

NOTICE  
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2016 IL App (5th) 130477-U

NO. 5-13-0477

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

|                                      |   |                   |
|--------------------------------------|---|-------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the   |
|                                      | ) | Circuit Court of  |
| Plaintiff-Appellee,                  | ) | St. Clair County. |
|                                      | ) |                   |
| v.                                   | ) | No. 09-CF-1163    |
|                                      | ) |                   |
| ELIJAH BRANCH,                       | ) | Honorable         |
|                                      | ) | John Baricevic,   |
| Defendant-Appellant.                 | ) | Judge, presiding. |

PRESIDING JUSTICE SCHWARM delivered the judgment of the court. Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held:* The circuit court's summary dismissal of the defendant's petition for postconviction relief was proper where, among other things, he failed to demonstrate that prejudice resulted from counsel's alleged ineffectiveness.

¶ 2 **BACKGROUND**

¶ 3 In February 2011, a St. Clair County jury found the defendant, Elijah Branch, guilty of first-degree murder (720 ILCS 5/9-1(a)(1) (West 2008)). The evidence adduced at the defendant's trial established that on September 21, 2009, at approximately 1:30 a.m., the defendant fatally shot Michael Williams with a .38-caliber revolver in the parking lot of the Alpha Plaza apartment complex in East St. Louis. The shooting

occurred in the presence of numerous witnesses, including Cynthia Wilson, her daughter, Elizabeth Wilson, Williams' girlfriend, Latoya Stewart, her sister, Kenisha Walton, the defendant's girlfriend, Christine Weaver, her friend, Latesha Jamison, and the defendant's cousin, Royneiss Dugan. At trial, Latoya, Kenisha, Cynthia, and Elizabeth positively identified the defendant as the man who shot Williams. Christine and Latesha testified that they were drunk when the shooting occurred and had only heard gunshots. The defendant did not testify. Trial counsel subpoenaed Dugan and intended to call him as a witness for the defense, but ultimately, he did not testify either.

¶ 4 Dugan's proposed testimony was discussed during a recess taken after the State had rested its case. Trial counsel explained that he intended to question Dugan about his "potential involvement in the shooting" and his ownership of a weapon at the time. Counsel stated that Dugan had recently confirmed that he was willing to testify for the defense. Counsel explained, however, that the State had since "alerted" him that Dugan was on felony probation. Counsel was thus concerned that Dugan's testimony might implicate his fifth amendment right against self-incrimination.

¶ 5 Noting its agreement with counsel's concerns, the State advised that it would charge Dugan with unlawful possession of a weapon by a felon if he took the stand and admitted that he was in possession of a gun when Williams was killed. The State further advised that it would impeach Dugan with prior "videotaped statements about certain things."

¶ 6 Thereafter, Dugan was brought into the courtroom, and the trial court advised him regarding his right against self-incrimination and his potential exposure to a criminal

charge should he "admit to having a gun as a felon." See *People v. Craig*, 334 Ill. App. 3d 426, 452 (2002) (Quinn, J., specially concurring) (noting that "the trial court has the discretion to inform a witness of his fifth amendment privilege against self-incrimination, particularly when the witness appears in court unrepresented"). The court told Dugan that although he had been subpoenaed to testify, he had the right to decline to if he believed that his responses might "place him in danger of being charged." Dugan indicated that he understood that he did not have to testify but that he still wished to do so. After advising Dugan that he could "change his mind" if he wanted to, the court directed him to go "back out in the hallway." Trial counsel subsequently requested that he be allowed to speak with Dugan to clarify "what his position actually [was]." Counsel's request was granted, and upon returning to the courtroom, counsel stated, "[W]ith [Dugan] having been advised of his [f]ifth [a]mendment right[ ] and having [had] a conversation with [him], I don't believe the defense is going to call him." Notably, during closing arguments, defense counsel suggested, among other things, that the State's eyewitnesses had conspired to wrongly convict the defendant and that Dugan had shot and killed Williams.

¶ 7 In March 2013, the defendant's conviction was affirmed on appeal. See *People v. Branch*, 2013 IL App (5th) 110188-U. On September 4, 2013, the defendant filed a *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). The petition alleged, among other things, that trial counsel had been ineffective for failing to call Dugan as a witness for the defense and that appellate counsel had been ineffective for failing to raise the issue on appeal. The

petition alleged that shortly after Williams' murder, Dugan had attempted to sell or trade a .38-caliber handgun to Nicholas Muhoro and that evidence to that effect would have lent support to the defendant's claim that Dugan might have shot and killed Williams. The petition further alleged that trial counsel had "stated that he intended to present Dugan as a witness (R.603), but later rested without calling him." The petition faulted counsel for failing to exercise the defendant's right to "compulsory process," after "informing [the defendant] that he would." The petition did not include an affidavit from Dugan indicating what his trial testimony might have been, nor did it acknowledge what had occurred at the recess at which Dugan had appeared.

¶ 8 On September 10, 2013, the trial court entered a written order summarily dismissing the defendant's postconviction petition. The court determined that trial counsel had not "ignored" the issues raised in the petition and that the defendant had failed to establish that he was prejudiced by trial counsel's alleged deficiencies. On September 24, 2013, the defendant filed his notice of appeal.

¶ 9 DISCUSSION

¶ 10 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). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002).

