

No. 1-14-0958

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**IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT**

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	No. 08 CR 12209
)	
ANDRE BULLOCKS,)	Honorable
)	Thomas V. Gainer, Jr.,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the circuit court's dismissal of defendant's post-conviction petition at the first stage as frivolous and patently without merit, finding that the petition's claims are *res judicata* in that they were addressed on direct appeal.

¶ 2 Defendant, Andre Bullocks, appeals the order of the circuit court dismissing his postconviction petition as frivolous and patently without merit. On appeal, defendant contends the trial court erred in dismissing his petition because it set forth an arguable claim that his

appellate counsel was ineffective for failing to argue that the trial court improperly placed the burden of proving his self-defense claim on defendant rather than on the State. For the following reasons, we affirm.

¶ 3 JURISDICTION

¶ 4 The trial court's order dismissing defendant's postconviction petition was entered on January 31, 2014. Late notice of appeal was allowed and a notice of appeal was filed on April 15, 2014. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Illinois Supreme Court Rule 651 (eff. Feb. 6, 2013), governing appeals in post-conviction proceedings.

¶ 5 BACKGROUND

¶ 6 The following facts are substantially taken from defendant's direct appeal, *People v. Bullocks*, 2013 IL App (1st) 110588-U. Defendant was charged with the first degree murder of Wesley Bonds and the attempted murder of Bryant Brown and Johnny Smith. The evidence at trial established that at about 7:30 p.m. on April 21, 2008, defendant shot those three men inside a van parked at a McDonald's restaurant at 76th Street and Vincennes in Chicago. The defense contended those shots were fired in self-defense because the van's occupants were trying to rob defendant of the money he brought to purchase drugs.

¶ 7 At defendant's bench trial, Willie Hutchinson testified that Smith drove Hutchinson's van to the parking lot with Bonds and Brown also inside. Defendant had called Brown and asked to buy marijuana from him. He had purchased marijuana from Brown before. The van's other occupants did not know defendant.

¶ 8 Inside the van, Brown was seated behind Smith in a middle row of seats, and Bonds and Hutchinson sat behind them on the rear bench seat. Defendant arrived and parked his SUV next

to the van. Two other men, Michael Wilburn and Torontae Agee, were in defendant's vehicle. Defendant got into the van and sat in the other middle seat next to Brown.

¶ 9 Hutchinson testified that defendant and Brown started arguing. Defendant grabbed Brown by the shirt collar and Bonds stood up between them, putting his arms in the air and telling defendant there wasn't "any need for this." Hutchinson said he heard 12 shots, but did not see who fired them. Smith heard at least 10 shots and was struck in his back by a bullet that exited his shoulder. Hutchinson heard a "click" indicating the weapon had been emptied. Defendant exited the van through a window, and Hutchinson saw him holding a gun that made a clicking noise. He saw defendant climb into the driver's seat of the SUV.

¶ 10 Everyone in the van other than Hutchinson had been shot, and he testified none of them had weapons. Brown was struck in the temple and Bonds was slumped in his seat. Bonds, who was shot through his chest, died from his injuries. Brown sustained two gunshot wounds to his head and lost significant brain function. Smith was treated for his wounds and released from the hospital the following day.

¶ 11 Hutchinson identified defendant in a police photo array and a lineup. On cross-examination, Hutchinson said he did not know what defendant and Brown discussed but heard them speaking in loud voices. Hutchinson said immediately after the shooting, he drove to a car wash where he was renting a space to park his van. Hutchinson stated that he was "nervous and [he] panicked" and "didn't know what to do." He denied telling personnel at the carwash to clean out his van.

¶ 12 Al Triplett, who worked at the car wash, testified that Hutchinson did not tell him to clean out the van but another person did. He stated that he saw blood on an armrest and seat belt but he

did not see shell casings or a weapon inside the van. When police found the van it had been cleaned and they recovered nothing from the van's interior.

¶ 13 Smith testified that Brown received a phone call and directed him to drive the van to the McDonald's. After defendant entered the van, Smith turned around to see defendant and Brown arguing "face-to-face." Smith said defendant and Brown "were all in each other's face" and defendant was holding onto Brown's shirt. When Bonds tried to stop the fight, shots were fired but Smith could not see who fired the shots. Smith was shot in the back.

