

2024 IL App (1st) 221513-U

No. 1-22-1513

Order filed March 29, 2024

Third Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

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. 16 CR 10178 (02)
)	
JAMES GIBSON,)	Honorable
)	Carl B. Boyd,
Defendant-Appellant.)	Judge, presiding.

PRESIDING JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and D.B. Walker concurred in the judgment.

ORDER

¶ 1 *Held:* Circuit court's summary dismissal of defendant's postconviction petition reversed and remanded for second stage proceedings, where defendant presented an arguable claim of ineffective assistance of trial counsel.

¶ 2 Defendant James Gibson appeals from the summary dismissal of his petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2020)). On appeal, defendant argues that the circuit court erred in dismissing his postconviction petition because he

presented an arguable claim of ineffective assistance of trial counsel. We reverse and remand for further proceedings.

¶ 3 Following a bench trial, defendant was found guilty of two counts of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2014)) and one count of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2014)) premised on his shooting Cameron Brock. The court merged the counts into one count of attempted first degree murder and sentenced defendant to 29 years in prison. We affirmed on direct appeal. *People v. Gibson*, 2021 IL App (1st) 190137.

¶ 4 At trial, Brock testified that he and defendant, whom he identified in court and had known for approximately six years, did not get along. Kyesha Davis was defendant's sister, and co-offender Darryl Kazee dated defendant's mother, Jamie Davis.¹ On May 21, 2016, at approximately 7 p.m., Brock was standing on the sidewalk with Tavares Adams on Nichols Avenue in Sauk Village, Illinois outside of Adams' residence. Kyesha drove past in a red Impala, "stuck out her middle finger," and yelled at them. Kyesha then drove to defendant's residence, approximately 1½ blocks away, and a "group of men" entered the vehicle.

¶ 5 The vehicle approached Brock and slowed down. From approximately 10 feet away, Brock observed Kazee driving the vehicle and defendant in the rear driver's-side seat. The vehicle turned right, and Brock lost sight of the vehicle. When the vehicle returned, Brock observed defendant in the rear seat holding a rifle with two hands. Brock then heard 10 to 15 gunshots and "immediately *** got hit."

¶ 6 While at the hospital, Brock spoke with Sauk Village police officer Ronald Tomalis and Detective David Melnyczenko and reported that defendant was the shooter and Kazee drove the

¹ Since Kyesha and Jamie share the same last name, we will refer to them by their first names. Also, Kazee is not a party to this appeal.

vehicle. On May 23, 2016, Brock identified Kazee in a photo array as the driver, and in a separate photo array, identified defendant as the shooter. On cross-examination, Brock testified that when he observed the group of men entering the vehicle, he could not identify them.

¶ 7 Iycee McKinley testified that on the day of the incident, she was outside of a residence on Nichols when “[g]unshots started flying.” She could not see who was shooting, but the gunshots were coming from a vehicle. Someone was injured, and she transported him to the hospital. McKinley agreed that she told Tomalis that the person in the rear seat of the vehicle from which the gunshots were coming was a dark skinned African American male with dreadlocks. On cross-examination, McKinley testified that she did not recall the color, make, or model of the vehicle.

¶ 8 Adams testified that on May 21, 2016, Brock was outside of Adams’ residence talking on the phone. Adams observed Kyesha drive past in a red Impala “sticking up her middle finger.” He then saw the vehicle again “driving real fast,” and “the car was shooting.” Adams was approximately 20 feet from the vehicle and observed two African American men inside the vehicle but could not see their faces. The man in the rear seat held a black firearm with two hands. Adams agreed that he told Tomalis and Melnyczenko that defendant was the shooter.

¶ 9 Melnyczenko testified that on the day of the incident, Brock identified defendant as the shooter and Kazee as the driver.² Melnyczenko and Tomalis searched the red Impala, which was located at the Sauk Village Public Works garage, and recovered a .45-caliber spent shell casing in the front console area and defendant’s identification card from the rear driver’s side floorboard.

² The record on appeal does not contain the trial transcript from July 23, 2018, which included stipulations and Melnyczenko’s testimony. However, the transcript was included in the record filed on direct appeal, and we take judicial notice of that record. *People v. Torres*, 2019 IL App (1st) 151276, ¶ 36 (this court may take judicial notice of court records in related cases).

¶ 10 The parties stipulated that, if called, David Turngren, a forensic scientist with the Illinois State Police (ISP), would have testified that DNA recovered from the vehicle was from three different people and the mixture of DNA was “potentially incomplete and unsuitable for comparison.” Also, if called, Scott Rochowicz, a forensic scientist with the ISP, would have testified that he performed a gunshot residue test from swabs of defendant’s hands and concluded that defendant “may not have discharged a firearm with either hand.”

