2012 IL App (1st) 102193-U

SIXTH DIVISION
March 23, 2012

No. 1-10-2193

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 06 CR 14829
	)	
ANDRE MOSLEY,	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon and Justice Garcia concurred in the judgment.

O R D E R

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's *pro se* post-conviction petition which alleged his trial counsel was ineffective because he failed to call a witness to impeach the trial testimony of a State witness; and the mittimus was modified to reflect judgment on only one count of first degree murder where there was only one murder victim.

¶ 2 Defendant Andre Mosley appeals from the summary dismissal of his *pro se* post-conviction petition. On appeal, he contends the petition adequately stated a constitutional claim of ineffective assistance of trial counsel based on counsel's failure to subpoena a witness whose testimony allegedly would have impeached the testimony of a crucial State witness. Defendant

also contends the trial court erred in sentencing him on two counts of first degree murder where there was only one murder victim. We affirm the summary dismissal of defendant's *pro se* post-conviction petition and modify the mittimus to reflect one conviction and sentence for first degree murder.

¶ 3 On May 30, 2006, Jarmel Wyatt was shot to death on a public street in Chicago. Defendant was arrested three days later and charged with Wyatt's homicide, tried by a jury, convicted of first degree murder, and sentenced to an aggregate of 57 years in prison. The evidence adduced at defendant's jury trial included the testimony of the State's two principal witnesses, Bryant Anderson and Michelle Taylor.

¶ 4 Anderson was arrested for trespassing at the homicide scene on May 30, 2006, and taken into custody. After initially claiming he could not identify the shooter, Anderson subsequently gave police a written statement describing Wyatt's murder and implicating defendant in the shooting. Subsequently, Anderson appeared before the grand jury and again implicated defendant, testifying that he was 50 feet away from defendant when he saw defendant fire five shots into a van and then run away. Anderson ran to the van and saw Wyatt slumped over. At trial, however, Anderson recanted his grand jury testimony, stating that he could not identify the shooter.

¶ 5 Michelle Taylor testified at trial that she was walking home from the J & J Fish restaurant shortly after midnight on May 31, 2006, when she observed a group of people across the street including defendant. Taylor heard defendant boasting about having shot someone. When Taylor later learned the shooting victim was Jarmel Wyatt, she went to the home of Wyatt's mother and later went to the police station. The following exchange occurred during cross-examination of Taylor:

"Q And Ms. Taylor, your son was with you on the walk to and from J & J Fish, wasn't he?

A Yes, he was.

Q Which son was that?

A What? I mean, I'm the one not on trial. I'm testifying. My son is not here, so why is he being brought up in it. It doesn't matter which son. I was walking with my son. I'm testifying, not my child."

¶ 6 After extensively resisting the identification of the son who had accompanied her, Taylor did not name him and would commit only to identifying him as her 15-year-old son, not her 2-year-old son. Defense counsel then asked Taylor: "In fact, your 15-year-old son was out of town this [*sic*] week, was he not?" An objection by the State was sustained. Defense counsel also questioned Taylor about statements she made to police and in her testimony before the grand jury that were inconsistent with her trial testimony. Taylor admitted giving the police a statement but denied much of the contents of the written police statement produced in court. She also denied some of her grand jury testimony.

¶ 7 The jury returned a verdict finding defendant guilty of murder. The court sentenced defendant to an aggregate of 57 years in prison--32 years for first degree murder and a consecutive 25-year term for use of a firearm in committing the murder.

¶ 8 Defendant's conviction was affirmed on direct appeal to this court in *People v. Mosley*, No. 1-08-0356 (2009) (unpublished order under Supreme Court Rule 23), and his petition for leave to appeal to the supreme court was denied.

¶ 9 Defendant timely filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)). Among defendant's claims of constitutional violations was his contention that he was denied the effective assistance of counsel when his trial

counsel failed to subpoena Trevor[1] Palmer as a trial defense witness. The petition alleged that Palmer, the son of Michelle Taylor, told a defense investigator he was in Minnesota at the time of the shooting. Taylor had testified at trial that her son was with her when she heard defendant bragging about shooting someone. The petition further alleged that Palmer's grandmother told defense investigators she would bring Palmer to court only if a subpoena issued for his attendance, but defense counsel did nothing to secure Palmer's presence at trial. Defendant asserted that if his trial counsel had subpoenaed Palmer for trial, he would have impeached his mother's credibility. No affidavit or other documentation supporting that claim was appended to defendant's petition. On June 18, 2010, the trial court summarily dismissed defendant's *pro se* petition as being frivolous and patently without merit. The trial court rejected defendant's claim concerning counsel's failure to call Palmer as a witness on the basis that defendant failed to support the claim with an affidavit from Palmer.

¶ 10 On appeal, defendant contends the trial court erred in summarily dismissing his *pro se* petition because it adequately stated a constitutional claim of ineffective assistance of counsel due to his trial counsel's failure to secure Palmer's appearance at trial where Palmer's testimony would have impeached the testimony of Michelle Taylor, a crucial State witness.