¶ 14 Kenneth King testified he was sitting in a tow truck in the parking lot when the shooting occurred and that he knew Hutchinson. King heard shots being fired and saw Hutchinson get out of the van and shout at him for help. King testified that defendant returned to his own vehicle and tried to drive away, at which point King rammed defendant's SUV with his tow truck to stop him from leaving the parking lot.

¶ 15 King further testified that Defendant drove out of the parking lot. King had difficulty starting the tow truck after he rammed it into defendant's vehicle, and King told the driver of a nearby Lexus, who he recognized, to help him pursue defendant. The tow truck and the Lexus followed defendant's SUV. After King forced defendant's SUV into a light pole, defendant and Agee got out and ran into the basement of a nearby building. A police officer found defendant in that building, bleeding from a gunshot wound to the leg. A nurse who treated defendant testified that the wound punctured his femoral artery, causing substantial bleeding.

¶ 16 Forensic investigator Nancy DeCook processed defendant's SUV and recovered a fired bullet from inside the driver's door, entering from outside the SUV, fired bullets in the center seat of the second row, and a 40 caliber Smith and Wesson automatic pistol with an empty magazine. Fired bullets were also recovered from defendant's leg and from the defrost vent of the van. Two

pellets were recovered from Bond's body. She recovered blood from the front passenger's seat and the driver's outside door handle. She also recovered a bloody folding knife, and \$71 in currency that was also bloody, from defendant's pants.

¶ 17 After testing it was determined that the bullets from the SUV and van came from the pistol recovered in defendant's SUV. The pellets recovered from Bonds were unsuitable for microscopic comparison. The bullet recovered from defendant did not come from the pistol. The parties stipulated that if called to testify, Robert Berk, an expert in the field of trace evidence, would state that he examined the gun residue kits and determined, with a reasonable degree of scientific certainty, that Hutchinson discharged a firearm or had both hands in the environment of a firearm when it discharged, and Bonds discharged a firearm or had both hands in the environment of a firearm when it was discharged.

¶ 18 For the defense, Wilburn testified he and Agee remained in defendant's vehicle while defendant left and got into the van. Defendant testified he was employed as a maintenance worker for an apartment complex and owned a gun that he kept under the seat of his car "for protection" and that defendant carried during the events in question.

¶ 19 Defendant stated that after he and Brown arranged the drug purchase, Brown instructed him via phone to get into the van. He testified that the situation worried him "because [Brown] usually gets out." Defendant said he was concerned about the other people present in the van because he did not know them. He greeted Smith and began talking to Brown. Defendant said he was "smacked in the head with a gun," and the men seated behind defendant told him to hand over his money.

¶ 20 Defendant testified "[t]hey were all grabbing and roughing me up, snatching my jewelry and stuff like that." He said the van's occupants were going through his pockets and were

shouting, "Give up the money." One of defendant's assailants shouted, "Shoot him," and defendant felt a pain in his leg.

¶ 21 Defendant took his weapon out and began shooting. Defendant said he "just kept shooting" because he was "afraid" and thought he was going to die, and that he fired without aiming at anyone or anything in particular. When the gun was emptied, defendant got out of the van through a window that had been shot out. When he returned to his own vehicle, Agee was there but Wilburn had disappeared.

¶ 22 Once defendant had driven away and the vehicle had crashed, defendant ran into the building to avoid the men who were chasing him from the tow truck. Defendant hid behind a table in the basement, where he removed his black jeans and work boots to assess the extent of his injury. When police entered the building, defendant called out for help.

¶ 23 On cross-examination, defendant said he had between \$300 and \$400 in his pocket, and when he got into the van, he wore a jacket over his jeans, with his gun in his pants pocket. He was not sure if Brown struck him, but Bonds and Hutchinson, who were seated behind him in the van, struck him in the head multiple times and they, along with Brown, took the money from his pocket. Defendant said that when he got into the building after being shot, he was "bleeding out." Photographs of the basement depict blood on the floor. Defendant's jacket and pants were among the exhibits entered into evidence. The parties stipulated that defendant was shot with a gun other than his own.

