2018 IL App (5th) 150090-U

NO. 5-15-0090

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Clinton County.
	)	
v.	)	No. 08-CF-140
	)	
ANTHONY T. JACKSON,	)	Honorable
	)	William J. Becker,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Justices Goldenhersh and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the State's motion to dismiss the defendant's second amended petition for postconviction relief where he failed to make a substantial showing that he was denied the effective assistance of appellate counsel.

¶ 2 In September 2009, a Clinton County jury found the defendant, Anthony Jackson, guilty of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2008)). The victim, Kevin Hamburg of Centralia, was a marijuana dealer who lived with his girlfriend, Amanda Hunt, and her two young daughters. In December 2011, the defendant's conviction was affirmed on direct appeal. The defendant now appeals from the trial court's second stage

dismissal of his second amended petition for postconviction relief. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 The defendant moved to Centralia from Arkansas in 2008. While living in Centralia, the defendant's acquaintances included Timothy Burton, Lloyd Finley, Brady McGruder, Brandon Purnell, Stacy Reese, Chwann Jones, Jared Queen, Erica Taylor, and Brittany Hohman, all of whom, with the exception of Taylor, were among the State's numerous witnesses at the defendant's trial. While living in Centralia, the defendant wore his hair in braids and was known to own and carry a .25-caliber semi-automatic pistol.

¶ 5 During the summer of 2008, Burton and Finley purchased marijuana from Hamburg on the defendant's behalf. The defendant did not know that Hamburg was Burton's and Finley's supplier at the time, but he stated that he would rob their supplier if the supplier "skimped" him. The defendant also asked Burton how much marijuana the supplier kept on hand and complained about the amount that Burton had received.

¶ 6 On the morning of September 10, 2008, Brittany gave the defendant a ride to Hamburg's apartment, where the defendant purchased some marijuana. Taylor was also present, and while the defendant made the purchase, she and Brittany waited outside the apartment in Brittany's vehicle. Later that day, the defendant advised Queen that he might rob Hamburg of his marijuana and shoot Hamburg if necessary.

¶ 7 Later that night, Brittany gave the defendant another ride to Hamburg's apartment, believing that he was going there to purchase another "bag of weed." Taylor was again

present, and on this occasion, the defendant had Brittany drop him off and "wait down the road."

¶ 8 Inside Hamburg's apartment, the defendant pulled his gun and threatened to shoot Hamburg if Hamburg did not "give it to him." A struggle ensued, and Hunt pleaded with the defendant "to please not do this." At some point, Hunt tried to grab the gun when Hamburg had the defendant pinned against a wall, and the defendant fired a shot into the ceiling. As Hunt and Hamburg attempted to force the defendant out of the apartment, the defendant fired a second shot that struck Hamburg in the head. Hamburg fell to the floor, and Hunt used his cell phone to call 9-1-1. Hamburg later died as a result of the gunshot wound and a bag of marijuana was found on his person.

¶ 9 As the defendant ran from the scene of the crime, he used his cell phone to call Brittany and Taylor. When they picked him up several blocks away, the defendant was out of breath and "looked kind of shook up." The defendant advised Brittany and Taylor that he had fired his gun, but he "didn't know if he hit anybody." Brittany subsequently dropped the defendant and Taylor off at Taylor's mother's house, and the defendant told Brittany to "keep [her] eyes and ears open."

¶ 10 Meanwhile, emergency medical responders were arriving at Hamburg's apartment, and the police were questioning Hunt about what had occurred. The police also interviewed Hunt's 8-year-old daughter, Tionna, who was in the hallway of the apartment during the incident. When trying to explain who had shot Hamburg, Hunt advised the police that she recognized the shooter but did not know his name. She further advised that Hamburg "only associated with three black guys." One of them she knew as "D"; another

she knew as "Terrell or Terreek," who lived nearby; and "the other one was from Arkansas." Indicating that the shooter was the last person to call Hamburg on his cell phone, Hunt identified the defendant's cell phone number as possibly being the shooter's cell phone number.

