

No. 1-14-0952

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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
)	Cook County, Criminal Division
Respondent-Appellee,)	
)	
v.)	No. 01 CR 24415
)	
CARLOS DESANTIAGO,)	Honorable William G. Lacy,
)	Judge Presiding
Petitioner-Appellant.)	

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in dismissing petitioner's second stage postconviction petition. Petitioner failed to substantially show that counsel was ineffective at trial and on appeal.
- ¶ 2 Petitioner Carlos DeSantiago appeals from a judgment of the Circuit Court of Cook County denying his postconviction petition at the second stage proceedings. For the following reasons, we affirm.

¶ 3

BACKGROUND

¶ 4 Following a jury trial, petitioner was found guilty of one count of first degree murder and two counts of attempt first degree murder. The trial court sentenced petitioner to 20 years in prison. The complete factual background underlying petitioner's convictions was recounted in our previous decision on direct appeal. *People v. Desantiago*, 365 Ill. App. 3d 855, 857-64 (2006).

¶ 5 In relevant part, petitioner and his friend, Arthur Guerrero, both Latin King gang members, were traveling in a white van in the early morning of September 9, 2001. While driving near the intersection of West 26th Street and South Hamlin Avenue in Chicago, petitioner and Guerrero became involved in a verbal altercation with three young males, members of the rival Two-Sixers gang. After exchanging gang signs and gang slogans with the three males, petitioner briefly exited the white van and, holding a metal object in his hands, confronted the three males.

¶ 6 Petitioner reentered the white van and drove it onto the sidewalk where the three males were walking. Two of the males, Jason Balboa and Alberto Ruiz, were able to run into the street and avoided being struck by the van driven by petitioner. However, one of the three males, Eduardo Plomero, was struck and driven over by the white van. Eduardo Plomero was taken to the hospital and later died of the injuries he sustained from being struck and driven over by the van.

¶ 7 Arnaldo Orozco testified at trial as to what he observed the night of the crime. While his car was stopped at the traffic light at the intersection of West 26th Street and South Hamlin

Avenue, Orozco observed the white van traveling on the sidewalk at a rate of approximately 30 to 40 miles per hour. Orozco also observed the white van pursuing three males, all of whom attempted to run away from the fast-approaching white van.

¶ 8 Orozco further testified that, while two of the males were able to avoid the oncoming white van by running off the sidewalk and into the street, the third male, who turned out to be Plomero, was unable to do so and was struck by the front passenger's side of the white van. Orozco stated that, after striking Plomero, the white van continued on and drove over Plomero, ultimately crashing between a concrete park bench and a building. Orozco testified that following the crash, he observed two men exit the driver's side door of the white van and flee the scene on foot. After he observed the incident, Orozco drove his car away from the scene and did not report the incident based on his fear that the incident was gang-related and based on his concern of gang retaliation.

¶ 9 Upon arriving at the scene, Officers Munguia and Rodriguez stopped petitioner and Guerrero, who had been fleeing the scene at a "suspicious" pace. Petitioner told Officer Rodriguez that someone forcefully attempted to obtain possession of his van. While they were speaking with petitioner and Guerrero, Officers Munguia and Rodriguez heard what they believed to be a loud breaking glass sound or gunshots originating from the area of the crashed van. Both Officer Munguia and Officer Rodriguez immediately ran toward the scene of the crashed van. Petitioner and Guerrero once again fled the scene on foot.

¶ 10 When Officers Munguia and Rodriguez approached the scene of the crashed van, the officers observed two males smashing the windows of the van with bolt cutters. The two males, later confirmed to be Balboa and Ruiz, were apprehended by the officers and taken to the 10th district Chicago police station. At that time, Balboa and Ruiz informed Officers Munguia and

Rodriguez that the driver of the van attempted to run them over and that the third male, Plomero, was still missing.

¶ 11 In response to a radio assignment, Officer Pruger reported to the scene of the crashed van. After speaking with Officers Munguia and Rodriguez, Officer Pruger noticed Plomero lying on the sidewalk in the alley between South Ridgeway Avenue and South Hamlin Avenue.

Plomero was badly injured and was bleeding profusely. Plomero was transported to Mt. Sinai Hospital and subsequently died of the injuries he sustained as a result of being struck and driven over by the van.

¶ 12 After fleeing the scene, petitioner called his girlfriend, Belin Avalos. During their conversation, petitioner stated that he had been chased by three males and indicated that he may have driven over one of the three males. Petitioner instructed Avalos to contact the Chicago police department and falsely report that the van had been stolen. Petitioner also instructed Avalos to inform anyone who inquired as to his whereabouts that he was in Kankakee for the weekend with Avalos' brother.

