

No. 1-15-1326

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 03 CR 19185
	)	
MICHAEL ORTEGA,	)	
	)	Honorable Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.
	)	

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JUSTICE DELORT delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Connors concurred in the judgment.

**ORDER**

- ¶ 1 **Held:** We affirm the second stage dismissal of defendant’s postconviction petition because he failed to make a substantial showing of a constitutional violation.
- ¶ 2 Defendant Michael Ortega appeals from the second stage dismissal of his petition for relief under the Post–Conviction Hearing Act, 725 ILCS 5/122–1 *et seq.* (West 2008) (Act). On appeal, defendant argues that he made a substantial showing that his constitutional right to the effective assistance of trial counsel was violated. We affirm.

¶ 3

## BACKGROUND

¶ 4 This court discussed the evidence presented at trial at length in an order on defendant's direct appeal (*People v. Ortega*, No. 1-05-0110 (Feb. 7, 2007) (unpublished order under Supreme Court Rule 23)), so herein we will only discuss the facts necessary for the disposition of his current post-conviction petition. Defendant was charged by indictment with multiple counts of first degree murder, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon. The crimes in question involved the murder of Kenneth Lawson. At trial, defendant argued that the State's witnesses mistakenly identified him as the offender. Pertinent to this appeal of defendant's second-stage postconviction remand, defendant testified that he did not commit the murder, but could not recall his whereabouts on the night in question. During closing argument, defense counsel specifically argued:

“We believe we did the best we could [to] show you all the evidence. I don't want to be accused of, and Michael does not want to be accused of holding back. He got on the stand, and he told you what happened. If Michael knew where he was in the early morning hours of July 13th, it would have been a lot easier, but all of you, unless it is a special day or a birthday or a holiday, today is November 22nd, and unless you have some business where you keep a date book every day that you might have as to where you are every day, if somebody knocks on your door and says, ‘Where were you October 16th at two o'clock in the morning,’ \* \* \* how many of us with certainty go, ‘Wait a second, I was at my cousin's house, it was his birthday.’ If Michael wanted to create an alibi and he did this, he could have ran off, got friends and family and said, ‘If the people come to you, I have been sleeping here for the last three hours.’ He could have said to the police on

the 5th of August, ‘You want to know where I was on July 13th? Go back to these four people, and they will vouch for the fact that I was three hundred miles away sleeping at their house.’ He had ample opportunity to create an alibi if he wanted to, but Michael went about his life, stayed at home, was home, went to the police.”

¶ 5 A jury found defendant guilty of first degree murder, and he was sentenced to 46 years in prison. This court affirmed defendant’s conviction. See *Ortega*, No. 1-05-0110 (Feb. 7, 2007) (unpublished order under Supreme Court Rule 23).

¶ 6 On July 2, 2008, defendant filed a *pro se* postconviction petition alleging, among other things, that he received ineffective assistance of trial counsel for failure to properly investigate and present an alibi defense. Defendant contended that his mother and sister would have provided him with alibi testimony, but counsel failed to interview them and call them as witnesses at trial. The affidavit he attached to his petition not only reiterated that he had no personal recollection of his whereabouts at the time of the murder, but also stated “the fact I did not remember my whereabouts and was unwilling to testify otherwise, showed I was credible.” In addition, defendant stated that, although he informed trial counsel that his mother and sister would testify that he was at home at the time of the alleged incident, counsel refused to call them as alibi witnesses. Counsel explained that their testimony would not be credible absent corroboration by evidence such as a credit card receipt or airplane ticket.

¶ 7 Defendant supplemented his petition with affidavits from his mother, Louise Ortega, and his sister, Leticia Ortega. The nearly identical affidavits both attested that defendant was at home with them at the time of the murder. The affidavits included statements that defendant told his mother and sister that he had instructed his counsel to have them testify on his behalf, but

counsel advised family members do not testify because the jury would not believe them. They also attested that counsel never interviewed them before trial.

¶ 8 On August 15, 2008, the trial court summarily dismissed defendant's postconviction petition as frivolous and patently without merit, finding that defendant's claims were refuted by the record. Defendant appealed. On June 8, 2010, this court reversed the trial court's decision, finding that defendant's allegation of ineffective assistance of counsel adequately presented an arguable constitutional claim. See *People v. Ortega*, No. 1-08-2680 (Jun. 8, 2010) (unpublished order under Supreme Court Rule 23). The court found that the proposed testimony of defendant's mother and sister, who did remember where he was that night and would have testified that he was at his mother's house at the time of the murder, "could only have bolstered the defense theory of misidentification [and] it is at least arguable that counsel's failure to investigate defendant's assertion, to interview the women, and to present their testimony at trial fell below an objective standard of reasonableness."

