

No. 1-10-3257

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. 04 C 661019
)	
LARRY JOHNSON,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Second-stage dismissal of defendant's *pro se* post-conviction petition affirmed where defendant failed to make a substantial showing of ineffective assistance of trial counsel.

¶ 2 Defendant Larry Johnson appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 2008)). He contends that he made a substantial showing of a claim of ineffective assistance of trial counsel to warrant an evidentiary hearing.

¶ 3 The record shows that defendant was convicted of robbery on evidence showing that about 8:45 p.m. on August 18, 2004, he approached Denise Walker at a gas station located at 12658 South Wood Street in Calumet Park, Illinois, and demanded her purse. Walker held onto one handle of the purse as defendant tugged at the other handle, pulling her toward an alley, where defendant got on a bicycle and rode away with the purse. Walker reported the incident to police, who, shortly thereafter, found defendant a block away from the gas station. At that time, defendant was lying on the ground a short distance from the bicycle, with visible injuries on his face. He was also in possession of Walker's purse, which Walker identified when she arrived there several minutes later. The jury found defendant guilty of robbery and the trial court sentenced him, as a Class X offender, to 18 years' imprisonment.

¶ 4 This court affirmed that judgment on direct appeal, over defendant's contentions that the trial court impaired his right to peremptory challenges in relation to alternate jurors by not properly informing counsel of its procedure for exercising such challenges, and that his sentence was excessive. *People v. Johnson*, No. 1-05-2021 (2006) (unpublished order under Supreme Court Rule 23). In doing so, this court found that the trial court did not commit plain error and

that defendant could not point to any evidence that he was prejudiced by the selection of the alternate juror, particularly where the evidence against him was overwhelming. Order at 9.

¶ 5 Defendant subsequently filed a *pro-se* post-conviction petition in which he alleged, in relevant part, that his trial counsel was ineffective for "waiving substantial errors that occurred at trial." In an attached memorandum, defendant specified that counsel failed to, *inter alia*, "object to the improper seating of the jury," in spite of his request that counsel strike certain jurors, and did not properly consult him regarding the composition of the jury. In an affidavit filed in support of the petition, defendant averred that he asked counsel to "strike" certain jurors because they had suffered burglaries and robberies, crimes for which defendant was currently on trial or of which he had previously been convicted. Defendant further averred that he wanted to "challenge some jurors for cause," but that counsel told him it was "too late to change the jury" and never objected to the seating of the jury or challenged jurors for cause. Defendant's petition was advanced to the second stage of review and he was appointed counsel.

¶ 6 On June 18, 2010, post-conviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), in which she stated that she had examined all relevant documents regarding defendant's case, consulted with him to ascertain his contentions of deprivation regarding his post-conviction issues, as well as reviewed his *pro se* petition and letters to ascertain if any amendments, supporting affidavits or documents would advance his arguments. She did not state whether she intended to amend the *pro se* petition or whether she believed that it adequately stated defendant's contentions of a denial of his constitutional rights.

¶ 7 However, on September 24, 2010, post-conviction counsel filed a motion to withdraw pursuant to *People v. Greer*, 212 Ill. 2d 192 (2004), in which she stated that defendant's petition "contains all issues addressed in the appellate court," rendering them subject to *res judicata*. The circuit court granted counsel's motion, after which the State made an oral motion to dismiss defendant's petition based on *res judicata*, and adopted the substance of post-conviction counsel's *Greer* motion. The circuit court granted the motion to dismiss.

¶ 8 On appeal, defendant challenges the propriety of that dismissal, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). We initially observe that defendant has concentrated solely on his claim of ineffective assistance of trial counsel based on the peremptory challenge issue related to victims of certain crimes, thereby abandoning the multiple claims raised in his petition and forfeiting them for appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 9 At the second stage of post-conviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true; however, nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 10 To establish a claim of ineffective assistance of trial counsel warranting further proceedings under the Act, defendant must show that counsel's performance was deficient and that he suffered prejudice as a result, *i.e.*, a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 11 Defendant's ineffectiveness claim is based on trial counsel's failure to peremptorily challenge venire members who had been victims of burglaries and robberies. The State responds that defendant's claim is either waived or barred by the doctrine of *res judicata* because it was raised for the first time in this appeal or was addressed and resolved on direct appeal.