¶ 13 After speaking with petitioner, Avalos went to the Chicago police department and attempted to file a false report that the van had been stolen; however, she was unable to do so because she did not have the van's vehicle identification number. By the time Avalos returned from the police station, petitioner was already at their residence in Berwyn, Illinois.

¶ 14 At approximately 7 a.m. on September 9, 2001, four Chicago police department detectives traveled to petitioner's residence to investigate his role in the events that led to Plomero's extensive injuries and ultimate death. Avalos, who believed that the detectives were investigating her report that the white van had been stolen, stated that she double-parked the

white van and left the engine running while she carried her baby inside. Avalos stated that when she returned, the van had been stolen.

¶ 15 One of the detectives who traveled to petitioner's home, Detective Lascola, observed a pair of men's shoes in the front hallway, the soles of which contained slivers of glass. Avalos indicated that the shoes belonged to petitioner. Avalos told the detectives that petitioner was not home; however, Detective Lascola found petitioner lying on the bed in his bedroom. Petitioner was taken into custody and transported to the police station for questioning. Avalos was also taken into custody for questioning regarding her false police report. Avalos admitted that the white van had not been stolen and that she filed the false report at petitioner's request.

¶ 16 Once petitioner was told that Avalos admitted filing the false police report, he altered his story and provided a written statement to Assistant State's Attorney Guy Lisuzzo. In his statement, petitioner confirmed his role in the events surrounding Plomero's death. Significantly, petitioner stated that he had chased the three males onto the sidewalk because he "wanted to teach them a lesson." Petitioner testified that the three males threw some rocks at the van. Petitioner stated that he was driving the white van on the sidewalk at a rate of 30 miles per hour and stated that he heard a loud boom when he drove over Plomero with the van. Petitioner indicated that, had he wished to do so, he could have driven from the scene without driving on the sidewalk or chasing the three males.

¶ 17 On September 21, 2001, both Avalos and Guerrero testified before the grand jury. Guerrero confirmed the circumstances surrounding Plomero's death. Guerrero testified that, prior to striking and driving over Plomero, Guerrero told petitioner to stop chasing the three males so that he and petitioner could fight the three males. Avalos testified at that grand jury proceeding that petitioner had instructed her to file the false police report.

¶ 18 At petitioner's trial, Guerrero testified on behalf of the State. During his testimony, Guerrero stated that he was arrested at least 24 times, that he was a member of the Latin Kings gang, and that the Two-Sixers gang was a rival of the Latin Kings gang. Guerrero, however, testified that he was recently attacked and hit on the head with a shovel and, as a result, he could recall neither testifying before the grand jury on September 21, 2001, nor the events of September 9, 2001. The transcript of Guerrero's grand jury testimony was published to the jury.

¶ 19 Avalos also testified at petitioner's trial. In contrast to her grand jury testimony, Avalos testified at trial that, during their telephone conversation immediately following the incident, petitioner told her that he had been chased by a group of males who had bolt cutters, bottles, and rocks.

¶ 20 Petitioner testified on his behalf and stated that at approximately 1:30 a.m. on September 9, 2001, he was traveling in the white van with Guerrero toward Guerrero's home. Petitioner stated that while his white van was stopped at a traffic light at the intersection of South Hamlin Avenue and West 26th Street, six males began throwing rocks and bottles at the van he was driving. Petitioner stated that, in an effort to escape the situation, he turned left toward California Avenue.

¶ 21 Petitioner testified that, due to the late night traffic, he was unable to escape the six males, who continued to chase the van and throw rocks and bottles at it. Petitioner testified that he then exited the van and, holding a metal pipe, confronted the group of males. When he exited the van, one of the males was running toward him, holding his jeans, which gave petitioner the impression that the male had a gun. Petitioner stated that he immediately reentered the white van and, in an effort to avoid the traffic and quickly escape the scene, drove the van onto the sidewalk. Petitioner testified that he then heard five gunshots, which caused him to duck down

below the steering wheel. Petitioner stated that he then lost control of the van and crashed.

Finally, petitioner testified that he may have run over Plomero with the van.

¶ 22 During cross-examination, the State asked petitioner why, prior to his testimony at trial, he never mentioned that there were six males instead of three males; never mentioned that one of the males had a gun; never mentioned that he heard gunshots; never mentioned that he ducked down underneath the steering wheel to avoid the gunshots; and never suggested that he was acting in self defense when he drove onto the sidewalk. Petitioner stated that he never mentioned this information prior to trial because he was scared.