¶ 9 Upon remand for second stage postconviction proceedings, appointed counsel filed a supplemental postconviction petition addressing only the claim of ineffective assistance of trial counsel. Defendant argued that counsel was ineffective for failing to support his theory of misidentification with the alibi defense. He contended that counsel failed to thoroughly interview and investigate known alibi witnesses to corroborate his claim of actual innocence. Defendant argued that, in light of the weak identification testimony, counsel had no reason to forgo the alibi defense, and that he was prejudiced by counsel's failure to present it.

¶ 10 The supplemental petition included affidavits from defendant's mother and sister, which added several details about their recollection on the night of the murder. In her affidavit, Louise attested that she always accompanied defendant when he left the house because a "hostile gang

was in the neighborhood.” She stated that she had spoken with defendant’s trial counsel and told him that the shooting occurred on the day of her daughter’s baby shower. That night, Louise’s boyfriend visited and began fighting with her. Defendant was at home, wearing headphones, and Leticia complained that defendant failed to intervene in the fight. Louise told counsel that defendant was with them the entire evening, but counsel never questioned her about that subject. Instead, counsel allegedly told her that he needed a receipt or other proof of defendant’s whereabouts. Counsel told Louise that she could not testify because she had no proof that defendant remained with her at home on the night of the murder. Finally, Louise stated that she was willing to testify about defendant’s alibi if called as a witness and that, to her knowledge, counsel did not use an investigator even though she would have been willing to pay for one.

¶ 11 Leticia’s affidavit was similar to Louise’s proposed testimony. Leticia stated that she celebrated her baby shower that day. Her mother’s boyfriend left shortly after midnight “after their normal fight.” As she went to sleep after 2:00 a.m., she observed defendant playing a video game on the couch. She never saw defendant leave the house that night. He was still on the couch when she woke up at 8:00 or 9:00 the next morning.

¶ 12 On September 9, 2014, the State moved to dismiss defendant’s postconviction petition, arguing that he failed to make a substantial showing of ineffective assistance of trial counsel. The State contended that defendant’s petition was refuted by the record because he testified at trial that he could not remember his whereabouts at the time of the murder. The State also argued that counsel’s decision not to call the alibi witnesses was a matter of trial strategy.

¶ 13 On March 19, 2015, the trial court granted the State’s motion to dismiss and denied defendant’s postconviction petition, finding that defendant failed to make a substantial showing that his constitutional rights were violated. The court found that trial counsel’s decision to not

call the alibi witnesses was a matter of trial strategy and was not objectively unreasonable. Further, the court found that defendant failed to show that he was prejudiced by counsel's decision to not call Louise and Leticia to testify. This appeal followed.

¶ 14

#### ANALYSIS

¶ 15 Defendant argues that he is entitled to a third-stage evidentiary hearing on his postconviction petition because he made a substantial showing that trial counsel was ineffective for failing to investigate his mother and sister as potential alibi witnesses. He contends that, taking their affidavits as true, trial counsel knew that defendant's mother and sister would testify he was at home with them when the offense occurred, but never investigated their claim. Because the proposed testimony of his mother and sister was potentially exonerating but not presented, defendant argues he made a substantial showing of ineffective assistance of trial counsel.

¶ 16 “The Post–Conviction Hearing Act provides a procedural mechanism through which a criminal defendant can assert that his federal or state constitutional rights were substantially violated in his original trial or sentencing hearing.” *People v. Davis*, 2014 IL 115595, ¶ 13. A proceeding initiated pursuant the Act is “not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence.” *Id.* The Act allows inquiry into constitutional issues arising in the original proceeding which have not been raised, and could not have been adjudicated, on direct appeal. *Id.* Issues raised and decided on direct appeal are therefore barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal are forfeited. *Id.*

¶ 17 Proceedings under the Act are divided into three stages. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). At the first stage, a petition may be summarily dismissed if the trial court finds

that it is “frivolous or patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2008). If, however, the petition states the “gist of a constitutional claim” or if the trial court does not rule on the petition within 90 days of filing, then the petition proceeds to the second stage. *People v. Ligon*, 239 Ill. 2d 94, 104 (2010); *Pendleton*, 223 Ill. 2d at 472; see also 725 ILCS 5/122-2.1(b) (West 2008).

