

NOTICE

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2019 IL App (4th) 170315-U

NO. 4-17-0315

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

December 10, 2019
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Champaign County
MARVINO MISTER,)	No. 12CF611
Defendant-Appellant.)	
)	Honorable
)	Thomas J. Difanis,
)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justices DeArmond and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court’s summary dismissal of defendant’s postconviction petition, concluding it failed to state the gist of a meritorious constitutional claim.

¶ 2 Defendant, Marvino Mister, appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2016)). On appeal, defendant argues this court should reverse the trial court’s judgment because his petition states an arguable claim his trial counsel rendered ineffective assistance by failing to investigate and present testimony of two alibi witnesses. We disagree and affirm.

¶ 3 I. BACKGROUND

¶ 4 On direct appeal, this court provided all the relevant facts in this case. *People v. Mister*, 2016 IL App (4th) 130180-B, ¶¶ 4-40, 58 N.E.3d 1242. We discuss only those facts necessary for the resolution of the issues on appeal.

¶ 5 A. The Charges and Jury Trial

¶ 6 On April 18, 2012, the State charged defendant by information with armed robbery (720 ILCS 5/18-2(a)(2) (West 2010)), a Class X felony. The information alleged on April 12, 2012, defendant took money from Sean Harrigan, a student at the University of Illinois in Champaign-Urbana, by threatening the imminent use of force while armed with a gun.

¶ 7 At defendant's jury trial in December 2012, Sean Harrigan testified that on April 11, 2012, he and two friends drove in Harrigan's car to Par-A-Dice Hotel and Casino in Peoria, Illinois. Harrigan played craps the entire night and into the early morning hours of April 12, 2012. Over the course of the evening, Harrigan won \$23,000. At 4:29 a.m., a security guard escorted Harrigan and his friends to Harrigan's car parked in the casino's parking lot. Around 6 a.m., Harrigan drove into an underground parking garage at his apartment at 512 South Third Street in Champaign, where he was robbed at gunpoint.

¶ 8 Other evidence presented at trial showed defendant and his alleged accomplice, John Williamson, were at Par-A-Dice Casino on April 12, 2012, and they played craps at the same table as Harrigan. According to surveillance video footage, defendant and Williamson stopped gambling at 1:50 a.m., but remained at the casino. Additional footage showed at 4:03 a.m., defendant entered a silver sedan in the casino parking lot and remained there until 4:30 a.m. At that point, Williamson can be seen following Harrigan out of the casino. Williamson entered the driver's side door of the silver sedan and followed Harrigan across the street to a gas station and then toward Interstate 74.

¶ 9 Detective Donald Shepard of the Champaign Police Department testified he interviewed defendant. Defendant said he drove to the casino in a rental vehicle. He was later joined by his sister, Alicia Mister, and her boyfriend, but they left in the boyfriend's vehicle. Defendant could not recall where he rented the vehicle from because "[h]e had somebody rent the vehicle" and "he didn't know who they were." Detective Shepard also testified he asked defendant for his sister's contact information:

"I asked what her phone number was. He said, oh, it's disconnected. It's out of service. And then he recited a number. He said that he didn't know where she lived. He doesn't know her birthday. I researched that through records in Peoria. He said she lived in Peoria, but he didn't know where. And I researched the records in Peoria with the police department for the utilities. If you live in Peoria and you have water or utility services, they have your records there. They had no record of the name of the woman that he gave me."

Detective Shepard was unable to find defendant's sister. Defendant also told Detective Shepard his girlfriend's name was Tonica Williams, but Detective Shepard found her and discovered her name was Tonica Fullilove. Neither Fullilove nor Alicia testified at trial.

¶ 10 Detective Robb Morris of the Champaign Police Department testified he obtained Williamson's cell phone records. Data from those records was used to pinpoint Williamson's cell phone location between April 11, 2012, and April 12, 2012, which showed movement along Interstate 74 between Peoria and Champaign. The data also indicated Williamson's phone was in the vicinity of Champaign at the time of the robbery and that Fullilove placed a call to Williamson's phone around 7:30 a.m. Defendant's phone records showed his phone was turned off or not in service beginning at 3:12 a.m.

¶ 11 At the close of the State's evidence, defense counsel moved for a directed verdict, which the trial court denied. Defendant did not testify or present any evidence. Following deliberations, the jury found defendant guilty of armed robbery. In January 2013, the trial court sentenced him to 30 years in prison.

¶ 12 B. Direct Appeal and Postconviction Petition

¶ 13 On direct appeal, defendant argued, *inter alia*, (1) plain error occurred where a witness's testimony violated the silent witness theory, (2) plain error occurred where the trial court gave incorrect jury instructions, (3) trial counsel was ineffective, and (4) the State failed to prove him guilty of armed robbery. *People v. Mister*, 2015 IL App (4th) 130180, ¶ 1, 27 N.E.3d 97. This court affirmed defendant's conviction and sentence. *Id.*

¶ 14 In 2016, the Illinois Supreme Court denied defendant's petition for leave to appeal but issued a supervisory order (*People v. Mister*, No. 118934 (Ill. March 30, 2016) (supervisory order)), directing this court to vacate our prior judgment and reconsider our decision in light of *People v. Thompson*, 2016 IL 118667, 49 N.E.3d 393. On remand, this court again affirmed defendant's conviction for armed robbery. *Mister*, 2016 IL App (4th) 130180-B, ¶ 2.

