2017 IL App (1st) 150837-U
Order filed: June 16, 2017

SIXTH DIVISION

No. 1-15-0837

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. 08 CR 22936
	)	
KIEARRE REESE,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the first-stage dismissal of defendant's postconviction petition, finding that defendant forfeited his claim of actual innocence by failing to raise it in his petition and that the court did not err in ruling that defendant's claims of ineffective assistance of trial counsel were frivolous or patently without merit.

¶ 2 A jury convicted defendant, Kiearre Reese, of the first-degree murder of Marshawn Melcher and the attempted first-degree murder of Terelle Griffin and the trial court sentenced him to a total of 76 years' imprisonment. On direct appeal, this court affirmed. See *People v. Reese*, 2014 IL App (1st) 113003-U. Defendant subsequently filed a *pro se* postconviction petition, which the court summarily dismissed at the first stage of the proceedings. On appeal, defendant contends the postconviction court erred in summarily dismissing his petition, where:

(1) he presented newly discovered evidence of actual innocence; and (2) he presented non-frivolous claims of ineffective assistance of trial counsel. We affirm.

¶ 3 The State's theory of the case was that, at about 10:30 p.m. on August 8, 2008, defendant shot and killed Mr. Melcher and shot and injured Mr. Griffin in Meyering Park in Chicago after an argument erupted during a dice game. At trial, the State presented evidence from seven witnesses, including two eyewitnesses to the shooting, Marvel Williams and Mr. Griffin.

¶ 4 Mr. Williams was 11 years old at the time of the shooting. He testified that at about 10:30 p.m. on August 8, 2008, he observed a number of individuals, including defendant, playing dice at Meyering Park. He saw Mr. Melcher and Mr. Griffin join the game. At some point during the dice game, Mr. Melcher asked defendant to give him two dollars so that Mr. Melcher could get on the bus to go home. Defendant and Mr. Melcher began to argue and defendant shot him in the chest. Defendant then shot Mr. Griffin. Mr. Williams heard a total of four gunshots. He did not see Mr. Melcher or Mr. Griffin with a gun. At some point after the shooting, Mr. Williams saw an individual named Darius grab a gun from beneath a bush and run off with it before the police arrived.

¶ 5 Mr. Griffin testified that on the night of the shooting he went to play a dice game with Mr. Melcher, Martino Mosby, and Darius Ballark. At some point, he left the park because someone told him that the dice game was going to be robbed. He returned 20 to 30 minutes later and soon after observed defendant shoot Mr. Melcher. As Mr. Griffin began to walk away, defendant shot him in the chest. Mr. Griffin testified that neither he nor Mr. Melcher had any weapons at the park, and never threatened defendant. On cross-examination, Mr. Griffin acknowledged he had five prior felony convictions for drug offenses and an escape from electronic monitoring, and he also admitted to lying to the police about his name and birth date.

He admitted stashing guns in the bushes of the park in the past because it was part of his drug territory, but testified he did not do so on the night of the shooting.

¶ 6 Detective Clifford Martin testified he arrived at the park at about 11:30 p.m. on August 8, 2008. Police officers had already cordoned off the area, questioned people at the scene, and collected evidence. Detective Martin did not speak with Mr. Williams that night because he had already been taken home.

¶ 7 Detective Martin and his partner went to the hospital, where they attempted, unsuccessfully, to speak with Mr. Griffin, who was undergoing a medical procedure. They spoke to Mr. Griffin's mother instead. Subsequently, Detective Martin put together a six-person photo array. On August 12, 2008, he returned to the hospital with the photo array and Mr. Griffin identified defendant as the shooter.

¶ 8 Detective Martin went to Mr. Williams' home on August 15, 2008, and spoke with him about the shooting. Mr. Williams stated that he saw a dice game being robbed and that Mr. Melcher asked the shooter for two dollars. The shooter then pulled out a gun and shot Mr. Melcher and Mr. Griffin. Mr. Williams stated he could not identify the shooter. Detective Martin did not show him the photo array.

¶ 9 On August 31, 2008, Mr. Williams and his mother came to the police station for further questioning. Detective Martin showed Mr. Williams the photo array and he identified defendant as the shooter. Mr. Williams told Detective Martin that defendant "won all the money" in the dice game on August 8, 2008, and Mr. Melcher became angry and gave some sort of signal to Mr. Griffin. A man, in a hooded sweatshirt, handed defendant a gun, and he shot Mr. Melcher and Mr. Griffin. Mr. Griffin tried to retrieve a gun from some bushes but was unable to do so.