¶ 24 The court also viewed footage from security cameras and noted that the footage showed a man wearing a white t-shirt coming around a building and a car approaching the man which came within feet of him. The car stopped and then moved forward a bit and then backed up. The man

in the t-shirt stopped, took a step or two back, and then took another step. The man then disappeared from the building.

¶ 25 After closing argument, the trial court found defendant guilty of the second degree murder of Bonds and guilty of aggravated battery of a firearm as to Brown and Smith. The court stated that it was "just not humanly possible" for defendant to have carried his gun in his pants pocket as he had testified; however, the gun could have been secreted in defendant's long jacket, as the State had asserted. The court stated "[s]omething happened inside the van" after defendant entered to buy drugs, and Bonds stepped in front of defendant as he argued with Brown, at which point defendant fired his weapon in the van. The court opined that defendant was shot in the leg while outside of the van, possibly by someone in the Lexus.

¶ 26 The court further stated that defendant's claim that he acted in self-defense was not believable and that defendant was the only person armed in the van. The court reasoned that if defendant had been shot inside the van as he claimed, both the van and defendant's vehicle would have substantial blood staining. The court concluded that defendant acted with an unreasonable belief that his actions were justified. On June 4, 2010, defendant was sentenced to 10 years on the second degree murder conviction and a consecutive term of 14 years for the aggravated battery with a firearm as to Brown, with a concurrent 8-year term for aggravated battery with a firearm as to Smith, for a total sentence of 24 years in prison. In response to the court's question, defendant's counsel, Michael Clancy, stated he planned to file a motion to reconsider the sentence.

¶ 27 On June 10, 2010, defendant filed a *pro se* motion for a new trial asserting that his counsel was ineffective. On June 21, 2010, Clancy appeared and asked to withdraw from representing defendant. When the court asked defendant if he was going to retain a new lawyer, defendant said he thought Clancy would still file the motion to reconsider his sentence. The court explained to

defendant that he could retain new counsel or a public defender could be appointed to represent him. The court allowed Clancy to withdraw. The court then noted that a portion of the sentence imposed against defendant was incorrect, though the length of defendant's sentence would not be affected. Defendant said he would hire a new lawyer, and the matter was continued to allow defendant time to do so.

¶ 28 On July 12, 2010, defendant appeared *pro se* and told the court he was in the process of obtaining counsel. On August 31, 2010, defendant filed an amended *pro se* motion for retrial "due to ineffective assistance of counsel." In September 2010, the court appointed the public defender to represent defendant on the issue of sentencing. On October 19, 2010, assistant public defender Timothy O'Hara noted to the court that he had been appointed for purposes of the motion to reconsider sentence. On December 7, 2010, on the State's motion, defendant's sentences were vacated and defendant was resentenced to consecutive 8-year and 6-year terms on the aggravated battery convictions, to be served consecutive to his 10-year murder sentence. On January 4, 2011, O'Hara filed a motion to reconsider that sentence, which the court denied.

¶ 29 On January 10, 2011, defendant was represented by O'Hara. The court asked defendant if he had made a *pro se* request for a new trial based on the ineffectiveness of counsel. Defendant responded yes, and the court stated it was in possession of an amended motion of defendant. The court continued the case to review the motion. After a hearing, the court denied defendant's motion.

¶ 30 On direct appeal, defendant argued that he did not receive adequate admonishment in his waiver of counsel, and that the State failed to disprove his claim of self-defense beyond a reasonable doubt because he had a reasonable belief that use of force was necessary. *Bullocks*, 2013 IL App (1st) 110588-U, ¶ 2. This court affirmed defendant's convictions, finding that the

trial court need not accept defendant's theory of the case, and that the State's witnesses supported the State's theory that only defendant had a gun. *Id.*, ¶¶ 36-37. Defendant's petition for leave to appeal was denied.

