2019 IL App (5th) 150535-U

NO. 5-15-0535

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 99-CF-1505
	)	
KEVIN L. EDWARDS,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err when it dismissed the defendant's amended successive petition for postconviction relief at the second stage of proceedings, because the defendant failed to make a substantial showing that he received ineffective assistance of counsel during his trial for a murder he committed in 1999.

¶ 2 The defendant, Kevin L. Edwards, appeals the dismissal by the circuit court of St. Clair County, at the second stage of proceedings, of his amended successive petition for postconviction relief. For the following reasons, we affirm.

¶ 3 FACTS

¶ 4 The facts necessary to our disposition of this appeal follow. The defendant was convicted, following a jury trial in the circuit court of St. Clair County, of first-degree murder for killing Clarence Jordan Jr., who was the lover of the defendant's estranged wife, on December 18, 1999. At trial, the defense theory of the case, which the defendant attempted to support with his own testimony, was that the defendant killed Jordan, but that the mitigating factors of sudden and intense passion should serve to reduce the crime from first-degree murder to second-degree murder. The jury was instructed as to first-degree murder, second-degree murder, and self-defense. The jury found the defendant guilty of first-degree murder, thereby rejecting his theory of the case. Following his conviction, the defendant was sentenced to 20 years in prison.

¶ 5 In our disposition of the defendant's direct appeal, we noted, *inter alia*, that at trial, the defendant testified that he purchased the high-powered rifle that he subsequently used to murder Jordan as a "trophy" approximately three or four months prior to the murder. *People v. Edwards*, 345 Ill. App. 3d 1167 (2004) (table) (unpublished order under Supreme Court Rule 23). The defendant kept the rifle hidden at his parents' home, without their knowledge or permission. *Edwards*, slip order at 5, 7. Approximately two days prior to the murder, the defendant's mother found the rifle and ordered the defendant to get it out of her home immediately. *Edwards*, slip order at 5. Several hours prior to the murder, the defendant's father asked the defendant if he had complied, and when the defendant said he had not, the defendant's father—who was deceased by the time of the defendant's trial, and therefore unavailable to testify therein—went into what

the defendant described as a "rage." *Edwards*, slip order at 7. The defendant testified that he then put the rifle in a black duffle bag and eventually placed the rifle and bag in the woods behind his parents' home. *Edwards*, slip order at 7.

¶ 6 The defendant further testified that after trying, unsuccessfully, for several hours to locate his estranged wife, he retrieved the duffle bag and gun and used his own key to her apartment to enter the apartment. *Edwards*, slip order at 7-8. He claimed that he was tired and went there to get some sleep and secure the rifle there. *Edwards*, slip order at 8. He testified that when he heard a noise behind the closed door of the master bedroom, he thought someone had broken into the apartment, so he took the rifle, which he testified he knew was loaded, to investigate. *Edwards*, slip order at 8. He testified that when he found his estranged wife in the room with Jordan, both naked, he fired the rifle. *Edwards*, slip order at 8. He testified that it was not an accident, but was the result of many emotions. *Edwards*, slip order at 8. He testified that he did not aim the rifle and did not mean to kill Jordan. *Edwards*, slip order at 8. His estranged wife testified that prior to firing, the defendant stated that her sister had told him that she was having an affair, and that then the defendant turned to Jordan and shot him. *Edwards*, slip order at 2. On cross-examination, the defendant admitted that he did not observe any signs of forced entry at his estranged wife's apartment, did not attempt to help Jordan after shooting him, and did not call for help for Jordan. *Edwards*, slip order at 9.

¶ 7 This court rejected the defendant's claims of error in his direct appeal. *Edwards*, slip order at 13. Specifically, we rejected the defendant's contention that there was not sufficient support for the jury's verdict of first-degree, rather than second-degree, murder.

Edwards, slip order at 9-12. We found that there was, and that the jury did not err in rejecting the defendant's theory of the case and instead finding him guilty of first-degree murder. *Edwards*, slip order at 9-12. We discussed in detail the many reasons, based upon the evidence adduced at trial, that the jury reasonably could have rejected the defendant's version of the night in question and could have found him guilty of first-degree murder for the killing of Jordan. *Edwards*, slip order at 11-12. Moreover, we rejected the defendant's contention that he received ineffective assistance of counsel, because we concluded that "defense counsel's alleged error would not have altered the outcome" of the case, in light of the fact that the jury clearly "did not believe the defendant's version of events." *Edwards*, slip order at 12-13.

¶ 8 We subsequently affirmed the denials of the relief the defendant sought in his first petition for postconviction relief and his first successive petition for postconviction relief. Thereafter, the defendant filed the successive petition for postconviction relief at issue in this appeal, which, as amended, constitutes his second successive petition for postconviction relief (the petition). The State moved to dismiss the petition at the second stage of proceedings.[1] The trial court dismissed the petition in an order in which the court found that none of trial counsel's actions or inactions met the applicable standard to be considered ineffective assistance of counsel. This timely appeal followed.