¶ 10 During grand jury proceedings in November 2008, Mr. Williams gave a different account of how defendant retrieved the gun, stating he had seen a girl (not a man in a sweatshirt) pass a gun to defendant at the park prior to the shooting.

¶ 11 The parties stipulated that Dr. Kendall Crowns would testify he performed Mr. Melcher's autopsy and opined that Mr. Melcher died of a gunshot wound to the chest and the manner of death was homicide.

¶ 12 The State rested and defendant did not present any evidence. Following a preliminary jury instruction conference, the court admonished defendant and asked him whether it was his decision to seek jury instructions on the lesser-mitigated offense of second-degree murder and the lesser-included offense of aggravated battery with a firearm. Defendant stated that he wanted the jury to receive those instructions.

¶ 13 During the final jury instruction conference, defense counsel argued for the lesser-included and lesser-mitigated instructions, and the court subsequently gave those instructions to the jury.

¶ 14 During its closing arguments, the State argued it proved its case beyond a reasonable doubt because witness testimony established that defendant intentionally shot and killed Mr. Melcher and shot and injured Mr. Griffin with no justification. Defense counsel argued that defendant was misidentified as the shooter. Defense counsel did not argue self-defense or that the jury should find defendant guilty of second-degree murder or aggravated battery with a firearm.

¶ 15 The jury convicted defendant of first-degree murder and attempted first-degree murder and the trial court sentenced him to 76 years' imprisonment. On direct appeal, defendant argued "he was denied effective assistance of counsel because trial counsel pursued a second degree

murder theory in both cross-examination and in the instructions tendered to the jury, but abandoned that theory in closing argument in favor of a theory of misidentification." *Reese*, 2014 IL App (1st) 113003-U, ¶ 2. The appellate court affirmed. *Id.*

¶ 16 Defendant subsequently filed a *pro se* postconviction petition. In pertinent part, defendant alleged his trial counsel provided ineffective assistance by: (1) coercing him into waiving his right to testify at trial; (2) denying him his right to personally decide whether to pursue a defense based on second-degree murder and aggravated battery with a firearm; and (3) failing to interview, investigate or subpoena a prospective defense witness named Lamar Collins-Thompson. Defendant's petition included a notarized affidavit signed by Mr. Collins-Thompson. Mr. Collins-Thompson attested that on August 8, 2008, he walked to the park and heard Mr. Griffin tell another man that he and Mr. Melcher were going to rob defendant because defendant was cheating at dice. Defendant and Mr. Melcher began arguing. Mr. Griffin went to the bushes to retrieve something. Mr. Griffin came back with a black gun and defendant shot at him three or four times. Mr. Collins-Thompson got on the ground and saw a man take the gun from Mr. Griffin and run out of the park.

¶ 17 Mr. Collins-Thompson attested he saw defendant at Menard Correctional Center in 2013 after the trial. Mr. Collins-Thompson told defendant he had witnessed the shooting but that he had not come forward because he did not want "trouble from the boys in the hood." He also did not come forward sooner because at the time of the shooting he had just come home from the juvenile center and was on probation. He was not interviewed by police or by defendant's attorney.

¶ 18 On January 28, 2015, the court summarily dismissed defendant's postconviction petition at the first stage of the proceedings, finding his claims were frivolous and patently without merit. Defendant appeals.

¶ 19 A postconviction proceeding is not an appeal of the underlying judgment; rather, it is a collateral proceeding in which defendant may challenge a conviction or sentence for violations of constitutional rights. *People v. Tate*, 2012 IL 112214, ¶ 8. Any issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. *Id*. Also, issues that could have been raised on direct appeal, but were not, are forfeited. *Id*.

¶ 20 In a noncapital case, the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), creates a three stage procedure for postconviction relief. At stage one, the trial court independently examines the petition, taking the allegations as true, to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *Tate*, 2012 IL 112214, ¶ 9. Review of a stage one dismissal is *de novo*. *Id*. ¶ 10.

¶ 21 I. Defendant's Claim Of Actual Innocence

¶ 22 First, defendant contends the court erred in summarily dismissing his postconviction petition because it adequately alleged a claim of actual innocence, based on Collins-Thompson's affidavit indicating that defendant fired his weapon in self-defense only after Mr. Griffin approached with a black gun.