¶ 11 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) (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).

¶ 12 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 the petition. 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. *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). "The dismissal of a postconviction petition without an evidentiary hearing is reviewed *de novo*." *People v. Hall*, 217 Ill. 2d 324, 334 (2005).

¶ 13 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).

¶ 14 "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). "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." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009).

¶ 15 Here, asserting that trial counsel failed to exercise the defendant's right to "compulsory process," the defendant's petition generally faults counsel for failing to call Dugan as a witness for the defense. The petition suggests that had Dugan testified, he would have admitted that shortly after Williams' murder, he had attempted to sell or trade

a .38-caliber handgun to Nicholas Muhoro. These claims, however, are belied by the record.

¶ 16 Trial counsel employed compulsory process, and Dugan appeared as he was subpoenaed to do. Dugan was thus given the opportunity to testify and admit that he had possessed a .38-caliber handgun after Williams' murder. We acknowledge that after his privilege against self-incrimination had been explained to him, Dugan indicated that he was still willing to provide such testimony. Outside the defendant's presence, however, when Dugan was subsequently given the opportunity to clarify "what his position actually [was]," he ostensibly changed his mind. To the extent that the defendant's petition suggests that counsel should have forced Dugan to testify, "[a] defendant's sixth amendment right to compulsory process does not include the right to compel a witness to waive his fifth amendment privilege." *People v. Edgeston*, 157 Ill. 2d 201, 220-21 (1993). Furthermore, a "witness should not be called to testify if he is going to invoke his fifth amendment privilege against self-incrimination," and "it is improper for a party to call a witness whom it has reason to believe will invoke his fifth amendment privilege before the jury." *People v. Human*, 331 Ill. App. 3d 809, 820, 819 (2002).

¶ 17 Under the circumstances, we cannot conclude that trial counsel's performance was in any way deficient. Moreover, as the trial court suggested, even if Dugan had testified that he possessed a .38-caliber handgun around the time of Williams' murder, there is not a reasonable probability that the outcome of the defendant's trial would have been different.

¶ 18 Four eyewitnesses, Latoya, Kenisha, Cynthia, and Elizabeth, positively identified the defendant as the man who shot Williams, and details of their accounts were corroborated by Christine and Latesha. The State's evidence also established that although Dugan and the defendant are cousins, they looked nothing alike in September 2009. The record further indicates that Cynthia and Elizabeth were disinterested witnesses who resided at the Alpha Plaza apartment complex and just happened to be outside when Williams was shot. At the defendant's sentencing hearing, the trial court noted that it was "absolutely clear from the evidence that [the defendant had] committed the offense."

¶ 19 During closing arguments, trial counsel suggested that Dugan might have killed Williams, but evidence that Dugan had attempted to sell or trade a .38-caliber handgun after the shooting would not have contradicted the State's evidence that the defendant was the shooter. It further appears that the State was prepared to impeach Dugan with prior "videotaped statements about certain things." The relative value of Dugan's testimony is thus speculative at best.

¶ 20 In any event, given the overwhelming evidence of the defendant's guilt, it is not arguable that there is a reasonable probability that had Dugan testified as a witness for the defense, the outcome of the defendant's trial would have been different. Because the defendant is unable to establish either of *Strickland's* propositions with respect to this claim, he is equally unable to establish that appellate counsel was ineffective for failing to raise the issue on direct appeal. See, e.g., *People v. Lacy*, 407 Ill. App. 3d 442, 462 (2011). The trial court's summary dismissal of the defendant's postconviction petition



was therefore proper. See, e.g., *People v. Pineda*, 373 Ill. App. 3d 113, 121 (2007). Given our disposition, we need not address the State's contention that the defendant's failure to provide an affidavit from Dugan in and of itself justified the petition's dismissal. See *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008); *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002).

¶ 21 On appeal, noting that in his opening statement to the jury, trial counsel indicated that Dugan would testify for the defense, the defendant argues that trial counsel was ineffective because he "promised to the jury that he would call Dugan as a witness but failed to do so despite Dugan having been available and willing to testify." As the State notes, however, this claim is forfeited because it was not an allegation that was raised in the defendant's postconviction petition, and we lack the authority to excuse the forfeiture. See *People v. Jones*, 213 Ill. 2d 498, 507-08 (2004).

¶ 22 The defendant's petition does not reference trial counsel's opening statement at all, and while it alleges that counsel "stated that he intended to present Dugan as a witness (R.603), but later rested without calling him," its citation to page 603 of the record is a citation to statements that counsel made when informing the court that he intended to call Dugan but had recently been advised that Dugan was "currently on probation for a felony conviction." We also note that the defendant's assertion that Dugan was "willing to testify" ignores that Dugan ostensibly changed his mind. Moreover, even if we were to liberally construe the defendant's petition as advancing the issue that he raises on appeal, we agree with the State that Dugan was not called as a witness due to "unexpected events" that occurred after counsel gave his opening statement, that the "unfulfilled

promises" cases that the defendant relies on in support of his claim are readily distinguishable from the present case, and that ultimately, the defendant is unable to establish that he was arguably prejudiced under the circumstances.

¶ 23

#### CONCLUSION

¶ 24 For the foregoing reasons, the trial court's summary dismissal of the defendant's petition for postconviction relief is hereby affirmed.

¶ 25 Affirmed.