

No. 1-11-0176

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 01 CR 26145
)	
GIOVANNI WEEMS,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE GARCIA delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

ORDER

¶ 1 *Held:* Summary dismissal of defendant's *pro se* postconviction petition affirmed where no arguable prejudice can be shown to support the claim of ineffective assistance of appellate counsel in light of the overwhelming evidence of the defendant's guilt, which included evidence that he confessed to the murder and arson, both orally and in a videotape, on successive days.

¶ 2 Defendant Giovanni Weems appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends his petition states an arguable claim of ineffective assistance of counsel based on appellate counsel's failure to raise an issue preserved by trial counsel. Specifically, the defendant claims that during the course of the State's closing argument, the State shifted the burden of proof by informing the jury that "the defense counsel could have requested forensic testing of several pieces of evidence," as the defendant states in his main brief. On direct appeal, the defendant argued that his separate oral and videotaped confessions, in which he admitted murdering his former girlfriend and setting fire to the home where she resided with her five children, were involuntary. The defendant had been discharged from jail the day before the murder and arson after serving a sentence for domestic battery of the murder victim. According to the testimony at trial, the defendant confessed to the crimes when he was confronted with photographs of a claw hammer, which was consistent with the weapon that inflicted the mortal wounds on the victim, and the victim's purse, both of which were recovered from a dumpster near the defendant's home. According to the investigating detective, upon being shown the photographs of the incriminating evidence, the defendant exclaimed, " 'You have got me, you found the hammer behind my house." *People v. Weems*, No. 1-06-1882 (2009) (unpublished order under Supreme Court Rule 23). "Defendant then gave an oral inculpatory statement admitting he committed the crimes. *** [A]t 9:30 a.m. [on the following day] defendant gave a videotaped inculpatory statement." *People v. Weems*, No. 1-06-1882 (2009) (unpublished order under Supreme Court Rule 23). While we doubt there is any merit to the defendant's argument that the State's burden of proof was shifted to the defense based on the State's comment regarding the absence of forensic testing on several evidentiary items, the overwhelming evidence of the defendant's guilt leaves no room for the defendant's required showing that "but for" appellate counsel's failure to raise the issue on

direct appeal, the result on appeal would arguably have been different. We affirm the summary dismissal of the defendant's postconviction petition.

¶ 3

BACKGROUND

¶ 4 A jury convicted the defendant of murdering his girlfriend at the home she shared with her five children. The defendant was sentenced to natural life for first degree murder, with consecutive sentences to be served for each of the five convictions of attempted murder of the children and his conviction of home invasion. He was sentenced to a 20-year concurrent term for aggravated arson. We affirmed the defendant's convictions on direct appeal, but modified the consecutive sentences to be served concurrently with his sentence of natural life. *People v. Weems*, No. 1-06-1882 (2009) (unpublished order under Supreme Court Rule 23). The following summarizes the evidence of the defendant's guilt from our unpublished decision.

¶ 5 A buccal swab was taken from the defendant for purposes of conducting DNA testing. The murder victim's DNA was found on the defendant's jeans that the police recovered from the defendant's apartment. According to the medical examiner, the victim died from a minimum of 59 blows to her head and upper body. The victim's skull was extensively fractured. She was dead before the fire started as she had no smoke in her lungs. The claw hammer recovered from the dumpster near the rear of the defendant's apartment was "quite consistent" with the victim's injuries. Blood was found between the two prongs of the claw hammer. A certified copy of the order of protection issued on July 22, 2001, was introduced into evidence. A CTA supervisor testified that the defendant's CTA transit card was used near the vicinity of the murder and arson during the early morning hours on the day of the crimes. A neighbor of the defendant testified that she discovered personal items of the victim near the defendant's apartment. The recovery of these belongings led to a greater search of the area that led to the recovery of the victim's purse and the claw hammer in a dumpster. According to police