¶ 23 The due process clause of the Illinois constitution affords a postconviction petitioner the right to assert a freestanding claim of actual innocence based on newly discovered evidence. *People v. Ortiz*, 235 Ill. 2d 319, 331 (2009). Substantively, the evidence in support of the claim

must be newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial. *Id*. at 333.

¶ 24 Evidence is newly discovered where it was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Edwards*, 2012 IL 111711, ¶ 34. Defendant argues on appeal that Mr. Collins-Thompson's willingness and ability to testify on his behalf is newly discovered, because he had never previously come forward and stated that he had witnessed the shooting and was willing to testify, and therefore he could not have been discovered before trial through the exercise of due diligence.

¶ 25 Further, defendant contends Mr. Collins-Thompson's testimony was material and not merely cumulative and would probably change the result on retrial, where he would testify (unlike any other witness) that Mr. Griffin approached defendant brandishing a gun just prior to the shooting. Defendant argues that Mr. Collins-Thompson's testimony would likely lead to his acquittal based on self-defense or, at most, a conviction of second-degree murder based on an unreasonable belief in self-defense.

¶ 26 However, a review of defendant's postconviction petition reveals that he never asserted therein a claim of actual innocence based on Mr. Collins-Thompson's newly discovered affidavit. Rather, defendant argued that his trial counsel was ineffective for failing to discover and subpoena Mr. Collins-Thompson to testify at trial. In this appeal, defendant concedes that "the circuit court reasonably rejected [his] ineffective assistance of counsel argument" premised on trial counsel's failure to discover and subpoena Mr. Collins-Thompson, but argues that the court should have considered whether the facts and evidence supported a different theory, actual innocence. The issue, then, is whether defendant has forfeited review of his claim of actual innocence by failing to raise it in his petition.

¶ 27 Section 122-3 of the Act contains a forfeiture rule.[1] *People v. Williams*, 2015 IL App (1st 131359, ¶14. Section 122-3 states that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2012). In analyzing the forfeiture rule set forth in section 122-3, the *Williams* court noted that in *People v. Jones*, 213 Ill. 2d 498 (2004), "our supreme court stated that this forfeiture rule is not merely a suggestion for appellate courts. *Id*. at 505-06 (criticizing this court, stating that it 'has repeatedly overlooked the waiver language of section 122-3 and has addressed claims raised for the first time on appeal for various and sundry reasons'). In fact, appellate courts are 'not free, as [the supreme] court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition.' *Id*. at 508; see also *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006) (stating that the appellate court, in the case before it that ignored the language of section 122-3, 'is yet another example of that inappropriate propensity' to overlook forfeiture of arguments not raised in a postconviction petition). Accordingly, we may not excuse a defendant's forfeiture when he argues on appeal a contention not made in his postconviction petition. See *People v. Reed*, 2014 IL App (1st) 122610, ¶43 ('This court lacks the authority to excuse an appellate forfeiture caused by the failure of a litigant to include issues in his or her postconviction petition.')." *Williams*, 2015 IL App (1st) 131359, ¶14.

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[1] "While section 122-3 of the Act (725 ILCS 5/122-3 (West 2012)) and *People v. Jones*, 213 Ill. 2d 498, 505 (2004), refer to this rule as a 'waiver' rule, we note that later cases refer to this rule as a 'forfeiture' rule. See, *e.g*., *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); *People v. Reed*, 2014 IL App (1st) 122610, ¶¶ 42-43; *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 45. Moreover, 'forfeiture applies to issues that could have been raised but were not,' whereas 'waiver is the intentional relinquishment or abandonment of a known right.' (Internal quotation marks omitted.) *People v. Phipps*, 238 Ill. 2d 54, 62 (2010). In the present case, defendant has not intentionally relinquished a known right, and therefore, we will use the term 'forfeiture' unless directly quoting the Act or case law using the term 'waiver.' " *Williams*, 2015 IL App (1st) 131359, ¶ 14, n.1.