¶ 12 The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues that have not been, and could not have been, previously adjudicated on direct review. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). In considering a post-conviction petition, issues in the petition that were raised and decided on direct appeal are barred from post-conviction review by *res judicata*, and issues that could have been presented on direct appeal, but were not, are waived. *Taylor*, 237 Ill. 2d at 372.

¶ 13 The record reflects that defendant did not allege ineffective assistance of trial counsel on direct appeal. Although he did raise a jury selection issue, his allegations related to errors allegedly committed by the trial court, and not trial counsel. Thus, the issue presented here, ineffectiveness of trial counsel for failing to peremptorily challenge venire members who had

been victims of burglary and robbery, was not raised or addressed on direct appeal, and, is therefore not barred under the doctrine of *res judicata*. *Taylor*, 237 Ill. 2d at 372.

¶ 14 The State maintains that defendant's claim is nevertheless waived because it was not included in his *pro se* petition. The State correctly points out that the Act provides that "any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3. Accordingly, the supreme court has held that any issue to be reviewed must be presented in the petition filed in the circuit court. *People v. Jones*, 211 Ill. 2d 146, 148-49 (2004).

¶ 15 The State maintains that defendant limited his ineffective assistance of counsel claim to trial counsel's failure to challenge potential jurors "for cause," and thereby waived an ineffectiveness claim related to peremptory challenges. A review of the petition, supporting memorandum, and defendant's affidavit, reveals that defendant's claim did not rest solely on his allegations relating to "for cause" challenges. Although defendant used that phrase in his affidavit, he did not use it exclusively, and averred that he requested that defense counsel "strike" jurors who had suffered burglaries and robberies and that counsel never objected to the seating of the jury *or* challenged those jurors for cause.

¶ 16 Although defendant used the word "strike" instead of the phrase "peremptorily challenge," construing defendant's petition and supporting affidavit liberally in light of the trial record (*Coleman*, 183 Ill. 2d at 381), we find that defendant's ineffectiveness claim was sufficient

to encompass the peremptory challenges issue raised on appeal. We now address whether defendant made a substantial showing of a constitutional violation in relation to this claim.

¶ 17 Defense counsel's decision whether to exercise a peremptory challenge is a matter of trial strategy and is, in general, immune from claims of ineffective assistance of counsel. *People v. Lopez*, 371 Ill. App. 3d 920, 931 (2007), citing *People v. Metcalfe*, 202 Ill. 2d 544, 562 (2002) and *People v. Bowman*, 325 Ill. App. 3d 411, 428 (2001). According to defendant, the presumption that counsel's decisions in relation to jury selection in this case was sound trial strategy is rebutted by his allegation that counsel defied his clearly expressed request that counsel strike venire members who had been victims of burglary and robbery. Defendant maintains that this court has previously held that "leaving crime victims on the jury in a case such as this is unsound strategy," citing *People v. White*, 88 Ill. App. 3d 788, 790-91 (1980). *White*, however, does not stand for this proposition.

¶ 18 In *White*, this court addressed defendant's claim that he was prejudiced because a juror who indicated during *voir dire* that she had never been the victim of a crime, was overheard describing a mugging incident during deliberations. *White*, 88 Ill. App. 3d at 790. This court found that the trial court did not err in denying defendant's motion for a new trial on this basis, and, in doing so, noted that in a case where the defendant's identity is a prime issue at trial, a proper trial strategy would be to eliminate potential jurors who had been crime victims through the use of peremptory challenges. *White*, 88 Ill. App. 3d at 790-91. *White*, however, did not involve a claim of ineffective assistance of counsel, and thus, in making that statement, this court

was not addressing whether trial counsel's conduct in relation to the exercise of peremptory challenges constituted deficient performance, nor holding that it is unsound strategy to allow a jury to be comprised, in part, by people who had been the victims of crimes.

¶ 19 Here, the record reflects that defense counsel actively participated in *voir dire*, questioned the members of the venire regarding their backgrounds and how that impacted their impartiality, as well as utilized four peremptory challenges, one of which was to dismiss a venire member whose purse was stolen the previous year. Although defendant correctly points out that six jury members stated that they or someone they knew were victims of burglary or robbery, he has presented no evidence to rebut the presumption that counsel's decisions regarding those jurors were the result of an objectively reasonable trial strategy, and thus failed to substantiate his claim of ineffective assistance of counsel. *Lopez*, 371 Ill. App. 3d at 931, *Bowman*, 325 Ill. App. 3d at 428.