¶ 15 In February 2017, defendant filed his *pro se* petition for postconviction relief, alleging ineffective assistance of trial counsel. Defendant argued trial counsel was ineffective because counsel failed to contact or obtain testimony from two potential alibi witnesses, Alicia Mister and Tonica Fullilove. Defendant attached to his petition an affidavit from Alicia, in which she stated:

“I, Alicia Mister, on April 12, 2012 I was at the Par-a-Dice Casino in Peoria, IL. I arrived roughly around 1[:]:00 AM. While I was there I ran into my brother [defendant], at a cra[p]s table. We e[m]braced each other and even went to the

smoke area and had a conversation together. While I was leaving, [defendant] appeared in the parking lot where I was parked and asked if he could catch a ride with me to my house where he was paroled at. With no hesitation I said yes. After a few hours he wanted to leave my house and go to his girlfriend[’s] house Tonica Fullilove. I agreed to take him and I did. I was never contacted by any detective or lawyer for a statement. Had I been interviewed or called to testify this would have been my testimony.”

Defendant also attached a police report containing a statement from Fullilove. According to the report, Fullilove stated she did not recall any details from April 12, 2012, but she was “sure [defendant] would have been with her at night.” When asked how she was sure, Fullilove stated defendant was “with her at night every night” and that “he helps her with the children and stays at home at night.” Fullilove stated she did not recall defendant receiving any phone calls that night but remembered that he “got up out of bed and left for awhile.” Fullilove stated defendant came home around 5 or 6 a.m.

¶ 16 In March 2017, the trial court entered a written order summarily dismissing defendant’s postconviction petition as frivolous and patently without merit. The trial court stated the following:

“The defendant claims his counsel should have called his sister and Tonica Fullilove to establish his alibi. The appellate court *** dealt extensively with the defendant’s alleged alibi. As stated in the opinion, the defendant lied about his sister’s name and address to the police. He lied about his girlfriend’s name. She appeared at the defendant’s arraignment driving a car that resembled the one used

in the robbery. The defendant gave conflicting statements as to how and with whom he left the casino.

For an ineffective assistance of counsel claim to have merit, the defendant must show not only that counsel's performance was deficient, but that the defendant was prejudiced by such performance. In this case, given the evidence presented, including the defendant's inconsistent statements, counsel's failure to call his sister and girlfriend does not satisfy his claim."

¶ 17 In April 2017, defendant filed a motion to reconsider the trial court's summary dismissal of his postconviction petition, which the trial court denied.

¶ 18 This appeal followed.

¶ 19 **II. ANALYSIS**

¶ 20 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition because the petition stated an arguable claim of ineffective assistance of counsel. Specifically, defendant argues trial counsel was ineffective for failing to contact two potential alibi witnesses and present their exculpatory testimony at trial. We disagree and affirm.

¶ 21 The Postconviction Act (725 ILCS 5/122-1 to 122-7 (West 2016)) provides criminal defendants a means by which they may assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. Proceedings under the Act are commenced by filing a petition in the trial court in which the original proceedings took place. *People v. Hodges*, 234 Ill. 2d 1, 9, 912 N.E.2d 1204, 1208 (2009). The Postconviction Act provides for three stages of proceedings in cases not involving the death penalty. *Id.* at 10.

¶ 22 The threshold for surviving the first stage of postconviction proceedings is low. *People v. Delton*, 227 Ill. 2d 247, 254, 882 N.E.2d 516, 519 (2008). A defendant need only allege the gist of a constitutional claim. *Id.* The trial court may summarily dismiss a postconviction petition only if there is “no arguable basis either in law or in fact.” *Hodges*, 234 Ill. 2d at 16; 725 ILCS 5/122-2.1(a)(2) (West 2016). A petition has no arguable basis in law or fact when it is based on an “indisputably meritless legal theory” or a “fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. A legal theory “completely contradicted by the record” is indisputably meritless. *Id.* We review the summary dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶ 23 Allegations of ineffective assistance of counsel are subject to the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, deficiency and prejudice. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *People v. Hall*, 217 Ill. 2d 324, 334-35, 841 N.E.2d 913, 920 (2005). To survive first-stage summary dismissal, a petition need only demonstrate (1) it is arguable counsel’s performance fell below an objective standard of reasonableness and (2) it is arguable defendant was prejudiced by counsel’s deficient performance. *Hodges*, 234 Ill. 2d at 17.