[1]It is not clear from the record on appeal why the trial court advanced the petition to the second stage of proceedings without first subjecting the petition to the judicially-required cause-and-prejudice test for successive petitions for postconviction relief. However, we agree with the State that under these circumstances, the trial court's failure notwithstanding, this court reviews the petition as a second-stage petition. See *People v. Bailey*, 2017 IL 121450, ¶ 26.

¶ 9 ANALYSIS

¶ 10 On appeal, the sole issue raised by the defendant is his contention that it was error for the trial court to dismiss the petition, because, according to the defendant, the petition "made a substantial showing that trial counsel was ineffective for failing to call a witness [who] would support" the defendant's theory of the case at the jury trial. Specifically, he contends trial counsel should have called "Aretha Phillips as a witness to support his uncorroborated defense." Phillips was the defendant's mother-in-law. The defendant posits that Phillips' affidavit, filed with the petition, demonstrates that she could[2] have testified at trial that the defendant was not upset or angry during a phone call with her on the morning of the murder, which the defendant claims on appeal would have "countered the State's theory that [the defendant] was angry and upset, and on a mission to kill his estranged wife's lover." The defendant notes that he testified at trial that he was not angry during the phone call with Phillips, and contends that Phillips' corroboration of that "would have greatly enhanced the believability of the second-degree murder mitigating factor of sudden and intense passion," especially because Phillips was purportedly the last person to speak to the defendant before the murder. He contends the "case was closely balanced as evidenced by the amount of time the jury deliberated their verdict," and notes that according to the record, "the jury deliberated for over 12 hours and asked numerous questions during their deliberation."

[2]The affidavit does *not* demonstrate that Phillips *would* have so testified if called at trial. In the affidavit, Phillips makes no such averment, and the affidavit does not address whether she was even available to testify at the defendant's trial.

¶ 11 The State responds by, *inter alia*, pointing to the well-established precepts of law that (1) the decision regarding which witnesses to call at trial rests with trial counsel, (2) matters of trial strategy are generally immune from claims of ineffective assistance of counsel, and (3) even if trial counsel makes a mistake in strategy, tactics, or commits an error in judgment, counsel's representation is rendered constitutionally defective "[o]nly if counsel's trial strategy is so unsound that [counsel] entirely fails to conduct meaningful adversarial testing of the State's case." See, *e.g.*, *People v. West*, 187 Ill. 2d 418, 432-33 (1999). In his reply brief, the defendant reiterates his position that Phillips' testimony at trial "would have carried a lot of weight with the jury," because Phillips was the mother of the defendant's estranged wife and "would have no motive to lie for" the defendant. He also contends that, the aforementioned precepts of law notwithstanding, this court has held "that counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence of which [counsel] is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense." See *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

¶ 12 We begin our analysis of the defendant's issue on appeal with the well-established legal principles relevant to this appeal, as well as this court's standard of review. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Johnson*, 2017 IL 120310, ¶ 14. In a case that does not involve as punishment the death penalty, proceedings under

the Act may consist of up to three stages of proceedings. *Id*. When, as in this case, a petition reaches the second stage of proceedings under the Act, the trial court must review both the petition and any accompanying documents to determine whether the petition and documents have made a substantial showing of a violation of the convicted criminal's constitutional rights. See, *e.g.*, *People v. Brown*, 2017 IL 121681, ¶ 24.[3] If a substantial showing of a violation is present, the trial court must conduct a third-stage evidentiary hearing. See *id*. If no such showing is present, the trial court should dismiss the petition. *Id*. A court of review such as this court must review *de novo* a trial court's dismissal of a petition at the second stage. *Id*. When so doing, a court of review must "accept as true all factual allegations that are not positively rebutted by the record." *Johnson*, 2017 IL 120310, ¶ 14.

¶ 13 Because the issue raised on appeal by the defendant is one of ineffective assistance of trial counsel, we turn to the general principles of law that are relevant, including when such a claim is raised, as here, in a petition filed pursuant to the Act. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that (1) counsel's performance was deficient, in that it consisted of " 'errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment [to the United States Constitution],' " and (2) counsel's deficient performance resulted in substantial prejudice to the defendant. *People v. Flores*, 153 Ill. 2d 264, 283 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To satisfy the second prong—often referred to as the prejudice prong—a defendant must show a reasonable

[3]See also, *e.g.*, *People v. Dupree*, 2018 IL 122307, ¶ 28.

probability that but for the unprofessional errors of counsel, the result of the proceeding in question—in this case, the defendant's trial—would have been different. See *id*. Where an ineffective assistance of counsel claim may "be disposed of on the ground that the defendant did not suffer sufficient prejudice, the [reviewing] court need not determine whether counsel's performance constituted less than reasonably effective assistance." *Id*. at 283-84. Moreover, for a reasonable probability of a different outcome to exist, there must be "a probability sufficient to undermine confidence in the outcome" that did result. *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