¶ 28 Defendant argues he did not forfeit his actual innocence argument, and he cites in support *People v. Thomas*, 2014 IL App (2d) 121001. In *Thomas*, the circuit court ruled that a statement made by an incarcerated minor, admitting to the murder with which the defendant was charged, was inadmissible because the statement was unreliable as it had not been corroborated by other evidence. *Id*. ¶ 1. The minor had confessed to detectives and a jail chaplain, but recanted the confession in an interview recorded on video. *Id*. ¶¶ 1, 2. In his *pro se* postconviction petition, the defendant alleged his appellate counsel provided ineffective assistance by failing to argue his trial counsel's ineffectiveness based on trial counsel's failure to take steps to ensure that the minor's confession was admitted. *Id*. ¶ 2. The court summarily dismissed the petition. *Id*. ¶ 3. On appeal, the defendant argued that "appellate counsel was ineffective for failing to argue that the *trial court* erred in excluding [the minor's] conversations with the chaplain and for failing to argue that the chaplain's testimony would have corroborated [the minor's] statement to the detectives." (Emphasis in original.) *Id*. The State responded that the defendant forfeited this argument because his postconviction petition focused on the minor's statement to the detectives, not to the chaplain, and attributed the error to trial counsel, not the trial court. *Id*. ¶ 4.

¶ 29 The *Thomas* court noted that "[t]he forfeiture issue is a close one, but the standard of review for a first-stage dismissal is *de novo*, and we have a duty to construe *pro se* postconviction petitions liberally and to allow borderline petitions to proceed." *Id*. ¶ 5. The *Thomas* court reasoned:

> "A liberal construction of the *pro se* petition, defendant's affidavit, and the record shows that the petition alleges that (1) appellate counsel was ineffective for omissions on direct appeal, (2) trial counsel failed to take the proper steps to corroborate [the minor's confession], (3) [the chaplain] would have testified at trial that [the minor]

> confessed, (4) the trial court excluded [the minor's] separate statements to the detectives and to [the chaplain], and (5) [the minor's] statement to the detectives would have been admitted upon proper corroboration. The logical conclusion to be drawn from these allegations is what defendant argues in this appeal: [the chaplain's] testimony is the 'other evidence' that should have been admitted to corroborate [the minor's] statement to the detectives." *Id*. ¶ 62.

Accordingly, the *Thomas* court rejected the State's forfeiture argument and concluded that the petition asserted a constitutional claim sufficient to survive the first stage of postconviction proceedings. *Id*. ¶ 63.

¶ 30 In the present case, defendant argues that, given a similarly liberal construction as that employed in *Thomas*, his *pro se* postconviction petition should be viewed as sufficiently alleging a claim of actual innocence based on the newly discovered evidence represented by Collins-Thompson's affidavit.

¶ 31 We disagree. *Williams* and *Reed* are informative. In *Williams*, the defendant filed a *pro se* postconviction petition alleging his trial counsel provided ineffective assistance. *Williams*, 2015 IL App (1st) 131359, ¶ 10. The circuit court dismissed the defendant's petition. *Id*. ¶ 12. On appeal, the defendant argued the court erred in dismissing his petition as it set forth an arguable claim that his *appellate counsel* was ineffective. *Id*. ¶ 13. The State countered that defendant forfeited review of his claim of ineffectiveness of appellate counsel by failing to raise it in his postconviction petition. *Id*. In response, the defendant argued that, giving his petition a liberal construction, the appellate court should "extrapolate" an argument that his appellate counsel was ineffective even though the petition only referenced the ineffectiveness of trial counsel. *Id*.

¶ 32 The appellate court found that the defendant forfeited review of his claim of ineffectiveness of appellate counsel. *Id.* ¶¶ 15-25. The appellate court expressly distinguished *Thomas*, stating:

> "[U]nlike *Thomas*, where a defendant's claim on appeal referenced the same subject matter and attacked the performance of the same attorney as in his petition ***, in this case, only one element of defendant's argument overlaps: the subject matter. *** Merely because the subject matter is similar, we cannot simply substitute defendant's argument on appeal that his *appellate* counsel was ineffective into his petition's argument that his *trial* counsel was ineffective." (Emphasis in original.) *Id.* ¶ 22.