¶ 23 At the conclusion of the evidence, the jury found petitioner guilty of first degree murder of Eduardo Plombero and two counts of attempt first degree murder of Alberto Ruiz and Jason Balboa. On direct appeal, we affirmed petitioner's convictions and sentence. *People v. Desantiago*, 365 Ill. App. 3d at 858.

¶ 24 On June 26, 2007, through appointed counsel, petitioner filed an initial postconviction petition. The case was advanced to a second stage, and petitioner's counsel asked for a continuance to file an amended petition. On February 14, 2013, petitioner's counsel filed an amended postconviction petition, along with a Rule 651(c) certificate. The issues presented in the petition alleged: (1) prosecutorial misconduct due to the State's improper comments regarding key witness Arnaldo Orozco; (2) ineffective assistance of counsel for failing to call two character witnesses at trial; (3) that petitioner's due process rights were violated when the attorneys and the trial judge discussed the jury' questions during deliberations outside of his presence; and (4) that petitioner's due process rights were violated by the court's imposition of the mandatory supervised release term. Petitioner attached the affidavits of Michael Douglas and Tadeusz Mlynek, who stated that they would have testified as character witnesses if defense

counsel had contacted them. The State filed a motion to dismiss. The trial court granted the State's motion to dismiss and later denied petitioner's motion to reconsider. This appeal follows.

¶ 25

ANALYSIS

¶ 26 The Illinois Post-Conviction Hearing Act (Act) provides a process by which a criminal defendant may challenge his or her conviction. 725 ILCS 5/122-1 *et seq.* (West 2012). A postconviction action is a collateral attack on a prior conviction and sentence, "not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). To be accorded relief under the Act, a defendant must show there was a substantial deprivation of his or her constitutional rights in the proceedings that produced the conviction. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). The Act "provides for postconviction proceedings that may consist of as many as three stages." *Id.* at 472. During the first stage, the trial court has 90 days to summarily dismiss any "frivolous" petitions. *Id.* If not dismissed, the petition advances to the second stage. *Id.* During second stage proceedings, counsel may be appointed for the defendant and the State may move to dismiss the petition or answer its allegations. *Id.* If the petition is not dismissed at the second stage, it advances to the third stage and an evidentiary hearing is held. *Id.* at 472-73.

¶ 27 A second stage dismissal of a defendant's petition presents a legal question we review *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005). The relevant question raised during a second stage postconviction proceeding is whether the petition's allegations, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which requires an evidentiary hearing. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). All well-pled facts in the petition and affidavits are taken as true, but assertions that are really conclusions add nothing to the required showing to trigger an evidentiary hearing under

the Act. *Id.* The Act does not provide a defendant with an opportunity to retry the case. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). As a reviewing court, we can "affirm the trial court on any basis supported by the record." *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). We review the trial court's judgment, not its reasoning. *Id.*

¶ 28 On appeal, petitioner argues that the court erred in granting the State's motion to dismiss his postconviction petition because he made a substantial showing that counsel was ineffective at trial and on appeal. Petitioner contends that even though trial counsel did object through the State's direct examination of Arnaldo Orozco, because counsel did not remind the court of a pretrial ruling regarding Orozco's generalized fear of gang retaliation, counsel was ineffective. In its pretrial ruling, the court noted that Orozco's testimony that he had a generalized fear of gang retaliation would be admissible if Orozco changed his testimony on the stand to explain "his reasons for changing his testimony." Petitioner maintains that, since Orozco did not change his testimony at trial, trial counsel erroneously failed to object when the State elicited testimony from Orozco that he was reluctant to testify due to his fear of gang retaliation.

¶ 29 Petitioner argues next that trial counsel was ineffective for failing to call two character witnesses at his trial. Petitioner attached two affidavits from Michael Douglas and Tadeusz Mlynek who claimed that they would have testified as to petitioner's peaceful character had they been contacted by trial counsel. Furthermore, petitioner contends that appellate counsel was ineffective for failing to raise on direct appeal the issue of trial counsel's ineffectiveness.

¶ 30 To prevail 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). Specifically, "a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance created a reasonable probability that, but

for counsel's errors, the result of the proceeding would have been different.” *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We apply the two-pronged *Strickland* test where the trial court has entered a second-stage dismissal of an ineffective assistance of counsel claim. *People v. Alberts*, 383 Ill. App. 3d 374, 377 (2008); *Coleman*, 183 Ill. 2d at 400.