¶ 11 We review the trial court's summary dismissal of a post-conviction petition at the first stage *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The pleading requirements of the Act are found in section 122-2 (see *People v. Hodges*, 234 Ill. 2d 1, 9 (2009)), which requires, *inter alia*, that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010); *Hodges*, 234 Ill. 2d at 10. The purpose of this requirement is to establish that a petition's

[1] Palmer's first name is spelled variously as "Trevor" and "Trevar" in the petition.

allegations are capable of "objective or independent corroboration." *People v. Delton*, 227 Ill. 2d 247, 254 (2008), citing *People v. Hall*, 217 Ill. 2d 324, 333 (2005).

¶ 12 A defendant's claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under *Strickland*, a defendant is required to prove that his defense counsel's performance fell below an objective standard of reasonableness and that the substandard performance prejudiced the defendant by creating a reasonable probability that, but for trial counsel's errors, the result of the trial would have been different. *People v. Johnson*, 205 Ill. 2d 381, 399 (2002). The decisions of what witnesses to call and what evidence to present are generally unassailable matters of trial strategy, rather than incompetence, that cannot form the basis of a claim of ineffective assistance of counsel. *People v. Ward*, 371 Ill. App. 3d 382, 433 (2007). When a defendant attacks the competency of his counsel for failing to call or contact certain witnesses, he must attach to his post-conviction petition affidavits of such witnesses. *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006).

¶ 13 Defendant contends that an affidavit by Palmer in support of the post-conviction petition was unnecessary. He relies on our ruling in *People v. Hanks*, 335 Ill. App. 3d 894, 899 (2002) that the absence of a supporting affidavit is not fatal where "the record, the contents of the court file and the exhibits allow for objective and independent corroboration of the allegations." In the instant case, however, unlike in *Hanks*, defendant's claim is just a bald allegation with no factual support.

¶ 14 Defendant contends his petition's "certification that referenced the Code of Civil Procedure" was the equivalent of an affidavit. Defendant misses the point. Objective and independent corroboration of the allegation of what Palmer would testify about would require an affidavit from Palmer, not from defendant. Defendant's failure to corroborate his claim with documentation also leaves open the possibility that Palmer did not testify because he was not

available to testify, not that defense counsel chose not to call him. Absent an affidavit from the proposed witness, any "further review of the claim is unnecessary." *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010), citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000); see *People v. Harris*, 224 Ill. 2d 115, 142 (2007); *Barcik*, 365 Ill. App. 3d at 190.

¶ 15 Defendant also contends, and the State correctly agrees, that the order of commitment and sentence must be amended to reflect only one conviction for first degree murder on which a 57-year prison sentence was imposed where there was only one murder victim. Defendant was originally charged by indictment with six alternative counts of first degree murder. Both counts 5 and 6 charged that defendant, without lawful justification, shot and killed Jarmel Wyatt while armed with a firearm and that during the commission of the offense he personally discharged a firearm that proximately caused death. Count 5 charged that defendant intentionally or knowingly shot and killed Wyatt in violation of section 9-1(a)(1) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1) (West 2006)). Count 6 charged that defendant shot and killed Wyatt, knowing that such act created a strong probability of death or great bodily harm to Wyatt, in violation of section 9-1(a)(2) of the Code (720 ILCS 5/9-1(a)(2) (West 2006)).

¶ 16 The jury returned a general verdict finding defendant guilty of first degree murder. The trial court imposed sentence of "32 years in the Illinois Department of Corrections, and 25 years per statute, personally discharging a weapon." The 25-year add-on sentence was mandated for the same murder count by the sentence-enhancing provision of section 5-8-1(a)(1)(d)(iii) of the Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2006). The court did not specifically state on which count the sentence was imposed. However, the written order of commitment erroneously stated that sentence was imposed on two first degree murder counts, count 5 ("murder/intent to kill/injure") with a sentence of 32 years and count 6 ("murder/strong prob kill/injure") with a 25-year sentence. The State agrees that the mittimus must be corrected to

reflect one conviction of a single count of first degree murder and a single aggregate sentence of 57 years. See *People v. Thompson*, 354 Ill. App. 3d 579, 595 (2004). Where the court did not specify on which count the sentence was imposed, the "one-good-count" presumption results in a determination that defendant was found guilty of the more culpable mental state, intentional murder. *People v. Moore*, 397 Ill. App. 3d 555, 564 (2009). Pursuant to our authority under Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we modify defendant's mittimus to reflect that judgment was entered only on count 5, the more serious of the murder charges, and that a sentence in the aggregate of 57 years was imposed on that count.

¶ 17 For the foregoing reasons, the summary dismissal of defendant's *pro se* post-conviction petition is affirmed and the mittimus is modified to reflect that judgment was entered only on count 5 and the aggregate prison sentence imposed on that count totaled 57 years.

¶ 18 Affirmed; mittimus modified.