¶ 33 In *Reed*, the defendant filed a *pro se* postconviction petition alleging his appellate counsel was ineffective for failing to challenge the admissibility of his alleged oral statement on hearsay grounds. *Reed*, 2014 IL App (1st) 122610, ¶ 59. The circuit court summarily dismissed the petition. *Id.* ¶ 1. On appeal, the defendant argued his direct appellate counsel was ineffective for failing to challenge the admissibility of his statement on constitutional grounds different than those stated in the postconviction petition. *Id.* ¶ 59. The appellate court applied the forfeiture rule, stating:

> "Although both claims nominally address [the defendant's] statement to the police, the claim in the petition is that [the defendant's] 'alleged' statement may not have been his statement at all (or not inculpatory), whereas the claim asserted on appeal is that [the defendant] provided a statement, but the statement was illegally obtained, regardless of whether it was inculpatory. These arguments are not necessarily inconsistent, but they are distinct from each other." *Id.*

¶ 34 In the present case, defendant's postconviction petition and his current appeal share the same general subject matter (Collins-Thompson's affidavit) but they are otherwise inconsistent. Defendant's petition alleged his trial counsel provided ineffective assistance for failing to discover and subpoena Mr. Collins-Thompson and then present his testimony at trial. By contrast, defendant argues on appeal that Mr. Collins-Thompson could *not* have been discovered before trial through the exercise of due diligence and therefore that his affidavit constitutes "newly discovered evidence" of defendant's actual innocence. Defendant's argument on appeal is not merely distinct from the claim in his postconviction petition—his appellate argument *contradicts* his postconviction claim. Accordingly, we find the present case to be more similar to *Williams* and *Reed*, rather than *Thomas*, in that even with a liberal construction, defendant's petition cannot be construed as alleging a claim of actual innocence based on newly discovered evidence that could not have been discovered prior to trial. Therefore, we hold that defendant forfeited his claim of actual innocence based on newly discovered evidence by failing to raise it in his postconviction petition.

¶ 35 Defendant argues that *People v. Hodges*, 234 Ill. 2d 1 (2009), compels a different result. In *Hodges*, the defendant filed a *pro se* postconviction petition alleging that his trial counsel was ineffective for failing to produce three witnesses who would have supported his claim of self-defense. *Id*. at 6. The circuit court summarily dismissed the defendant's petition. *Id*. at 8. On appeal, the appellate court affirmed, holding that even if the witnesses had testified, their testimony would not have supported the defendant's theory that he acted in self-defense. *Id*. at 19-20. The supreme court granted the defendant's petition for leave to appeal. *Id*. at 4.

¶ 36 The supreme court agreed with the appellate court that the testimony of the three witnesses would not have supported the defendant's theory of self-defense. *Id*. at 20. However,

the supreme court then proceeded to address whether the witnesses would have supported a theory of second-degree murder. *Id*. The State argued that the issue was forfeited where the defendant failed to raise the issue of second-degree murder in his postconviction petition, and instead focused on self-defense. *Id*. at 21. The supreme court disagreed, stating:

> "The State's strict construction of defendant's petition is inconsistent with the requirement that a *pro se* petition be given a liberal construction. Where defendants are acting *pro se*, courts should review their petitions 'with a lenient eye, allowing borderline cases to proceed.' [Citation.] In the case at bar, the issue of whether defendant's *pro se* petition, which focused on self-defense, could be said to have included allegations regarding 'unreasonable belief' second degree murder—*i.e*., imperfect self-defense—is at minimum the type of 'borderline' question which, under a liberal construction, should be answered in defendant's favor." *Id*.

¶ 37 In contrast to *Hodges*, no amount of liberal construction here can disguise the fact that the claim on appeal that Collins-Thompson's affidavit was newly discovered evidence of actual innocence that could not have been discovered prior to trial *contradicts* the allegations in the petition that counsel was ineffective for failing to discover and subpoena Mr. Collins-Thompson prior to trial. When dismissing defendant's postconviction petition, the circuit court properly considered only what had been alleged in the petition, *i.e*, the argument that counsel was ineffective for failing to discover and subpoena Mr. Collins-Thompson, and did not consider whether defendant was actually innocent, as that argument was never made. Thus, defendant's claim of actual innocence based on Mr. Collins-Thompson's newly discovered affidavit, raised for the first time on appeal, is forfeited.

¶ 38 We note that, despite the forfeiture, defendant is not without recourse to subsequently raise the issue of his actual innocence based on newly discovered evidence. Defendant may file a successive petition in which that claim of actual innocence is properly alleged. See *People v. Edwards*, 2012 IL 111711.

¶ 39 II. Defendant's Claim Of Ineffective Assistance Of Counsel

¶ 40 Generally, to prevail on a claim of ineffective assistance of counsel, defendant must show both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his defense. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). At the first stage of postconviction proceedings, "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." *Hodges*, 234 Ill. 2d at 17.

