importance of introducing available evidence that undermined the credibility of the State's eyewitnesses was paramount. Boone's testimony and defendant's timecard would have done just that, yet trial counsel failed to present either piece of evidence at trial. The cumulative effect of these omissions undermines our confidence in the outcome of defendant's trial. We conclude, in other words, that there is a reasonable probability

that the result of defendant's trial would have been different if trial counsel had presented Boone's testimony and defendant's timecard.[4]

¶ 31 III. CONCLUSION

¶ 32 For the foregoing reasons, we reverse the circuit court's order denying defendant's petition for postconviction relief, vacate defendant's conviction, and remand for a new trial.

¶ 33 Reversed and remanded.

[4] In light of this conclusion, we need not consider any additional prejudicial effect from counsel's failure to present testimony from Jeanne.