¶ 11 Acting on Hunt's information that the shooter's name might have been "Terrell or Terreek," the police immediately began looking for Terrell Branch, who lived in Hamburg's neighborhood. After Branch's mother later brought him to the Centralia police department, the police arrested and temporarily detained him as a suspect. Branch had an alibi, however, and when Hunt was shown a photographic line-up that included his picture, she stated that he was one of the three black males who bought marijuana from Hamburg but was not the one who had entered her apartment and shot him. A few days later, when Hunt was shown another photographic line-up that included a picture of the defendant, she positively identified the defendant as the shooter, as she later would at trial. After further investigation, a warrant was issued for the defendant's arrest.

¶ 12 Approximately two to three hours after the shooting, the defendant boarded a train from Centralia to Memphis, Tennessee. Before leaving town, he stopped by Queen's house and told Queen to advise Purnell that he had to "get ghost for a little while." The defendant also asked Queen to take possession of a bag of .25-caliber bullets, but Queen refused.

¶ 13 The morning after the shooting, the defendant's ex-girlfriend, Pamela Hill, picked him up at the train station in Memphis and drove him to Arkansas. Later that day, the

defendant called Brittany, and when she informed him that Hamburg was dead, he again told her to "keep [her] eyes and ears open and let him know what was going on."

¶ 14 Later that night, Taylor called Brittany, and Brittany drove her outside of town where she dumped the defendant's gun and bullets off of a bridge into a creek. A dive team later attempted to recover the gun but was unable to find it. At some point, Taylor also burned some clothing that the defendant left behind, the remains of which the police later discovered along with the defendant's Social Security card.

¶ 15 While in Arkansas, the defendant convinced Hill that they should promptly relocate to Oklahoma City and start a new life. In October 2008, the defendant was apprehended in Oklahoma, and he shaved his head before he was extradited back to Illinois.

¶ 16 Following his extradition, the defendant agreed to speak with detectives from the Centralia police department. When interviewed, the defendant claimed, among other things, that he knew nothing about the incident at Hamburg's apartment and had fled Centralia because he was being threatened by a drug dealer from Chicago. When the detectives advised the defendant that Brittany and Taylor were among the numerous people who had talked to them during the course of their investigation, the defendant suggested that Brittany was a "dirty whore" who was trying to set him up. The defendant further claimed that he had not even spoken with Brittany on the day Hamburg was shot.

¶ 17 While awaiting trial, the defendant spent time in the Clinton County jail with inmates Louis Lawson and Charles Lewis and discussed his case with both of them. The defendant told Lawson that he had shot a man while trying to rob him of his "weed" and

generally detailed what had occurred at Hamburg's apartment. The defendant told Lewis, among other things, that he had shot a man in the head during "a drug deal that went bad" and that he "almost got away with it."

¶ 18 While Taylor was incarcerated in the Clinton County jail with inmate Kristen Brazelton, Brazelton heard the defendant berating Taylor from a neighboring pod. The defendant was angry with Taylor because she had given a statement to the detectives who were investigating Hamburg's murder. On another occasion, inmate Vanessa LeMar heard the defendant say to Taylor, "[Y]ou snitched on me, bitch."

¶ 19 In the fall of 2008, when Deputy Donald Hohman of the Clinton County sheriff's department was escorting the defendant to a pretrial court appearance, the defendant noticed his "D. Hohman" nametag and correctly deduced that he was related to Brittany. The defendant told Deputy Hohman that "it was all Brittany's fault that he was even here in trouble" and that he "ought to just wipe out all of [the] Hohmans."

¶ 20 In June 2009, the defendant was housed with inmate Devon Smith when investigators collected samples of the defendant's hair. Although the defendant told Smith that "he didn't do it," the defendant was nevertheless "worried" after the samples had been collected. Smith also heard the defendant accuse Taylor of "talking on him."