¶ 41 Defendant contends the court erred in summarily dismissing his petition because it alleged an arguable claim of ineffective assistance of counsel. Specifically, defendant argues that the decision to submit an instruction on the lesser-included offense of aggravated battery with a firearm belonged to him alone (and not his counsel) because such an instruction exposed him to potential criminal liability that he might otherwise have avoided if neither the trial judge nor the State sought that instruction (*People v. Johnson,* 2013 IL App (1st) 103361, ¶ 27 (citing *People v. Wilmington*, 2013 IL 112938)) [2] and that he informed his counsel, as well as the court

[2] Defendant also argues that he alone had the right to decide to submit an instruction on the lesser-mitigated offense of second-degree murder. However, unlike an instruction on a lesser-included offense, the decision to submit an instruction on a lesser-mitigated offense does not belong exclusively to the defendant "because the defendant can only be guilty of second degree murder if first proven guilty of first degree murder. Therefore, the second-degree murder instruction does not subject a defendant to 'potential criminal liability which he might otherwise avoid.' " *Id*. (citing *Wilmington*, 2013 IL 112938, ¶ 48).

during the jury instruction conference, that he wanted an instruction submitted on aggravated battery with a firearm. The instruction was submitted and given to the jury, but during closing arguments his counsel argued only for an acquittal based on misidentification. Defendant argues that by unilaterally abandoning the defense of aggravated battery with a firearm during closing arguments, trial counsel effectively "usurped his right to pursue a verdict" based on that defense and thereby arguably committed ineffective assistance.

¶ 42 Initially, we note that on direct appeal, the appellate court held that defense counsel's decision to argue only a misidentification defense was a matter of trial strategy that did not constitute ineffective assistance. *Reese*, 2014 IL App (1st) 113003-U, ¶ 13. Accordingly, defendant's claim of ineffective assistance based on counsel's closing argument is barred by *res judicata*. *Tate*, 2012 IL 112214, ¶ 8.

¶ 43 Even if defendant's claim was not barred by *res judicata*, we would affirm the circuit court. While it is for the defendant to decide whether to submit an instruction on a lesser-included offense, "[t]he content of closing argument is generally considered a matter of [counsel's] trial strategy." *People v. Shamlodhiya*, 2013 IL App (2d) 120065, ¶ 15. In *Shamlodhiya*, the defendant submitted an instruction on the lesser-included offense of involuntary-manslaughter, but during closing arguments his counsel stated that involuntary-manslaughter would be a compromise verdict. *Id*. ¶ 21. Counsel stated: "I don't want a compromised verdict, and I don't want first degree murder, because the State can't prove it." *Id*. On appeal, the defendant argued that counsel's closing argument constituted a withdrawal of the involuntary-manslaughter instruction and that whether to make such a withdrawal was a question only he could decide. *Id*. ¶ 11. The appellate court stated:

> "[W]e cannot hold that defendant's awareness (or lack thereof) of defense counsel's trial strategy regarding closing argument constitutes a constitutional issue. Such a holding would elevate to constitutional magnitude countless issues that traditionally fall within the realm of trial strategy (*e.g.*, 'had I known trial counsel would not bring a motion to suppress certain evidence, I would have accepted the State's offer to plead guilty to a lesser charge'; 'if I had known counsel was going to be so reckless with peremptory strikes and run out of them before the end of *voir dire*, I would have chosen a bench trial'; or 'counsel never told me he would not call a certain witness to establish an alibi defense, otherwise I would have testified to do so'). In short, we are unpersuaded by defendant's attempt to transmute trial strategy into constitutional error. *** Anything short of the functional withdrawal of defendant's request that the jury consider involuntary manslaughter is insufficient to warrant a reversal." *Id.* ¶ 18.

¶ 44 The appellate court then considered defense counsel's closing argument and held: "We do not see where in this argument counsel tells the jury to disregard the involuntary-manslaughter instruction. It is true he calls it a 'compromised verdict' and states that he 'does not want a compromised verdict.' However, he also states that he does not 'want first degree murder.' Clearly, the jury did not disregard the first-degree murder instruction simply because counsel stated he did not want it, so it is unclear to us why we should conclude that the involuntary-manslaughter instruction was disregarded based on a similar statement." *Id.* ¶ 21.

¶ 45 The appellate court concluded that it saw "nothing in counsel's closing argument that would amount to the functional withdrawal of the involuntary-manslaughter instruction." *Id.* ¶ 20.

