

No. 1-12-3558

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. 05 CR 4772
)	
ANTON GARRETT,)	Honorable
)	Steven J. Goebel,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Lampkin concurred in the judgment.

O R D E R

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

¶ 2 Defendant Anton Garrett appeals from the second-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) by the circuit court of Cook County. He contends that his trial counsel was ineffective for failing to call essential known witnesses to corroborate his claim that he did not commit the crime of home invasion. We affirm.

¶ 3 Defendant was charged with 18 counts, including attempted first degree murder, home

invasion, aggravated discharge of a firearm, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. Following a bench trial, the court found defendant guilty of a single count of home invasion and sentenced him to 26 years in prison, including a 20-year enhancement for discharging a firearm during the course of the offense.

¶ 4 According to the State's theory of the case, on the evening of December 17, 2004, Latasha Collins was having a birthday party in her apartment located at 1059 North Avers. Tiffany Cates, Kamali Wilson, Myisha Dixon, Samuel English, and Kwanzzi Pugh were in the living room area. Around 9:30 p.m., defendant forced his way into the apartment through the back door. Defendant entered the living room area armed with a gun and told everyone not to move. He pointed his gun in English's face, reached into his pockets, removed some money, then placed the money back into English's pockets and told him to sit down. Defendant noticed that Dixon was in the bathroom and ordered her to come out. Dixon exited the bathroom with her hands up, and stood next to Cates. Defendant raised his gun and fired a shot in their direction, which hit a crockpot in the kitchen. Defendant then walked out of the apartment.

¶ 5 At 9:40 p.m., Officer James Obaldo and his partner responded to a call of shots fired at the scene of the crime. Upon entering the apartment, he spoke with Collins and Dixon and observed a bullet hole in the kitchen shelf and crockpot and a spent nine millimeter casing on the floor. Officer Obaldo learned the name of the offender.

¶ 6 On January 26, 2005, Sergeant Eric Madsen learned that defendant was in custody in the narcotics division, and that a nine millimeter firearm was recovered in connection with his drug case. Madsen ordered a comparison of the weapon and the nine millimeter casing recovered from the scene of the shooting. No results were admitted into evidence. The next day, he went to Collins's home where she identified defendant by name and through a photograph as the

perpetrator who entered her home. In addition to Collins, Madsen interviewed Cates, English, Dixon, and defendant and arranged for a lineup to be conducted. Cates and Dixon independently identified defendant from a lineup. English also viewed the lineup. Defendant was arrested.

¶ 7 After the State's case, defense counsel moved for a directed finding of not guilty, which the court granted on the attempted first-degree murder charge and denied on the remaining counts. The court admonished defendant regarding his right to testify and the defense rested without presenting any evidence. The court found defendant guilty on all counts except for attempted murder, and merged all of them into a single count of home invasion.

¶ 8 Defense counsel filed a motion for new trial, which alleged, among other things, that the State failed to prove defendant guilty of the charges beyond a reasonable doubt. The trial court denied the motion.

¶ 9 At sentencing, after hearing the defense argument in mitigation, the trial court asked defendant if he wished to speak. Defendant stated that he had been afraid to testify. He maintained that he should be granted a new trial citing ineffective assistance of counsel and stating that, because of his attorney, "none of my witnesses was present, period." Defendant then named Lashina Collins, Odum Fix, Jackweus Clark, and Juan Taz as potential witnesses that his counsel never called. After considering both aggravation and mitigation, the trial court gave defendant permission to address the court. Defendant claimed that he had been invited to the party because he was dating Collins's sister. An argument broke out with English and Pugh over a dice game and a shot was fired. Defendant denied firing the shot and claimed it was "impossible" for him to have committed the offenses because he lived in the area and was not a violent person. The court sentenced defendant on a single count of home invasion to 26 years in prison, including a 20-year enhancement for discharging a firearm during the course of the

offense. Defense counsel filed a written motion to reconsider sentence, which the trial court denied.

¶ 10 On direct appeal, defendant argued that the State failed to prove beyond a reasonable doubt that he committed home invasion because the State's witnesses lacked credibility and their story defied common sense. He also argued that the court failed to inquire into his *pro se* posttrial claim that defense counsel was ineffective for failing to call certain witnesses to testify. This court affirmed the conviction for home invasion. *People v. Garrett*, No. 1-09-0479 (2009) (unpublished order pursuant to Supreme Court Rule 23).

¶ 11 On January 15, 2010, defendant filed a *pro se* postconviction petition raising several issues, including trial counsel's ineffectiveness for failing to call several witnesses among whom were Olin Fitts and Quenton Morgan. Defendant attached an affidavit from Fitts which stated that he accompanied defendant to a party on the night of the offense. The men paid \$5, and entered the party. Fitts claimed that a dice game was going on, and at some point during the party he heard a gunshot. Fitts said he saw defendant on the dance floor when he heard shots fired. He stated that he was out of town, and returned when he learned that defendant had been charged with the offense. When he returned, Fitts went to the police and told them what occurred and an officer named "Jenkins" told him that he would look into the information that Fitts had provided. Defense counsel never contacted Fitts, but Fitts was willing to testify.