¶ 20 Even assuming that counsel's actions were objectively unreasonable, defendant has also failed to make a substantial showing that he was prejudiced thereby. In his petition and supporting documents, defendant did not allege that any of the jury members who were victims of robbery or burglary were actually prejudiced against him, much less made a substantial showing of a reasonable probability that the result of his trial would have been different if they had not served as jurors. Rather, in his appellate brief, defendant speculates that, due to their personal experiences, those jurors were more likely to discount his defense. There is no indication in the record that any of the jury members were biased against defendant, and, to the

contrary, all affirmed that their prior experiences would not prevent them from being fair and impartial jurors.

¶ 21 Moreover, as this court noted on direct appeal, the evidence against defendant was overwhelming. This evidence included Walker's in-court identification of defendant, as well as her testimony regarding the incident and its aftermath, including seeing defendant after he was apprehended by police, and identifying the purse with which he was found as her purse, both by its style and contents. Accordingly, we find that defendant has failed to make a substantial showing that his conviction was the result of anything other than the overwhelming evidence against him (*People v. Dixon*, 409 Ill. App. 3d 915, 923-24 (2011)), or that the result of the trial would have been different had counsel challenged the venire members who had been victims of robberies and burglaries.

¶ 22 Defendant erroneously maintains that we may not undertake a harmless error analysis here because, pursuant to *People v. Thompson*, 238 Ill. 2d 598, 610 (2010), a trial before a biased jury constitutes structural error and is not subject to such analysis, but rather requires automatic reversal. In *Thompson*, the supreme court addressed whether a trial court's failure to comply with Supreme Court Rule 431(b), which governs the questions the court poses to potential jurors during *voir dire*, fell within the "very limited category" of structural errors warranting automatic reversal. *Thompson*, 238 Ill. 2d at 610-11. In answering that question in the negative, the court noted that a trial court's failure to comply with Rule 431(b) does not necessarily result in a biased jury, and that there was no evidence that the jury in question was biased. *Thompson*, 238 Ill. 2d

at 610-11. Here, as in *Thompson*, there is no evidence that the jury was biased against defendant, nor does this case fall within the very limited category of structural errors warranting automatic reversal.

¶ 23 Defendant also argues that counsel's failure to challenge those jurors and carry out his request that she strike certain members of the venire was prejudicial in that his ability to receive a fair trial by an impartial jury was undermined. Defendant acknowledges that "certainly there will be occasions where an attorney disagrees and therefore makes a decision against the wishes of his client." However, defendant, citing *People v. Peeples*, 205 Ill. 2d 480, 521-25 (2002), *People v. Bean*, 137 Ill. 2d 65 (1990) and *People v. Bennett*, 282 Ill. App. 3d 975 (1996), claims that defense counsel does not have "sole authority" to determine the composition of the jury. *Peeples*, *Bean*, and *Bennett*, however, all involved a defendant's right to be physically present during jury selection, as well as factual scenarios where the defendant was not present for portions of *voir dire*, and are thus readily distinguishable from the case at bar. *Peeples*, 205 Ill. 2d at 511; *Bean*, 137 Ill. 2d at 79; *Bennett*, 282 Ill. App. 3d at 979.

¶ 24 Although, as defendant points out, the reviewing court in *Bennett* noted that if defendant had been present during questioning of the venire members, he could have "influenced" whether any of them served on the jury (*Bennett*, 282 Ill. App. 3d at 979), the court did not hold that a defendant has the right to dictate the exercise of peremptory challenges or override counsel's strategic choices in that regard. Nor is such a sweeping pronouncement made in *Bean* or *Peeples*.

¶ 25 Finally, we reject defendant's request that we find that post-conviction counsel provided unreasonable assistance. Because post-conviction counsel is not required to advance nonmeritorious claims on defendant's behalf (*Greer*, 212 Ill. 2d at 205), counsel's failure to amend defendant's *pro se* petition to include the meritless claim of ineffective assistance of trial counsel for failing to peremptorily challenge venire members who had been the victims of robbery and burglary, did not render post-conviction counsel's assistance unreasonable. See *Pendleton*, 223 Ill. 2d at 472; *Greer*, 212 Ill. 2d at 205. As such, we do not find that counsel's decision to withdraw resulted in unreasonable assistance.

¶ 26 For the foregoing reasons, we affirm the order of the circuit court.

¶ 27 Affirmed.