¶ 21 Prior to trial, the defendant was furnished funds with which to hire a private investigator to assist in his defense. The record indicates that the investigator canvassed Hamburg's neighborhood for potential witnesses and interviewed several individuals, including Patricia Phillips, who lived approximately three blocks away from Hamburg's apartment. The defendant later listed Phillips as a potential witness and provided the State

with a "summary of the investigative interview with Ms. Phillips," which we note is not included in the record on appeal.

¶ 22 Citing *People v. Enis*, 139 Ill. 2d 264 (1990), the State subsequently filed a motion *in limine* seeking to bar Phillips' purported testimony as irrelevant. At a hearing on the motion, the parties generally agreed that Phillips would testify that while walking her dog on the night of the shooting, she saw a black male wearing a dark hoodie, a do-rag, and white tennis shoes running in the vicinity of Hamburg's apartment, and she noticed the same individual in the area two nights later. The State argued that Phillips' proposed testimony was speculative and failed to establish a connection to Hamburg's murder. The State also noted that it was "[u]nclear what time" Phillips had seen the black male running. In response, noting that the police had never interviewed Phillips, defense counsel maintained that Phillips' observation would support the defendant's arguments that "Branch was the shooter" and that the police had conducted a "shoddy" investigation. The trial court ultimately granted the State's motion *in limine*, finding that Phillips' proposed testimony was "essentially irrelevant."

¶ 23 At the defendant's trial, the State used the defendant's cell phone records to corroborate the testimony of several of its witnesses. The records demonstrated, among other things, that the defendant had called Hamburg minutes before the shooting and had called Brittany minutes afterward. The records further demonstrated that the defendant had called Brittany multiple times on the day of the shooting and had continued to call her once he was in Arkansas.

¶ 24 In his defense, the defendant called Chris Mollett, who explained that he was among the inmates that Deputy Hohman had escorted to court when the defendant had allegedly threatened the Hohman family. When asked about the threat, Mollett stated that he had not heard "anything like that."

¶ 25 The defendant also called Illinois State Police forensic scientist Glenn Schubert, who had microscopically examined and compared the hair samples collected from the defendant with four Negroid hair fragments found on the shirt that Hamburg had been wearing when he was shot. Schubert testified that the Negroid hair fragments from the shirt were dissimilar to the defendant's hair samples and did not originate from the defendant. Schubert further testified that that hairs can transfer onto clothing in a variety of ways and that Caucasian hairs, animal hairs, and miscellaneous fibers were also present on Hamburg's shirt. Schubert stated that no samples other than the defendant's had been submitted for comparison. The State suggested that the Negroid hair fragments could have originated from one of "the EMS people" or one of Hunt's daughters, who Hunt described as "mixed race."

¶ 26 The defendant's private investigator testified that the defendant had police reports and other discovery materials in his possession while he was incarcerated in the Clinton County jail. During closing arguments, defense counsel maintained, among other things, that the State's "parade of jailhouse snitches" had access to the materials as well. Referencing Branch's arrest, counsel also argued that Branch had shot and killed Hamburg and that the police "had it right the first time."

¶ 27 In October 2009, the defendant filed a motion for a new trial. The motion set forth numerous claims of error, one of which was that the trial court erred in granting the State's motion to exclude Phillips' testimony. In November 2009, the trial court denied the defendant's motion for a new trial, entered judgment on the jury's verdict, and sentenced the defendant to a 40-year term of imprisonment. When imposing sentence, the court opined that although the defendant might not have made the "conscious decision" to kill Hamburg "in cold blood," it was apparent that when he went to Hamburg's apartment on the night in question, he was armed with a gun and "was up to no good." The court also noted the persuasiveness of "the evidence concerning the phone calls on the night of the murder." The defendant subsequently filed a motion to reduce sentence, which the trial court denied following a hearing. In December 2011, the defendant's conviction was affirmed on direct appeal. *People v. Jackson*, 2011 IL App (5th) 100181-U.

