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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the Circuit Court
Plaintiff-Appellee,)	of Cook County.
)	
v.)	No. 11 CR 9437
)	
CALVIN MILONS,)	The Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge, presiding.
)	

JUSTICE HYMAN delivered the judgment of the court.
Justices Pucinski and Mason concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial counsel’s advice to defendant to waive his right to testify was a matter of trial strategy and not ineffective assistance of counsel; in closing argument the prosecutor did not rely on “perjured testimony” where inconsistencies in the witnesses’ testimony were minor; prosecutor argued reasonable inferences from the evidence.
- ¶ 2 Defendant Calvin Milons appeals the summary dismissal of his *pro se* postconviction petition. Milons argues his petition alleged the gist of a claim of ineffective assistance of trial counsel.

¶ 3 We affirm. Milons' trial attorney was not ineffective when she advised him that testifying at trial would subject him to cross-examination and not be in his best interests. Moreover, Milons answered "yes" when the trial court asked him whether he wanted to waive his right to testify.

¶ 4 Background

¶ 5 Following a bench trial, defendant Calvin Milons was convicted of home invasion, armed robbery, and aggravated unlawful restraint. The trial court sentenced Milons to concurrent terms of 30 years' incarceration for home invasion and armed robbery, and 5 years for unlawful restraint. The court sentenced him without a presentence investigation report. On direct appeal, Milons argued reasonable doubt and error. This court affirmed in *People v. Milons*, 2014 IL App (1st) 122949-U. Pertinent to this appeal are the following facts.

¶ 6 Samuel Glover shared a second-floor apartment with his daughter, Lyntina. One afternoon in June, three men came up behind Samuel and forced their way into the apartment. The men robbed Samuel at gunpoint, then used belts to tie up Samuel and his daughter. The men left the apartment, taking various items with them. Samuel freed himself and ran outside looking for help. When he reached the corner, he looked back to see if anyone was following him and saw Milons, who was about 20 yards away, shoot at him three times with "[a] 38." Samuel ran four houses down and hid behind a van. He watched the three men quickly walk eastbound. As Samuel ran back to his apartment, several police officers arrived and asked Samuel whether he had heard any shots. Samuel replied "those three guys right there just came from my house and they shot at me." The police took chase of the three men, and Samuel returned to the apartment to check on his daughter, who was still tied up. After freeing her, Samuel went back outside and saw three or four squad cars, one of which contained Milons. Samuel identified Milons as one of the offenders, and

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also identified a pair of gym shoes, a pair of boots, a quilt, and two bottles of cologne that were found with Milons.

¶ 7 Officer Anthony Blake testified that he was on patrol in the area and saw Milons running from other police officers, who chased Milons into a rear yard. Milons was placed in custody after a bag of cannabis was found in his waistband. Blake searched Milons and recovered \$85, two bottles of cologne, two Link cards, a bundle of pink garbage bags, and an orange cell phone. Blake then went to the 7900 block of South Wood, where he learned an individual had flagged down the police car that happened to be transporting Milons. In front of 7958 South Wood, Blake recovered shoes and a plastic bag containing a quilt. Samuel identified the items as his.

¶ 8 Officer Blake did not recover a gun from defendant and did not see a gun in the area where Milons was arrested. Blake searched the area around Samuel's apartment building, but did not recover any shell casings or bullets, and did not request that a gunshot residue test be performed. While searching Samuel's home, Blake found additional rolls of the pink garbage bags that had been recovered from Milons.

¶ 9 Officer Rumbaugh answered a call of "shots fired" and saw Milons on the street nearby. Milons ran away down a gangway and Rumbaugh lost sight of him. Police officers found Milons hiding in a stairwell. They placed him in custody, and patted him down. Milons had a roll of plastic bags and a baggie of cannabis in his pocket. Two other police officers placed Milons in a squad car and drove him to Samuel's building, arriving about 10 minutes later.

¶ 10 At trial, the parties stipulated that Milons had 22 grams of cannabis on him when he was arrested. The defense rested without presenting any witnesses. Then the trial court addressed Milons:

“THE COURT: Mr. Milons, you can testify or not testify. If you do not testify, it will not be held against you. Your lawyer says you don’t want to testify; is that correct?

DEFENDANT MILONS: Yes.”

¶ 11 In finding Milons guilty, the trial court stated there was “no question in my mind that this is exactly what home invasion is about” and noted that, although home invasions are rarely random encounters, and “[t]here may have been something more to the story, *** the story is clear enough.” The trial court found that Milons “took people at gunpoint” and tied them up, and that a gun was fired. Milons was found guilty of home invasion, armed robbery, and aggravated unlawful restraint. The trial court found Milons not guilty of attempted first degree murder because the State had not proven beyond a reasonable doubt that he had a specific intent to kill. *Milons*, 2014 IL App (1st) 122949-U, ¶ 14.

¶ 12 In his direct appeal, Milons contended the evidence was insufficient to prove he committed home invasion, armed robbery, and aggravated unlawful restraint. *Id.* ¶ 22. This court affirmed, holding that the testimony of a single witness, if positive and credible, suffices to convict. *Id.* ¶ 28. The State was not required to present corroborating physical evidence at trial and eyewitness testimony alone was sufficient to establish that Milons was armed. *Id.* ¶ 30.