¶ 11 Defendant presented one witness, Kazee, who admitted that he pled guilty to aggravated battery with a firearm related to Brock’s shooting and felony possession and use of a firearm. Kazee stated that he pled guilty because he shot Brock. When Kazee left the residence, defendant was in defendant’s bedroom playing a game. Kazee never observed defendant with a .45-caliber rifle. Kazee left defendant’s residence alone at approximately 7 p.m., driving Kyesha’s vehicle. Kazee had a Glock 21 .45-caliber firearm with him and was looking for Brock “to shoot him.” He explained that, as he drove, he had the firearm in his lap, approached Brock, and aimed the firearm at him. Kazee then observed Brock attempt to “pull his firearm,” and Kazee fired approximately 10 times. The shell casings were in his lap, and he threw them in the trash. Kazee agreed that he initially told officers that someone else shot Brock, which he testified was not the truth.

¶ 12 On cross-examination, Kazee agreed that he denied being in Sauk Village during the shooting when he spoke with officers. He also told officers that he did not know about the firearm. Kazee informed his attorney that he was the shooter.

¶ 13 On redirect examination, Kazee testified that the factual basis of his plea did not state that defendant discharged the firearm. Kazee believed aggravated battery with a firearm meant that he shot Brock. Kazee intended to murder Brock that day.

¶ 14 The court found Kazee “100 percent incredible” and found defendant guilty of attempted first degree murder and aggravated battery with a firearm. The court merged the counts into one count of attempted first degree murder and imposed a 29-year prison sentence.

¶ 15 On direct appeal, defendant alleged that his due process rights were violated when the circuit court allowed him to be shackled during his trial. We affirmed. *Gibson*, 2021 IL App (1st) 190137.

¶ 16 Defendant then filed the postconviction petition now at issue, alleging, *inter alia*, ineffective assistance of trial counsel for failing to present two alibi witnesses. In support of his claim, defendant presented affidavits from Kyesha and Jamie regarding his whereabouts on May 21, 2016.

¶ 17 Kyesha averred that defendant was inside their residence when Kazee took her vehicle keys and left. She later found the keys on the stairs. Police officers then arrived and informed her that her vehicle was seen leaving the scene of a shooting. Kyesha informed the officers that Kazee was the last person to drive her vehicle, and that defendant was at home playing a game.

¶ 18 Jamie averred that defendant was in his bedroom playing a game on the day of the incident. She knew he was home as she heard him “fussing” with his nephew about the game. Kazee took the keys to Kyesha’s vehicle and left. He returned, left the keys on the stairs, and left again. The police informed her that they recovered defendant’s drivers license from Kyesha’s cupholder. Jamie averred that defendant “always” kept his license in Kyesha’s vehicle because he drove Kyesha to work early in the morning.

¶ 19 Defendant also attached his own affidavit, stating that at the time of the shooting, he was at his residence playing a video game with his nephew. Defendant informed trial counsel that his mother and sister were willing to testify to his whereabouts that day, and defendant believed that

trial counsel would call them to testify. Defendant also informed trial counsel that he wanted to testify regarding why his driver's license was in Kyesha's vehicle. Trial counsel did not inform defendant that he would not call Kyesha, Jamie, and defendant to testify until the day of closing arguments.

¶ 20 The court summarily dismissed defendant's postconviction petition as "frivolous and patently without merit," finding "no newly-discovered evidence for which relief can be granted."

¶ 21 Defendant appeals, contending that the circuit court erred in summarily dismissing his postconviction petition at the first stage because he presented an arguable claim of ineffective assistance of trial counsel for failing to present two alibi witnesses.

¶ 22 The Act allows a criminal defendant to challenge his or her conviction based on an alleged violation of federal or state constitutional rights. *People v. Urzua*, 2023 IL 127789, ¶ 32. The postconviction petition is not an appeal from the conviction, but a collateral attack on the circuit court proceedings. *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction proceeding occurs in three stages. *People v. Huff*, 2024 IL 128492, ¶ 19. The circuit court here dismissed defendant's petition at the first stage.

¶ 23 At the first stage, the court ascertains, without input from the State, whether the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2020)), meaning it has "no 'arguable basis either in law or in fact' " (*People v. Smith*, 2023 IL App (1st) 221496, ¶ 33 (quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009))). A defendant need only present "the gist of a constitutional claim" with a limited amount of detail. *People v. Sparks*, 393 Ill. App. 3d 878, 883 (2009). At the first stage, the circuit court must take as true a petition's allegations unless they are positively rebutted by the trial record. *People v. Toy*, 2013 IL App (1st) 120580, ¶ 18. If the court

determines that a petition is frivolous and patently without merit, it must dismiss the petition. *Smith*, 2023 IL App (1st) 221496, ¶ 33. We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Laney*, 2024 IL App (1st) 221129, ¶ 50.