testimony, upon being confronted with Polaroid photos of the hammer and purse, the defendant exclaimed, "You got me, you found the hammer in the garbage behind my house." The defendant then gave a detailed oral statement admitting he killed his former girlfriend and set fire to the coach house, where she lived with her children. The defendant's videotaped statement, which was recorded the day after he gave his oral confession, was played to the jury. In the video, the defendant explained that he was released from jail on September 27, 2001, following the completion of a sentence he received for domestic battery against his former girlfriend, Dawn. In the video, he stated he called Dawn after he was released from jail, even though an order of protection prohibited such contact. They met, argued, and the defendant went home. At home, the defendant placed a hammer and ice pick in a bag, went to Dawn's house, broke in, and entered Dawn's bedroom. Without disturbing the sleeping girlfriend, he took Dawn's purse, van keys and left. He then drove the van to purchase a small amount of gasoline because he was "on some sort of revenge trip."

¶ 6 During cross-examination by defense counsel, an Illinois State Police forensic scientist testified that she removed trace material from Weem's jeans and the hammer, but neither the police nor the prosecution requested that the material be tested. Bedding from the victim's bedroom was also not processed. During redirect, the scientist testified that she would have processed the bedding and had analyzed the trace material from the jeans and hammer had either the prosecution or the defense requested. A defense expert testified that he did not believe the fire at the home was arson, as the State's expert from the Chicago Fire Department testified. The defendant testified that he did not kill Dawn and was not in her neighborhood on the night of her killing. He claimed that he agreed to give a videotaped statement only after the detectives threatened to charge his mother with aiding and abetting in Dawn's murder. He testified he merely repeated what the detectives told him to say in the videotape.

¶ 7 The defense's closing argument suggested that the investigating detectives manipulated the investigative process in a rush to judgment to charge the defendant. According to the defendant's main brief, "Counsel also noted that the prosecution did not analyze the trace materials collected from several evidentiary items or a fingerprint left on the hammer. *** The defense then suggested an alternative suspect, Rufus McGill, the father of [Dawn's] two oldest children, who spoke to the police soon after the fire." The underlying error claimed by the defendant that should have been pursued by appellate counsel occurred during the State's rebuttal argument.

"[Prosecutor:] While he sits here without [a] burden, and he truly has none, he does not sit here without power. Okay.

The evidence that you heard about that [*sic*] was tested and the analysis, as the analyst told you it was tested at the request of the state's attorney. You also heard that there were no requests from the Defense.

[Defense counsel:] Objection. Shifting the burden.

THE COURT: Overruled.

[Prosecutor:] She also told you what would have been done if the defense had asked him or her to test a particular piece of evidence. They would have tested it. Do you really think if there was reasonable change, the testing, The bedding or the fingernail scrapings or

whatever, would have led to the ah-ha moment that he didn't do it, do you think it wouldn't have been tested?

I mean, if you've heard[,] learned anything at all during the course of this trial, it's that these lawyers are very capable. They're very talented and they know this case at least as well as we do. And I'm not suggesting by the way, that they have anything to prove to you. But if you're going to go back in there and speculate about the meaning of evidence that you haven't heard about and ask why it wasn't tested, at least be fair about it. That's all I ask.

[Defense counsel:] Judge, I'm objecting. He's shifting the burden.

THE COURT: Your objection is overruled."

¶ 8 The jury convicted Weems of first degree murder, five counts of attempt first degree murder, home invasion, and aggravated arson. The jury also specially found that three of the children were under 12 years of age at the time of the offenses, that an order of protection preventing Weems from contacting Bramwell was in effect at the time of the offenses, and that Bramwell's killing was committed by brutal and heinous conduct.

¶ 9 On August 31, 2010, the defendant filed a *pro se* postconviction petition alleging, in pertinent part, that appellate counsel was ineffective "for not efficiently presenting each issue in the Motion for a new trial." On November 17, 2010, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. This appeal followed.