¶ 13 Milons filed *pro se* a postconviction petition alleging ineffective assistance by appellate counsel, prosecutorial misconduct, misapprehension of facts by the trial court, and trial counsel’s failure to prepare a defense and conduct a meaningful adversarial challenge. Milons also averred that he planned to testify that he ran from the police because he was in possession of cannabis while on parole.

¶ 14 Accompanying Milons' postconviction petition was his own affidavit indicating he fled from the police to avoid any chance of being caught with cannabis because he was on parole and possession would violate the terms of his parole. Milons averred his trial counsel "acted as if she understood my reason for wanting to testify" but told him it would not be in his best interests to do so because "her concern was more so with not wanting me to face cross-examination by the prosecutor." Milons then averred that his counsel "completely failed to challenge the State's case by presenting evidence to clarify my reason for running from police." Finally, Milons stated he "would have testified had [he] not been given misadvice by [his] trial attorney."

¶ 15 The trial court summarily dismissed his petition, remarking "[Milons is] also complaining that his lawyer talked him out of testifying. It was the Court that asked if he wanted to testify and he declined to do so. Looking at all things in totality I find his *pro se* petition is without merit and is denied on its face."

¶ 16 Milons now seeks reversal of the summary dismissal of his postconviction petition and remand to the trial court for second stage proceedings.

¶ 17 Analysis

¶ 18 Milons argues the trial court erred in summarily dismissing his petition because he "stated an arguable claim that his trial counsel was ineffective and thus deprived him of his constitutional right to testify." The State counters that Milons was fully aware of his right to testify but chose not to. According to the State, Milons was found hiding in the area while in possession of the robbery proceeds and there is "no probability" the verdict would have been different had he testified.

¶ 19 Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). “The Post-Conviction Hearing Act sets forth a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 et seq. (West 2014). At the first stage, the court independently reviews the petition to determine whether it sets forth the gist of a constitutional claim or if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 9-10 (2009). The post-conviction petitioner is not entitled to an evidentiary hearing as of right; rather, the Act permits summary dismissal of a nonmeritorious petition. *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). At this stage, the court acts “strictly in an administrative capacity by screening out those petitions which are without legal substance or are obviously without merit.” *People v. Tate*, 2012 IL 112214, ¶ 12 (quoting *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). The threshold for survival is low at the first stage of post conviction proceedings (*Id.* ¶ 9), but the petition may be dismissed as frivolous or patently without merit if the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12; 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 20 All well-pled facts in the postconviction petition and supporting affidavits are taken as true. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455 (2002). “At the first stage of postconviction proceedings, the trial court must take the allegations in the petition and accompanying documentation as true, so long as they are not affirmatively rebutted by the record. *White*, 2014 IL App (1st) 130007, ¶ 19.” *People v. Valencia*, 2016 IL App (1st) 133524-U, ¶ 31. We review a first-stage summary dismissal *de novo*. *People v. Allen*, 2015 IL 113135, ¶ 19.

¶ 21 The petition will be dismissed only if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is considered “frivolous” or “patently without merit”

¶ 25 A criminal defendant's right to testify on his own behalf at trial is so fundamental that the decision to testify or to decline to testify can be made only by the defendant, regardless of counsel's advice to the contrary. *People v. Clemons*, 277 Ill. App. 3d 911, 214 (1996). A defendant who claims on appeal he or she was precluded from testifying at trial must have contemporaneously asserted the right to testify by informing counsel at the time of trial. *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

¶ 26 The trial court admonished Milons, telling him: "you can testify or not testify. If you do not testify, it will not be held against you. Your lawyer says you don't want to testify; is that correct?" The trial court accepted his one-word answer, "yes." Milons now claims that he would have testified had he known that counsel would not otherwise present his reason for flight. He further claims that his postconviction petition made an arguable showing of prejudice caused by his counsel's advice.

¶ 27 The evidence established Milons had cannabis in his pocket when he was apprehended in the stairwell, and also several items belonging to Samuel and his daughter. Even if Milons had testified as to the reason he ran from the police, Samuel's possessions found on Milons' person and the eyewitness identification within minutes of the home invasion weigh in favor of a finding of guilt.

¶ 28 By hypothesis, in every case in which the issue is raised, the lawyer's advice will in retrospect appear to the defendant to have been bad advice, and he [or she] will stand to gain if he [or she] can succeed in establishing that he [or she] did not testify because his [or her] lawyer refused to permit him [or her] to do so." *Brown*, 54 Ill. 2d at 24. Milons' attorney advised him that testifying was not in his best interests and, as he averred in his petition, her concern was with

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not wanting him to face cross-examination by the prosecutor. Defense counsel's recommendation to the defendant that he not testify also involved a matter of trial strategy and we will not engage in second-guessing a tactical decision. See *People v. Uselding*, 217 Ill. App. 3d 1063, 1075 (1991) ("In reviewing counsel's conduct, great deference must be given to trial counsel's conduct, and we will not review matters involving the exercise of judgment, discretion, or trial tactics."). Under these circumstances, this advice cannot be considered ill-advised or prejudicial.

¶ 29 Affirmed.