¶ 24 Generally, the decisions about which witnesses to call at trial and what evidence to present are strategic ones. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79, 962 N.E.2d 528. Matters of trial strategy “are generally immune from claims of ineffective assistance of counsel.” *Id.* Nevertheless, trial counsel has “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” *Strickland*, 466 U.S. at 691. “[S]trategic decisions may be made only after there has been a ‘thorough investigation of law and facts relevant to plausible options.’ ” *People v. Gibson*, 244 Ill. App. 3d 700, 703-04, 612 N.E.2d 1372, 1374 (1993) (quoting *Strickland*, 466 U.S. at 690). If counsel fails to interview

witnesses that are known to him and who have potentially exonerating information, it may indicate that he performed inadequately. *People v. Davis*, 203 Ill. App. 3d 129, 140-41, 560 N.E.2d 1072, 1079 (1990). Whether trial counsel was ineffective for failing to investigate is generally determined by comparing the strength of the trial evidence with the value of the evidence allegedly not presented at trial. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 24, 957 N.E.2d 162.

¶ 25 Here, defendant attached to his postconviction petition his affidavit averring he told trial counsel (1) his sister, Alicia Mister, was at the casino on the night of the robbery and “could testify that she gave me a ride home from the casino” and (2) his girlfriend, Tonica Fullilove, “could testify that I was at home with her at the time of the robbery.” Defendant further averred he told trial counsel his sister and girlfriend “should be called as witness[es]” but their names did not appear on the witness list for trial. Defendant’s sister averred in her affidavit she “was never contacted by any detective or lawyer for a statement.” Defendant did not attach an affidavit from Tonica Fullilove.

¶ 26 Taking defendant’s well-pleaded facts about his “two alibi witnesses” as true, we must determine whether his postconviction petition presents the gist of a meritorious claim for relief when considered with the record of the trial court proceedings. *People v. Coleman*, 183 Ill. 2d 366, 382, 701 N.E.2d 1063, 1072 (1998) (holding that summary dismissal of a postconviction petition is proper where the allegations are contradicted by the record in the trial proceedings).

¶ 27 Here, defendant’s claim his trial counsel was ineffective for failing to investigate “two alibi witnesses” was completely contradicted by the record. Alicia’s affidavit states defendant left the casino in her vehicle and was at her home “for a few hours” before Alicia drove defendant to his girlfriend’s house. At trial, Detective Shepard testified he interviewed

defendant approximately one week after the robbery. Defendant first told Detective Shepard his sister gave him a ride home from the casino. Later, defendant told Detective Shepard his sister and brother-in-law left the casino in their vehicle and defendant left in a rental vehicle.

Defendant could not recall where he rented the vehicle because “[h]e had somebody rent the vehicle” and “he didn’t know who they were.” Counsel’s failure to call defendant’s sister as a witness was not arguably unreasonable because defendant’s allegation that he left the casino in his sister’s vehicle is contradicted by the record. It is not arguable defendant was prejudiced by trial counsel’s failure to call defendant’s sister as a witness.

¶ 28 To support his allegation that his counsel provided ineffective assistance for failing to investigate and interview his girlfriend, Tonica Fullilove, defendant attached to his postconviction petition “a verbal statement, which was made to Detectives stating the whereabouts of [d]efendant at the time the crime took place.” The “statement” consists of pages four and five of an eight-page document authored by Detective Shepard and characterized as a “narrative.” The names of all the individuals referenced in the narrative are redacted except defendant’s name. Although defendant titles the document as “Tonica Fullilove[’s] police statement,” the “statement” does not identify the name of the individual referenced in the narrative, referring to the individual as “she” or “her.”

¶ 29 A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Johnson*, 183 Ill. 2d 176, 192, 700 N.E.2d 996, 1004 (1998); *People v. Thompkins*, 161 Ill. 2d 148, 163, 641 N.E.2d 371, 378 (1994). 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. *Johnson*, 183 Ill. 2d at 192; *Thompkins*, 161 Ill. 2d at 163.

¶ 30 Here, defendant failed to support his claim with an affidavit from Fullilove. Even if we considered the “statement” in lieu of an affidavit, defendant has not demonstrated there is a reasonable probability the outcome of his trial would have been different had counsel presented Fullilove’s testimony. According to the narrative, Fullilove stated she did not recall any details regarding April 12, 2012. She believed defendant was “with her at night” because “he is with her at night every night.” She then recalled on the night of the armed robbery, defendant “got up out of bed and left for a while” returning home “about 5 or 6ish a.m.” On appeal, this court found that “the phone call from [Fullilove’s] phone to Williamson’s phone at 7:33 a.m. len[t] credence to [defendant] being with Williamson at that time—*i.e.*, since [Fullilove] could not reach defendant on his phone, which was off, she tried contacting him through Williamson, whom she kn[ew] he was with.” *Mister*, 2016 Ill App (4th) 130180, ¶ 106. Fullilove’s testimony would have been completely contradicted by the record and would not have provided defendant with an alibi.

¶ 31 We conclude counsel’s failure to call defendant’s sister and girlfriend as witnesses did not arguably result in prejudice to defendant and he failed to present the gist of a constitutional claim of ineffective assistance of counsel.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the trial court’s judgment.

¶ 34 Affirmed.