¶ 10 ANALYSIS

¶ 11 In response to the defendant's postconviction claim of ineffectiveness of appellate counsel, the State maintains the defendant forfeited the issue because he did not include it in his postconviction petition. "Defendant's *pro se* post-conviction petition does not contain an allegation that appellate counsel was ineffective for not claiming on direct appeal that the prosecutor's closing argument shifted the burden of proof to the defense." Notably, the State does not immediately follow its assertion of forfeiture with a citation to authority. The reason seems clear: no authority exists that demands a defendant raise in his *pro se* postconviction petition the precise issue appellate postconviction counsel raises from the first-stage dismissal of the petition. Such a rule would impose upon *pro se* defendants the same standard imposed on appointed postconviction counsel. See *People v. Suarez*, 224 Ill. 2d 37 (2007).

¶ 12 The Act recognizes that "most postconviction petitions [are] filed by *pro se* prisoners who lack[] the assistance of counsel in framing their petitions." *Id.* at 46. "The Act provides for a reasonable level of assistance." *Id.* at 42. "To ensure that postconviction petitioners receive this level of assistance, [Illinois Supreme Court] Rule 651(c) imposes specific duties on postconviction counsel." *Id.* "The duties imposed on postconviction counsel serve to ensure that the complaints of a prisoner are adequately presented." *Id.* at 46. If counsel is appointed, it falls to postconviction counsel to "ascertain[] the basis of [the prisoner's] complaints, shape[] those complaints into appropriate legal form and present[] them to the court." (Internal quotation marks omitted) *Id.* (quoting *People v. Slaughter*, 39 Ill. 2d 278, 285 (1968)).

¶ 13 The State is in error to in effect argue that a *pro se* defendant must cast his unassisted complaints "into appropriate legal form," without the assistance of counsel. "[A] defendant at the first stage need only present a limited amount of detail in the petition [regarding the manner in which the petitioner's constitutional rights were violated]." *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The imposition of such a burden upon a *pro se* defendant would almost render pointless the duties imposed on postconviction counsel by Rule 651(c).

¶ 14 We agree with the defendant that no authority exists to declare forfeited the issue raised in the instant appeal simply because the precise issue was not articulated in the defendant's *pro se* petition.

¶ 15 The correct issue before us is whether the defendant states an arguable claim of ineffective assistance of appellate counsel because he did not raise the "shifting of the burden" issue, which the State does not dispute was preserved during trial and raised in defendant's posttrial motion. See *People v. Cheers*, 389 Ill. App. 3d 1016, 1027 (2009) ("Appellate counsel's omission, to which she readily admits, *** serves to avoid the bar of forfeiture.")

¶ 16 To determine whether counsel was ineffective in the assistance he provided to a defendant, we apply the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984); *Hodges*, 234 Ill. 2d at 17 ("we are guided by the standard set forth in *Strickland*"). "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id.* To prove deficient performance, a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms. *Strickland*, 466 U.S. at 688-89. To prove prejudice there must be a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland*, 466

U.S. at 694. The same standard applies to trial and appellate counsel. *People v. Childress*, 191 Ill. 2d 168, 175 (2000). Summary dismissals are reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 17 Claims of ineffective assistance of counsel are reviewed with certain principles in mind. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Strickland*, 466 U.S. at 689. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A similar presumption applies to reasonable professional assistance by appellate counsel. *Childress*, 191 Ill. 2d at 175 ("Claims of ineffective assistance of appellate counsel are measured against the same standard as those dealing with ineffective assistance of trial counsel."); *People v. Coleman*, 2011 IL App (1st) 091005, ¶¶ 36-45 (claim of ineffectiveness of appellate counsel rejected where counsel's performance was "not arguably objectively unreasonable and caused no prejudice to the defendant").

¶ 18 Under the two prong test, the defendant must make a showing that it is arguable that counsel's performance fell below an objective standard of reasonableness. *Hodges*, 234 Ill. 2d at 17. In order to do so, he must overcome a strong presumption that appellate counsel's conduct, in selecting the issue to raise on appeal that presented the best chances of success, falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Simply because

the arguments raised on direct appeal were not successful does not mean the choice to pursue them, over possible others, was unreasonable.