¶ 18 At the second stage, the trial court “must determine whether the petition and any accompanying documentation make ‘a substantial showing of a constitutional violation.’ ” *People v. Tate*, 2012 IL 112214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). In making that determination, the court must take as true “all well-pleaded facts that are not positively rebutted by the trial record.” *Pendleton*, 223 Ill. 2d at 473. We review the court’s second stage dismissal of a postconviction petition *de novo*. *Id.*

¶ 19 Ineffective assistance of counsel claims are governed by standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, a criminal defendant must show that trial counsel’s performance was objectively deficient and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 687-88, 694; *People v. Stewart*, 141 Ill. 2d 107, 118 (1990).

¶ 20 “The decision whether to call particular witnesses is a matter of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim.” *People v. Patterson*, 217 Ill. 2d 407, 442 (2005). Trial counsel’s “tactical decisions may be deemed ineffective when they result in counsel’s failure to present exculpatory evidence of which he is aware, including the failure to call witnesses whose testimony would support an otherwise uncorroborated defense.” *People v. King*, 316 Ill. App. 3d 901, 913 (2000).

¶ 21 In this case, the record shows trial counsel was aware of the potential alibi testimony and decided not to call defendant's mother and sister as witnesses in light of defendant's testimony that he could not recall his whereabouts on the night the offense occurred. Defendant never personally supplied an alibi of his own and, when questioned at trial, he expressly denied any knowledge of where he was at the time of the murder. As a result, trial counsel asserted during closing argument that if defendant knew where he was when the offense was committed, or if he wanted to fabricate an alibi, he had every opportunity to do so, but did not, in order to appear more credible to the jury. Thus, trial counsel likely chose not to call Louise and Leticia to testify regarding the alibi as matter of trial strategy, which does not support an ineffective-assistance-of-counsel claim. *Patterson*, 217 Ill. 2d at 442. Furthermore, Illinois courts have long recognized that it is a reasonable trial strategy for counsel to forego presenting the testimony of family members because it would be afforded little weight. See *People v. Flores*, 128 Ill. 2d 66, 106-07 (1989) (defense counsel not ineffective for failing to call potential alibi witnesses where they were related to defendant and counsel reasonably could have concluded that their testimony was unreliable). Accordingly, trial counsel's performance in this respect was not constitutionally deficient.

¶ 22 Moreover, defendant has failed to make a substantial showing that trial counsel's failure to investigate or present the alibi defense prejudiced him. Defendant characterizes the evidence presented at trial as "closely balanced," but this court previously found the State presented "a strong case" against him. See *People v. Ortega*, No. 1-05-0110 (Feb. 7, 2007) (unpublished order under Supreme Court Rule 23). Two eyewitnesses, Jeremy Howard and Marvin Willis, testified that they saw defendant's face as he initially approached and again saw his face when he stood in front of Lawson's van. Both testified that they observed defendant remove a revolver



from his waistband, raise the gun, and shoot Lawson. After the shooting, Howard identified defendant in a photo array and in a line-up. Willis identified defendant in a photo array. At trial, Howard and Willis identified defendant in open court.

¶ 23 The testimony of a single witness, if it is positive and the witness credible, is sufficient to sustain a conviction. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Here, defendant cannot meet the prejudice prong of *Strickland* because the proposed testimony of his mother and sister would have been afforded little weight. See *Flores*, 128 Ill. 2d at 106-07. Defendant has not demonstrated how the proposed testimony would outweigh the testimony of the two State's witnesses, who had an unobstructed view of defendant and witnessed the offense at close proximity in a well-lit area. In short, defendant has not demonstrated that the investigation and presentation of the alibi defense would have resulted in a different outcome at trial. As such, defendant cannot show that he suffered prejudice by the absence of their testimony.

¶ 24 CONCLUSION

¶ 25 We find that defendant has failed to make a substantial showing that his constitutional right to the effective assistance of trial counsel was violated. Therefore, we affirm the judgment of the trial court dismissing defendant's postconviction petition.

¶ 26 Affirmed.