¶ 12 The trial court docketed the petition for further proceedings and appointed counsel, who filed a Supreme Court Rule 651(c) (eff. Feb. 6, 2013) certificate. Defendant later filed an additional affidavit to support his postconviction petition. The court allowed the additional affidavit to be attached to defendant's original postconviction petition. In his affidavit, Quenton Morgan said that he, "Money", and defendant went to Collins's house because she sold food and

women were there. He said "an incident broke out over the same dice game and out of nowhere a shot we [*sic*] fired, we headed for the door to get outta there."

¶ 13 The State filed a motion to dismiss defendant's petition. At a hearing, the State argued that defendant's claims were barred by *res judicata* and waiver, that his claims were unsupported and conclusory, that his trial attorney's performance was not prejudicial, and that his petition did not demonstrate a substantial showing of a violation of his constitutional rights. The trial court granted the State's motion to dismiss defendant's postconviction petition. In regards to defendant's ineffectiveness claim, the trial court stated that defendant failed to show that counsel was aware of Fitts's possible testimony at the time of trial and that counsel provided vigorous defense so there is no reasonable probability that the outcome would have been different absent counsel's errors. Defendant now appeals.

¶ 14 On appeal, defendant claims that the trial court erred in dismissing his postconviction petition because he made a substantial showing that his trial counsel was ineffective for failing to call essential witnesses.

¶ 15 The Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) "provides a means for a criminal defendant to challenge his conviction or sentence based on a substantial violation of constitutional rights." *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). A petition under the Act initiates a collateral proceeding at which the inquiry is limited to constitutional issues that were not, and could not have been, previously adjudicated. See *People v. Williams*, 209 Ill. 2d 227, 232-33 (2004). If the circuit court does not dismiss the postconviction petition as frivolous or patently without merit, then the petition advances to the second stage where counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2010)), and the State is allowed to file responsive pleadings (725 ILCS 5/122-5

(West 2010)).

¶ 16 At the second stage of postconviction proceedings, as in the instant case, defendant bears the burden of making a "substantial showing" of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A claim is said to make a "substantial showing" of a constitutional violation if its allegations, as supported by the independent corroborative evidence, would entitle the petitioner to relief if proven at an evidentiary hearing during the third stage of proceedings. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). 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). 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).

¶ 17 To show an attorney's representation was ineffective, a defendant must establish that counsel's performance was deficient and that this deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). When determining whether an attorney's performance was unreasonable, the reviewing 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.'" *Strickland*, 466 U.S. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). A defendant establishes prejudice by showing a reasonable probability, *i.e.*, a probability sufficient to undermine confidence in the outcome of the proceeding, that but for counsel's errors the proceeding would have resulted in a different outcome. *Strickland*, 466 U.S. at 694. Failure to satisfy either part of the *Strickland*

test defeats a claim of ineffective assistance. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001).

¶ 18 When an appeal arises from the trial court's refusal to grant relief at the second stage of the postconviction proceedings, the facts are not in dispute, and present only a question of law. Thus, the standard of review is *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001).

¶ 19 As a general rule, the doctrine of *res judicata* bars review of issues raised and decided on appeal, and issues that could have been raised on appeal, but were not, are forfeited. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). To excuse forfeiture in the context of postconviction proceedings, it must be determined that (1) fundamental fairness so requires, (2) the alleged forfeiture stems from the incompetence of appellate counsel, or (3) facts relating to the claim do not appear on the face of the original appellate record. *Id.* at 450-451. The State maintains that defendant's ineffective assistance of counsel claims are forfeited because he could have raised the issue on direct appeal, but did not. We note that forfeiture does not apply in the instant case because defendant's petition includes affidavits from two witnesses, which were not a part of the original appellate record.

¶ 20 We do not find that defendant's petition makes a substantial showing that his trial counsel was ineffective for failing to call essential known witnesses to corroborate his claim that he did not commit the crime of home invasion. First, defendant does not show that these witnesses were known to counsel nor does he allege that he told his attorney these witnesses were available to testify. At sentencing, defendant addressed the court and stated that Lashina Collins, Odum Fix, Jackweus Clark, and Juan Taz were witnesses that had not been called on his behalf. However, nowhere in his statement did defendant mention Fitts or Morgan, although he may have given the court the wrong name when he mentioned "Odum Fix." Furthermore, even if defendant had mentioned the men's names, it is not apparent defendant told his counsel about

Fitts and Morgan prior to trial. Thus, a review of the record shows that the name of either witness did not come to counsel's attention until after defendant's trial.

¶ 21 Additionally, it is not mentioned in the petition or affidavits that the defendant or the witnesses ever contacted defense counsel. Fitts claims to have contacted police upon his return to tell them that defendant was innocent, but only stated that an officer with the last name "Jenkins" told him that he would look into the information. However, even if this information is true, it does not show that counsel received this information and failed to call Fitts as a witness. Therefore, we find that, if defense counsel did not know about the two witnesses, counsel cannot be held responsible for failing to call these men as witnesses at trial.

¶ 22 Because defendant does not make a substantial showing that defense counsel both knew of Fitts and Morgan and failed to call them to trial, his ineffective assistance of counsel claim fails. Thus, defendant fails to make a substantial showing that counsel's performance was deficient. Finding that defendant cannot meet the first prong of the *Strickland* test, we conclude that defendant has not made a substantial showing that trial counsel was ineffective.

¶ 23 For the foregoing reasons, we affirm the judgment of the Circuit court of Cook County.

¶ 24 Affirmed.