¶ 19 "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. Accordingly, unless the underlying issues are meritorious, defendant has suffered no prejudice from counsel's failure to raise them on appeal." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). To warrant a remand for second-stage consideration of a *pro se* postconviction petition claiming ineffective assistance of appellate counsel, a defendant must demonstrate that "it is arguable that the [he] was prejudiced." *Hodges*, 234 Ill. 2d at 17. In order to demonstrate arguable prejudice in the context of the instant case, the defendant must demonstrate that but for appellate counsel's unprofessional error, there is a reasonable probability the result of his direct appeal would have been different. *Strickland*, 466 U.S. at 694.

¶ 20 While we may be unconvinced that the issue the defendant now contends should have been raised in his direct appeal had a better chance of success than those actually pursued, the impossible hurdle for the defendant to overcome is to make a showing of arguable prejudice to establish error in the first-stage dismissal of his postconviction petition. *Hodges*, 234 Ill. 2d at 17; see *Childress*, 191 Ill. 2d at 175 ("Unless the underlying issue is meritorious, petitioner suffered no prejudice from counsel's failure to raise it on direct appeal."); *People v. Negron*, 297 Ill. App. 3d 519, 537 (1998) (to establish prejudice, a defendant is required to show that there is a reasonable probability that, absent the error, the outcome would have been different).

¶ 21 As the defendant properly acknowledges in his brief, the State's forensic scientist testified without an objection by the defense "that she would have sent the trace material collected from the jeans and hammer for analysis and processed the bedding if the defense had requested it." It

is also clear based on the excerpts from the State's closing argument that the defendant's initial objection was triggered by the State's comment regarding the testimony of the State's forensic scientist: "You also heard that there were no requests from the defense." The defense repeated its objection at the conclusion of the State's comments on the lack of testing: "But if you're going to go back in there and speculate about the meaning of evidence that you haven't heard about and ask why it wasn't tested, at least be fair about it. That's all I ask." Each of defense counsel's objections that the State's comments were "shifting the burden" was overruled by the presiding judge. The defendant does not dispute that the objected-to comments by the State were consistent with the testimony of the forensic scientist.

¶ 22 While we question whether the objected-to-comments rose to the magnitude of "shifting" the prosecution's burden to the defense (see *People v. Bradley*, 70 Ill. App. 2d 281, 287 (1966) (the trial judge's comments that a defendant protesting his innocence "should come forward with enough evidence to create a reasonable doubt in the mind of the Court" was not an erroneous shifting of the prosecution's burden, but rather merely served to express doubt over the credibility of the defendant's testimony to overcome the testimony of the credible witnesses presented by the State)), the insurmountable hurdle for the defendant is to make an arguable showing of prejudice given the overwhelming evidence of his guilt. *People v. Gutierrez*, 2011 IL App (1st) 093499 ¶¶ 45-46 (no prejudice shown where evidence of defendant's guilt overwhelming); *People v. Smith*, 341 Ill. App. 3d 530, 547 (2003) (no prejudice existed where evidence of defendant's guilt overwhelming based on an oral confession and positive identification). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 694.

¶ 23 The defendant confessed to the murder of his girlfriend and the arson of her home, not once but twice, both orally and on videotape. Even without the two confessions by the defendant

the remaining evidence, which included the victim's DNA on the defendant's pants, the recovery of her personal items, along with the likely murder weapon, near the defendant's apartment, his recent release for having battered his girlfriend, his violation of the order of protection, his likely presence in the area when the crimes occurred, presented a very strong case to convict the defendant. With his two confessions, the evidence was so overwhelming that the likelihood of success on the "shifting of the burden" claim was nil, which precludes a finding of arguable prejudice. *Gutierrez*, 2011 IL App (1st) 093499 ¶¶ 45-46 (overwhelming proof of the defendant's guilt foreclosed a finding of prejudice); *Smith*, 341 Ill. App. 3d at 547 (2003) (defendant's oral confession and positive identification as the perpetrator rendered the evidence overwhelming).

¶ 24 The defendant's claim of ineffectiveness of appellate counsel, based on his failure to raise an issue that had virtually no likelihood of success, was frivolous and patently without merit. We affirm the summary dismissal of defendant's *pro se* postconviction petition.

¶ 25 Affirmed.