¶ 31 On November 18, 2013, defendant filed his *pro se* post-conviction petition, alleging violations of his due process rights and ineffective assistance of trial and appellate counsel. Specifically, defendant alleged that the trial court "relieved" the State of its "Burden of Persuasion" and appellate counsel was ineffective for failing to raise all of the claims in his petition. The trial court dismissed defendant's post-conviction petition as frivolous and patently without merit. Defendant filed this appeal.

¶ 32 ANALYSIS

¶ 33 On appeal, defendant contends that the trial court erred in dismissing his postconviction petition where he set forth an arguable claim that appellate counsel was ineffective. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a procedural mechanism in which a defendant can claim that his conviction was the result of a substantial denial of his rights under the United States Constitution or the Illinois Constitution or both. *People v. Cathey*, 2012 IL 111746, ¶ 17. A postconviction proceeding is not an appeal of the underlying judgment; rather, it is a collateral proceeding. *People v. Burns*, 332 Ill. App. 3d 189, 190 (2001).

¶ 34 The Act provides a three-stage process for nondeath penalty cases. *People v. Jones*, 213 Ill. 2d 498, 503 (2004). To survive summary dismissal at the first stage, *pro se* defendant need only present the gist of a constitutional claim. *Id.* at 504. As our supreme court has noted, "the threshold is a low one at this stage – defendant need only present a modest amount of detail and need not make legal arguments or cite legal authority." *Id.* However, the trial court may

summarily dismiss a postconviction petition if it is frivolous or patently without merit, which means the petition has "no arguable basis either in law or in fact." *Cathey*, 2012 IL 111746, ¶ 17 quoting *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Furthermore, in postconviction proceedings all issues decided on direct appeal are *res judicata*, and all those which could have been presented but were not are considered waived. *People v. Kitchen*, 189 Ill. 2d 424, 432 (1999). The trial court's dismissal of a postconviction petition at the first stage is reviewed *de novo*. *Burns*, 332 Ill. App. 3d at 191.

¶ 35 In alleging ineffective assistance, defendant "must show both a deficiency in counsel's performance and prejudice resulting from that deficiency." *People v. Harris*, 182 Ill. 2d 114, 146 (1998). At the first stage of a post-conviction proceeding, 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." *People v. Hodges*, 234 Ill. 2d 1,17 (2009). Prejudice in this context means that "there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Cathey*, 2012 IL 111746, ¶ 23, quoting *Strickland v. Washington*, 104 S. Ct. 2052 (1984). Furthermore, the prejudice prong of an ineffective assistance of counsel claim cannot be established if no error has occurred. *People v. Mahaffey*, 194 Ill. 2d 154, 173 (2000), overruled on other grounds by *People v. Wrice*, 2012 IL 111860. Dismissal of defendant's ineffective assistance of counsel claim is proper where defendant cannot establish prejudice.

¶ 36 Self-defense is applicable where (1) unlawful force was threatened against defendant; (2) defendant was not the aggressor; (3) the danger of harm was imminent; (4) the use of force was necessary; (5) defendant actually and subjectively believed a danger existed requiring the use of

force applied; and (6) defendant's beliefs were objectively reasonable. *People v. Lee*, 213 Ill. 2d 218, 225 (2004). Self-defense is an affirmative defense and once raised, it is the State's burden to prove beyond a reasonable doubt that defendant did not act in self-defense. *Id.* at 224. The State may disprove defendant's self-defense claim by negating any one of these elements. *Id.* at 225.

¶ 37 Defendant contends in his petition that the trial court violated his due process rights when it placed the burden of proving his self-defense claim on defendant when the burden of disproving his claim properly falls on the State. He argues that the trial court relied on an "unsubstantiated belief" that there would have been more blood in the van or defendant's SUV if he had been shot in the van; therefore its conclusion that his belief in the need to use force to protect himself from danger was baseless, and shows that the trial court "put the onus on [defendant] to prove he was shot in the thigh before he began firing his gun." Specifically, defendant argues that no medical evidence was presented that his artery was "nicked," which would have resulted in profuse bleeding, and the trial court's finding that defendant was shot while he was outside the van is questionable where the only evidence presented shows that he was shot with a gun other than his own. Defendant concludes that "it is clear that the court gave the benefit of the doubt to the State and acted under the improper presumption that Bullocks was *not* acting in self-defense." He further contends that his appellate counsel was ineffective for failing to raise this issue on direct appeal.