¶ 24 For a claim of ineffective assistance of counsel to survive summary dismissal, a defendant must show that it is arguable that (1) counsel’s performance was objectively unreasonable compared to “prevailing professional standards” and (2) defendant was prejudiced as a result. *People v. Garcia*, 2022 IL App (1st) 210040, ¶ 21; see also *Strickland v. Washington*, 466 U.S. 668 (1984). At first-stage proceedings, we do not consider arguments regarding trial strategy as that issue is more appropriate for second-stage proceedings. *People v. Coats*, 2021 IL App (1st) 181731, ¶ 32. For a defendant to establish that he was arguably prejudiced, a defendant must demonstrate an arguable reasonable probability that the result of the proceeding would have been different but for counsel’s unprofessional errors. *Garcia*, 2022 IL App (1st) 210040, ¶ 21. Failure to present a claim as to either prong precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76.

¶ 25 As an initial matter, we reject the State’s contention that defendant forfeited his claim of ineffective assistance of trial counsel because he failed to raise the issue on direct appeal. As the State notes, its answer to discovery listed Kyesha as a possible witness and defendant’s answer to discovery, in turn, stated that he “may or may not call *** all persons listed” by the State in its response to discovery.”³ Neither Jamie nor Kyesha testified at trial, however, and the substance of their affidavits was not included in the record on direct appeal. Therefore, defendant could not

³ The parties’ answers to discovery are not included in the record on appeal. They are included in the record filed on direct appeal, of which we take judicial notice. See *Torres*, 2019 IL App (1st) 151276, ¶ 36.

have raised the issue on direct appeal. *People v. Morris*, 335 Ill. App. 3d 70, 76 (2002) (“If a claim of ineffective assistance of counsel is based on matters outside the record, then it could not have been raised on appeal and, consequently, is not waived in a post-conviction petition.”). Accordingly, defendant’s claim of ineffective assistance of trial counsel for failing to present Kyesha and Jamie as alibi witnesses is not forfeited. *Tate*, 2012 IL 112214, ¶ 14 (“‘[A] claim based on what ought to have been done may depend on proof of matters which could not have been included in the record precisely because of the allegedly deficient representation.’” (quoting *People v. Erickson*, 161 Ill. 2d 82, 88 (1994))). Therefore, we consider whether defendant stated an arguable claim of ineffective assistance of trial counsel.

¶ 26 As to the first prong, we find that trial counsel’s alleged failure to call two alibi witnesses was arguably objectively unreasonable. The State’s case relied on the identification testimony of Brock and Adams, who both identified defendant as the shooter. No firearm was recovered, no fingerprints or DNA linked defendant to the crime, and defendant did not confess. Kyesha’s and Jamie’s affidavits averring that defendant was inside the residence at the time of the shooting, taken as true, provide defendant with an alibi during the shooting. Moreover, defendant stated in his affidavit that trial counsel was aware that Kyesha and Jamie could establish his alibi, but trial counsel did not present either of them at trial.

¶ 27 At first-stage proceedings, we cannot assess the credibility and weight that would be given to them as witnesses; instead, we must take all allegations in defendant’s postconviction petition and supporting affidavits as true unless positively rebutted by the record. *People v. Robinson*, 2020 IL 123849, ¶ 45. We do not find that Kyesha’s and Jamie’s assertions were positively rebutted by the record or that no fact finder could ever accept the truth of their statements. *Id.* ¶ 60. Their

testimony could have contradicted the identification testimony of Brock and Adams. Thus, it is arguable that trial counsel's failure to present these two alibi witnesses was objectively unreasonable.

¶ 28 As to the second prong, we find that defendant was arguably prejudiced by trial counsel's failure to call Kyesha and Jamie as alibi witnesses. The identification testimony of Brock and Adams, as noted, could have been contradicted by Kyesha and Jamie. Thus, presenting the alibi witnesses arguably could have changed the outcome of the proceedings because there would have been conflicting testimony regarding defendant's participation in the shooting to be weighed by the court. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009) (the trier of fact determines credibility, weighs evidence, draws reasonable inferences, and resolves any conflict in the evidence). Consequently, we find that trial counsel's performance was arguably objectively unreasonable, and defendant was arguably prejudiced by trial counsel's performance, supporting his claim of ineffective assistance of trial counsel. See *Tate*, 2012 IL 112214, ¶ 23 (holding that defendant presented an arguable claim of ineffective assistance of trial counsel for trial counsel's failure to call two alibi and two occurrence witnesses).

¶ 29 Accordingly, we reverse the summary dismissal of defendant's postconviction petition and remand for second-stage proceedings.

¶ 30 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed.

¶ 31 Reversed and remanded.