¶ 14 In this case, we agree with the State that trial counsel's representation of the defendant was not constitutionally defective. In *King*—upon which the defendant relies for his proposition that counsel's tactical decisions may be deemed ineffective when they result in counsel's failure to present exculpatory evidence, including the failure to call a witness whose testimony would support an otherwise uncorroborated defense—the defendant was a school bus driver who was convicted, following a bench trial, of aggravated criminal sexual assault and aggravated kidnapping after a 17-year-old passenger on his bus accused him of rape. 316 Ill. App. 3d at 903-04. The evidence against him at his bench trial consisted mainly of the testimony of the victim and two other students on the bus, all of whom attended a high school for students with "psychological dysfunction[,] *** behavioral disorders[,] and/or emotional problems." *Id*. at 907. According to their testimony, the defendant was alone on the bus with the victim after he altered his route to drop off another student before the victim and allowed the bus attendant to leave early. *Id*. at 907-10. In his petition for postconviction relief, the

defendant alleged, *inter alia*, his trial counsel was ineffective for failing to inform the defendant that he had a right to testify in his own defense and failing to call "an essential alibi witness." *Id.* at 904. The alibi witness was the bus attendant. *Id*. Both she and the defendant could have testified at trial that the bus attendant did not leave early and the defendant was never alone with the victim. *Id*. However, neither testified at the defendant's trial. *Id*. Thus, although defense counsel presented evidence at trial to undermine the victim's credibility as a witness due to her past episodes of psychosis, which included imagined sexual acts (*id*. at 910), he presented no evidence to directly rebut her testimony that she was left alone on the bus with the defendant, even though such evidence existed and was available to counsel. *Id*. at 916.

¶ 15 In other words, although an alibi witness was present at the trial and ready to testify that the victim was never alone with the defendant, trial counsel did not call the alibi witness. It is hardly surprising, under such circumstances, that this court agreed with the defendant's assertion that he had received ineffective assistance of counsel, as the facts in *King* demonstrate a profound and disturbing failure by counsel, as well as insinuations that the postconviction judge in that case bent over backward to find no error on the part of trial counsel. See, *e.g.*, *id*. at 911 ("judge, among other things, improperly took judicial notice that [trial counsel] was a public defender handling major felony cases for 15 years," was " 'well-seasoned' and 'well-experienced,' " and had appeared before judge " 'many times' "). Here, by contrast, there are no such insinuations. Moreover, the defendant did testify in this case, thus his defense was not uncorroborated in the same manner the defense in *King* was. In addition, unlike in *King*, where the missing testimony

would have provided an alibi for the defendant because it would have established that the rape could not have occurred in the way the victim claimed, the purportedly missing testimony in this case would have done no such thing. At most, it would have bolstered the defendant's own testimony about his theory of the case, which was that he was not angry or upset until he found his estranged wife with a lover. Accordingly, unlike the missing testimony of the witness in *King*, Phillips' testimony would not have been "unequivocally exculpatory." See *id.* at 914. The facts in *King* are simply too distinct from the facts in this case for *King* to persuade us that a similar result is dictated in this case. To the contrary, in this case there is no reason to conclude that trial counsel's performance consisted of " 'errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment [to the United States Constitution]' " (see *Flores*, 153 Ill. 2d at 283 (quoting *Strickland*, 466 U.S. at 687)), and no reason to conclude that trial counsel's strategy was so unsound that counsel entirely failed to conduct any meaningful adversarial testing of the State's case (see, *e.g.*, *West*, 187 Ill. 2d at 432-33); thus, counsel's failure to call Phillips did not constitute ineffective assistance of counsel. See *id.* Therefore, the trial court did not err when it dismissed the petition.

¶ 16 In addition, even if we were to assume that trial counsel's representation on this issue was deficient, we remain unconvinced that Phillips' testimony would have created the requisite "reasonable probability" that the defendant would have been convicted of second-degree, rather than first-degree, murder. See *Flores*, 153 Ill. 2d at 283 (to satisfy prejudice prong of ineffective assistance of counsel claim, defendant must show reasonable probability that but for the unprofessional errors of counsel, result of

proceeding in question would have been different). As explained above, for a reasonable probability of a different outcome to exist, there must be "a probability sufficient to undermine confidence in the outcome" that did result. *King,* 316 Ill. App. 3d at 913. In this case, based upon the testimony adduced at the defendant's trial, as described above, our confidence in the jury's determination that the defendant committed first-degree murder is not undermined by the alleged error.

¶ 17 CONCLUSION

¶ 18 For the foregoing reasons, we affirm the trial court's dismissal, at the second stage of proceedings, of the defendant's amended successive petition for postconviction relief.

¶ 19 Affirmed.