¶ 28 In August 2012, the defendant filed a *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The defendant's petition alleged that he was innocent and had been denied the effective assistance of both trial counsel and appellate counsel. The petition referenced, among other things, the trial court's exclusion of Phillips' proposed testimony.

¶ 29 In February 2014, appointed counsel filed an amended postconviction petition on the defendant's behalf, which was followed by a second amended petition filed in October 2014. The defendant's second amended petition alleged, among other things, that counsel on direct appeal was ineffective for failing to challenge the trial court's ruling

barring Phillips' testimony. In December 2014, the State filed a motion to dismiss the defendant's second amended petition.

¶ 30 In March 2015, the trial court held a hearing on the State's motion to dismiss and ultimately granted it. After noting that it had presided over the defendant's trial and "all of the pretrial proceedings of any consequence," the court stated that it was "satisfied" that the State's motion to dismiss the defendant's second amended petition should be granted. The present appeal followed.

¶ 31 ANALYSIS

¶ 32 The defendant argues that the trial court should not have dismissed his second amended postconviction petition because he made a substantial showing that counsel on direct appeal was ineffective for failing to challenge the trial court's exclusion of Phillips' proposed testimony. We disagree.

¶ 33 The Act sets forth a procedural mechanism through which a defendant can claim that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012). "A postconviction proceeding is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings." *People v. English*, 2013 IL 112890, ¶ 21. The Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 34 At the first stage, the trial court independently assesses the defendant's petition, and if the court determines that the petition is "frivolous" or "patently without merit," the

court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A postconviction petition is considered frivolous or patently without merit if the petition has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* "A claim completely contradicted by the record is an example of an indisputably meritless legal theory." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 35 If a petition is not dismissed at the first stage, it advances to the second stage, where an indigent petitioner can obtain appointed counsel and the State can move to dismiss it. 725 ILCS 5/122-2.1(b), 122-4, 122-5 (West 2012). At the second stage, the trial court determines whether the defendant has made a substantial showing of a constitutional violation, and if a substantial showing is made, the petition proceeds to the third stage for an evidentiary hearing; if no substantial showing is made, the petition is dismissed. *Edwards*, 197 Ill. 2d at 245. "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 36 A criminal defendant is guaranteed the right to the effective assistance of counsel under both the United States Constitution and the Illinois Constitution. *People v. Mata*, 217 Ill. 2d 535, 554 (2005). To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), *i.e.*, a defendant must show that counsel's performance fell below an

objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 37 "The *Strickland* standard applies equally to claims of ineffective appellate counsel, and a defendant raising such a claim must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Accordingly, unless an underlying issue is meritorious, it cannot be said that the defendant suffered prejudice from counsel's failure to raise the issue on appeal. *Id.*

¶ 38 "An accused may attempt to prove that someone else committed the crime with which he is charged, but that right is not without limitations." *Enis*, 139 Ill. 2d at 281. If the proffered evidence is too remote, speculative, or uncertain, the trial court may properly exclude it as irrelevant. *Id.*; *People v. Whalen*, 158 Ill. 2d 415, 431 (1994);