¶ 31 Unless the defendant makes both showings under *Strickland*, we cannot conclude that he received ineffective assistance. See *People v. Munson*, 171 Ill. 2d 158, 184 (1996). Courts may resolve ineffectiveness claims under the two-part *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. *People v. Hale*, 2013 IL 113140, ¶ 17; *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998); *Graham*, 206 Ill. 2d at 476 (“[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient.”).

¶ 32 Petitioner's ineffective assistance of trial counsel claims fail because he cannot show that he was prejudiced by counsel's alleged deficient performance. In order to establish the prejudice prong, a petitioner must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Graham*, 206 Ill. 2d at 476. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v. Enis*, 194 Ill. 2d 361, 376 (2000).

¶ 33 Here, the State presented overwhelming evidence of petitioner's guilt and even assuming *arguendo* that trial counsel's performance was unreasonable for the reasons argued by petitioner, petitioner failed to establish that there is a reasonable probability that the result of his trial would have been different. Several eyewitnesses testified at trial detailing petitioner's involvement in the crime. Arnaldo Orozco testified that he observed petitioner driving a van, at approximately 30-40 miles per hour on the north sidewalk of 26th Street. Orozco saw petitioner's van pursue

three males on the sidewalk and eventually hit the victim Plomero while the other two victims avoided being struck by running in the street.

¶ 34 One of the victims, Jason Balboa, testified that petitioner and Guerrero "threw" gang signs and they were trying to "disrespect him." Balboa and his two fellow Two-Sixers chased the van on foot until petitioner stopped, got out of the van holding a metal "club-like" object, confronted them, reentered the van, and drove onto the sidewalk. Balboa testified that he and Ruiz ran into the street and avoided being struck, but Plomero was struck by the van before petitioner crushed the van between a building and a concrete bench near the intersection of 26th Street and Hamlin Avenue. Balboa then saw petitioner and Guerrero getting out of the van and fleeing from the crash site on foot.

¶ 35 Officer Munguia testified that he and Officer Rodriguez stopped petitioner and Guerrero because they were running from the direction of the van at suspicious pace. While talking with them, the officers heard a sound originating from near the van and ran toward it, leaving them on the sidewalk. When the officers ran toward the van, petitioner and Guerrero again fled on foot.

¶ 36 Furthermore, Guerrero's grand jury testimony regarding the circumstances surrounding Plomero's death corroborated the eyewitness testimony in the case. Belin Analos, petitioner's girlfriend, testified that she received a call at approximately 2:00 a.m. from petitioner who told her to report the van as stolen and that he may have hit one of the guys on the street. Moreover, in his written statement to police, petitioner admitted that he had chased the three males onto the sidewalk because "he wanted to teach them a lesson," and then drove over Plomero with the white van.

¶ 37 Based on this record, just as we noted in our previous decision on direct appeal, we find that the evidence of petitioner's guilt was overwhelming. See *People v. Desantiago*, 365 Ill.

App. 3d at 871. In the light of the evidence presented at trial, calling two character witnesses to testify as to petitioner's peacefulness, or reminding the court of its pretrial ruling involving Orozco's generalized fear of gang retaliation would not have surmounted the overwhelming evidence of petitioner's guilt. In other words, petitioner cannot establish that there is a reasonable probability that the outcome of his trial would have been different but for counsel's alleged deficient performance. Accordingly, petitioner's claim that his trial counsel was ineffective has no merit.

¶ 38 Similarly, petitioner's claim that appellate counsel was ineffective for failing to raise on direct appeal a claim of ineffective assistance of trial counsel fails. In assessing claims of ineffective assistance of appellate counsel, the court follows the same two-pronged test of *Strickland v. Washington*, 466 U.S. 668. To succeed on a claim of ineffective assistance of appellate counsel, petitioner must show that the failure to raise a particular issue was objectively unreasonable and that his appeal was prejudiced by the omission. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). "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." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Thus, a petitioner has not suffered prejudice from appellate counsel's decision not to raise certain issues on appeal unless such issues were meritorious. *Easley*, 192 Ill. 2d at 329. Here, petitioner failed to establish that he was prejudiced by trial counsel's alleged deficient performance. Accordingly, appellate counsel was not ineffective for not including on direct appeal a claim of ineffective assistance of trial counsel that would not have been meritorious.

¶ 39

CONCLUSION

No. 1-14-0952

¶ 40 Based on the foregoing, we affirm the circuit court's second stage dismissal of petitioner's postconviction petition.

¶ 41 Affirmed.