¶ 46 Similarly, in the present case, counsel's decision to argue misidentification was a matter of trial strategy in which he decided not to present the legally permissible but logically inconsistent theories that: (1) defendant was not the shooter; but (2) if he was the shooter, then his crime only constituted aggravated battery with a firearm. Instead, defense counsel opted only to argue that defendant was misidentified as the shooter. By making such an argument, counsel did not foreclose the jury from considering the evidence and the instruction on the lesser-included offense of aggravated battery with a firearm and to convict the jury of the lesser-included offense. Accordingly, in the absence of the functional withdrawal of the aggravated battery with a firearm instruction, we find no arguable claim of ineffective assistance of counsel.

¶ 47 Next, defendant argues that the court erred in summarily dismissing his petition because it alleged an arguable claim of ineffective assistance of counsel based on his trial counsel "coercing" him into waiving his right to testify at trial.

¶ 48 The decision whether to testify on his own behalf belongs to defendant, although this decision should be made with the advice of counsel. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). "Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify." *Id.*

¶ 49 Defendant's affidavit belies his assertion of ineffective assistance of counsel. In his affidavit, defendant stated that, prior to trial, defense counsel told him he would have to testify to give his rendition of the shooting. In the middle of trial, defense counsel changed his mind and informed defendant he should not testify because the State's witnesses supported the theories of self-defense and second-degree murder, and his testimony would only be harmful because the State would then be able to bring up his background and his decision to leave town following the

shooting. Defense counsel also told defendant that if he testified, the State would question him about his statement to police. Defendant asked whether counsel had spoken to defendant's mother about not testifying, and counsel stated he had not yet talked to her about it, but that she would likely agree. Relying on counsel's advice, defendant agreed not to testify.

¶ 50 The trial court subsequently admonished defendant that he had the right to testify or not to testify, that he could discuss the decision with his attorney, but that the decision whether to testify ultimately belonged to defendant. Defendant told the court that after speaking with his attorney, he had decided not to testify and that the decision had been made freely and voluntarily and not as the result of any threats, force or promises. Defendant stated that he understood it was his decision alone as to whether to testify. The court found that defendant had knowingly and voluntarily given up his right to testify.

¶ 51 Defendant's affidavit and his responses to the admonishment of the court indicate no "coercion" on counsel's part; rather, counsel advised defendant not to testify as a matter of trial strategy, and defendant ultimately took counsel's advice. As a matter of trial strategy, counsel's advice not to testify did not arguably constitute ineffective assistance (*id*.) and, therefore, the court did not err in dismissing defendant's petition. See also *People v. Palmer*, 2017 IL App (4th) 150020, ¶¶ 22-23 (holding that the circuit court did not err in summarily dismissing the defendant's postconviction petition where his petition alleged ineffectiveness of counsel by refusing defendant his right to testify, but where the record demonstrated that the court admonished the defendant about his right to testify and that the decision belonged solely to him and defendant demonstrated no equivocation or misunderstanding as he waived his right to testify).

¶ 52 Defendant contends on appeal that his petition alleged that his counsel was arguably ineffective because counsel "tricked" him into giving up his right to testify by falsely stating that his testimony would allow the State to question him about his statement to police. Defendant cites to a pretrial hearing in which the State said that it would not be using the defendant's statement in its case-in-chief. Defendant argues, "In threatening [him] with the admission of any statements, then, counsel was either lying or was so incompetent that he did not know what the evidence would be." However, careful review of the pretrial hearing shows that the State further said, "If the defendant hits the witness stand and misinform[s] anyone, we would then reconsider [the decision not to use defendant's statement]." Thus, counsel's advice to defendant that his testimony could cause the State to question him about his statement to police was not false, but, rather, was an accurate reflection of what might occur at trial should defendant disregard counsel's advice and decide to testify. We find no arguable claim of ineffective assistance and no error by the court in dismissing defendant's petition.

¶ 53 Finally, defendant contends on appeal that his petition alleged that his counsel was arguably ineffective because he tricked defendant into giving up his right to testify by failing to tell him that counsel would argue only a misidentification defense during closing argument. As discussed earlier in this order, defense counsel's closing argument focusing on a misidentification defense was a strategic decision that does not constitute an arguable claim of ineffective assistance. See also *Reese*, 2014 IL App (1st) 113003-U, ¶ 13.

¶ 54 For the foregoing reasons, we affirm the circuit court.

¶ 55 Affirmed.