People v. Sims, 244 Ill. App. 3d 966, 1002 (1993). Moreover, "[s]uch evidence is admissible only if a close connection can be demonstrated between the third person and the commission of the offense" (*People v. Wilson*, 271 Ill. App. 3d 943, 948 (1995)), as the general test for admissibility is "whether such evidence tends to prove the particular offense charged" (*People v. Lewis*, 165 Ill. 2d 305, 341 (1995)). The trial court's ruling as to the admissibility of such evidence is reviewed for an abuse of discretion. *Sims*, 244 Ill. App. 3d at 1002. "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 39 Here, we cannot conclude that the trial court abused its discretion in granting the State's motion *in limine* to bar Phillips' testimony as irrelevant. That Phillips saw a black male running in Hamburg's neighborhood on the night of the shooting and noticed the same man in the area two nights later established no connection to the incident at Hamburg's apartment and did not tend to prove the charged murder. Although the defendant suggests that Phillips' testimony would have strengthened his claims that Branch was the shooter and that the police had conducted a "shoddy" investigation, the evidence was too speculative and uncertain to have meaningful probative value and would not have cast doubt over the identification of the defendant or the steps that the police had been taken as the investigation unfolded. Hamburg was shot at approximately 9:40 p.m., and it is "[u]nclear what time" Phillips was walking her dog when she saw the man running. Moreover, even assuming that the man Phillips observed was Branch, he had an alibi for the time of the shooting and lived in Hamburg's neighborhood, where one

would expect him to be seen. Additionally, Hunt, who had no incentive to provide false information, advised the police that although Branch was one of the three black males who purchased marijuana from Hamburg, he was not the man who had entered her apartment and shot Hamburg in the head. Hunt also indicated that the defendant's cell phone number was the shooter's cell phone number.

¶ 40 Under the circumstances, we agree with the trial court's determination that Phillips' proposed testimony was "essentially irrelevant." We thus find that the trial court did not abuse its discretion in granting the State's motion *in limine* and that had the issue been raised on direct appeal, the court's ruling would not have been disturbed. Compare *Enis*, 139 Ill. 2d at 281-82 (finding no abuse of discretion where the trial court precluded evidence of an alternative suspect who matched the defendant's general description and had been seen running in the area shortly before the shooting where there was no evidence connecting the suspect to the crime), with *People v. Simmons*, 372 Ill. App. 3d 735, 749-50 (2007) (holding that the trial court abused its discretion in precluding all evidence that the police had investigated an alternative named suspect who had made incriminating statements regarding the shooting and had been seen in the area of the shooting shortly after its occurrence). Accordingly, appellate counsel's failure to challenge the trial court's ruling was not unreasonable.

¶ 41 Moreover, even assuming that the issue had been raised on direct appeal and we concluded that the evidence should have been admitted, we would have nevertheless affirmed the defendant's conviction because he suffered no resulting prejudice. See *People v. Patterson*, 192 Ill. 2d 93, 112 (2000); see also *People v. Sipp*, 378 Ill. App. 3d

157, 171 (2007) ("The exclusion of admissible evidence is subject to a harmless error analysis."). Viewed in the light most favorable to the State (see *People v. Wheeler*, 226 Ill. 2d 92, 117 (2007)), the evidence adduced at the defendant's trial overwhelmingly established his guilt, and even assuming Phillips' testimony had been presented for the jury's consideration, there is not a reasonable probability that the outcome of the trial would have been different. Accordingly, the claimed error does not support a finding that appellate counsel was constitutionally ineffective.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, the trial court's judgment granting the State's motion to dismiss the defendant's second amended petition for postconviction relief is hereby affirmed.

¶ 44 Affirmed.

SUPREME COURT OF ILLINOIS

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September 26, 2018

In re: People State of Illinois, respondent, v. Anthony T. Jackson, petitioner. Leave to appeal, Appellate Court, Fifth District. 123843

The Supreme Court today DENIED the Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 10/31/2018.

Very truly yours,

Carolyn Taft Grosboll

Clerk of the Supreme Court

FILED
June 27, 2018
APPELLATE
COURT CLERK

5-15-0090

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. ANTHONY T. JACKSON, Defendant-Appellant.	Clinton County Trial Court/Agency No.: 08CF140

ORDER

This cause has been considered on appellant's petition for rehearing and the court being advised in the premises:

IT IS THEREFORE ORDERED that the petition for rehearing be, and the same hereby is, denied.

Additional material from this filing is available in the Clerk's Office.