¶ 38 Although framed differently by defendant, he essentially makes a sufficiency of the evidence argument. He argues that the State's evidence does not disprove his self-defense claim beyond a reasonable doubt. In other words, he argues that the State failed to negate any of the elements of self-defense, and therefore defendant would have prevailed on his self-defense claim

if not for the fact that the trial court improperly placed the burden of proving self-defense on him. If the evidence in the record is sufficient to support the trial court's finding, it follows that defendant cannot prevail on his ineffective assistance of counsel claim.

¶ 39 We note that this sufficiency of the evidence argument regarding defendant's self-defense claim was addressed on direct appeal. On appeal, defendant argued that the State failed to prove that his belief in the need to act in self-defense was unreasonable where circumstantial evidence supported his theory that he was shot in the leg after the men in the van tried to rob him. *Bullocks*, 2013 IL App (1st) 110588-U, ¶ 34. He asked that this court revisit the events involving his leg wound, "including the lack of blood in his own vehicle, asserting that his jeans stanching the bleeding until he removed them from the basement of the building where he was found." *Id.*, ¶ 36. In *Bullocks*, this court affirmed the judgment of the trial court, reasoning that "[t]he testimony of Hutchinson and Smith supported the State's theory that defendant and Brown began arguing in the van. No testimony was offered that someone other than defendant had a weapon. The [trial] court was free to weigh that testimony against defendant's account that the van's occupants tried to rob him." *Id.*, ¶ 37. We reiterated the general rule that a reviewing court need not "search out all possible explanations consistent with innocence and raise them to the level of reasonable doubt. [Internal quotation marks and citations omitted.] Rather, it is the role of the fact finder, which was the trial judge in this bench trial, to resolve conflicting inferences." *Id.* Since this issue was addressed on direct appeal, it is barred from post-conviction consideration as *res judicata*. *Kitchen*, 189 Ill. 2d at 432.

¶ 40 Regardless of the application of *res judicata*, we find no error occurred here. The evidence presented at trial showed that defendant contacted Brown about obtaining drugs and they met in the van. Defendant had his gun for protection and had about \$300-\$400 with him.

Defendant and Brown got into an argument in the van, a scuffle ensued, and defendant shot his gun 10-12 times striking Smith, Brown and Bonds. Bullets recovered from the van and SUV came from a pistol found in defendant's SUV. Defendant fled the van and drove his SUV. He was pursued by a tow truck, which forced his SUV into a light pole, and then a Lexus. Defendant fled his vehicle and as he came around a building a car approached within feet of defendant. The car stopped and moved forward and back a bit. Defendant stopped and took several steps back. Defendant then ran into a building and hid in the basement. The police found him bleeding and in need of assistance. A nurse at the hospital where he was treated testified that she believed defendant's artery had been "nicked" due to the substantial bleeding. Police later recovered defendant's bloody pants and found \$71 in currency, also covered in blood. Defendant had been shot with a gun other than his own.

¶ 41 Defendant argues that the evidence supports his theory of self-defense; that the men in the van tried to rob him and he was shot in the van so he responded by firing his gun in the van. However, the evidence also supports the trial court's conclusion that defendant had an unreasonable belief in the need to use force when no other person in the van had a gun, and that defendant was shot at some point outside of the van while he was fleeing the scene and being pursued by the tow truck and Lexus. In a bench trial, it is for the trial judge, as the fact finder, to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve conflicts in the evidence. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). The fact finder "may consider the probability or improbability of the defendant's account, the circumstances surrounding the crime, and the relevant testimony of other witnesses." *People v. Young*, 347 Ill. App. 3d 909, 920 (2004). It need not accept the defendant's claim of self-defense. *Id.* Rather than imposing a burden on defendant to prove his claim of self-defense,

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the trial court here simply performed its duty as fact finder. Since no error occurred, defendant cannot show prejudice in his claim of ineffective assistance of appellate counsel. Therefore, the trial court properly dismissed defendant's post-conviction petition.

¶ 42 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 43 Affirmed.