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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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THE PEOPLE OF THE STATE OF	)	Appeal from the
ILLINOIS,	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
vs.	)	No. 02 CR 24799
	)	
MICHAEL SUAREZ,	)	Honorable
	)	Kenneth Wadas,
Defendant-Appellant.	)	Judge, presiding.
	)	

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JUSTICE COBBS delivered the judgment of the court.  
Justices Lavin and Pucinski concurred in the judgment.

**ORDER**

¶ 1           *Held:* The trial court did not err in dismissing defendant's post-conviction petition at the second stage of the proceedings where defendant failed to make a substantial showing of ineffective assistance of trial counsel.

¶ 2           Defendant, Michael Suarez, appeals from the second-stage dismissal of his post-conviction petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that he set forth a substantial claim that trial counsel provided him with ineffective assistance by failing to investigate three alibi witnesses and introduce the results of a gunshot residue test at trial. We affirm.

¶ 3

### BACKGROUND

¶ 4

This court has previously described the facts underlying defendant's conviction and sentencing in an unpublished opinion on direct appeal. See *People v. Suarez*, No 1-06-0976 (2009) (unpublished order under Supreme Court Rule 23). Thus, we will summarize only the facts necessary to resolve the issues raised in this appeal.

¶ 5

On September 16, 2002, Jason Gill, Monique Ward, Wassaza Martin, Edwin Treadwell, and Lucrechia Curtis each testified that at approximately 10:50 p.m. they were standing in front of Gill's home at 49<sup>th</sup> Street and Marshfield Avenue in Chicago. Gill further testified that while speaking with the group, he noticed a champagne colored car circulating the area between 10 and 15 minutes before coming to a stop near the small group. Once the car stopped, Gill noticed two Hispanic males in the car. He saw the men speak to each other before defendant reclined his seat, lowered the car's back window and fired a black semi-automatic handgun several times. The first shot was fired from about two feet away and struck Gill in the left side of his face at the lower jaw line. Gill further testified that he was able to identify defendant as the driver because he had seen defendant two days earlier arguing with a neighbor. He also recognized defendant because defendant's mother previously worked at a local pizza shop.

¶ 6

Ward testified that on the arrival of the police, she described the driver as a "male Hispanic in his twenties with black short hair," and that the car was a tan four-door Chrysler.

¶ 7

Martin testified that after defendant raised the gun, he ran to the side of a house where he remained until the shooting stopped. When the police arrived at the scene, Martin described the car as a champagne colored four-door Chrysler. He agreed to accompany the officers on a drive around the neighborhood to search for the vehicle. After driving to the intersection of

47<sup>th</sup> Street and Marshfield Avenue, he identified the vehicle. Shortly thereafter, the officers stopped the car and defendant was arrested. Martin also testified that he recognized defendant as the shooter because defendant's mother previously worked at a local pizza shop.

¶ 8 Sergeant Ignacio Hernandez testified that on the night of the incident he was called to the area because a "person was shot." On his arrival, Martin described the car driven by the shooter as a four-door Chrysler and agreed to accompany the officers on a tour around the neighborhood. Sergeant Hernandez testified consistently with Martin, adding that he observed defendant driving a four door Chrysler at the intersection of 47<sup>th</sup> Street and Marshfield Avenue at approximately 11:10 p.m.

¶ 9 On cross examination, Detective Anthony Padilla testified that a gunshot residue test was performed on defendant's hands. He recalled submitting a pair of brown gloves recovered from defendant's vehicle and the gunshot residue test to a technician for analysis. However, Detective Padilla denied receiving or seeing the analysis report.

¶ 10 Following jury deliberations, defendant was found guilty of two counts of attempted first degree murder and two counts of aggravated battery with a firearm. Defendant was subsequently sentenced to four 30-year concurrent prison terms.

¶ 11 On direct appeal, defendant argued, *inter alia*, that the trial court erred in denying his motion for a mistrial, and that he received ineffective assistance of counsel. Also, he requested that his \$4 criminal/traffic conviction surcharge be vacated. On March 4, 2009, this court vacated the \$4 surcharge and affirmed defendant's conviction. *People v. Suarez*, No. 1-06-0976 (2009) (unpublished order under Supreme Court Rule 23).

¶ 12 On October 22, 2009, defendant filed a *pro se* post-conviction petition claiming, *inter alia*, ineffective assistance of trial counsel. In his petition, defendant asserted that counsel

failed to investigate and interview Lucy Battle, Damien Torres, Carlos Vasquez, Vivian Palacios, and Perla Arzola. In support of his claim, defendant attached his own affidavit as well as affidavits from Vasquez, Palacios, and Arzola. Additionally, he alleged that counsel failed to admit into evidence a gunshot residue test result.

¶ 13 According to his affidavit, defendant informed his trial attorney that on September 16, 2002, at around 11:00 p.m. he was at El-Intemo bar having a few drinks with a friend. During trial, he informed his trial attorney that Palacios, Arzola, and Vasquez could verify that he was at the bar at that time, and that these individuals would testify on his behalf. He also stated that he requested that his trial attorney obtain the results of the gun residue test because he was certain that the results were negative.

¶ 14 In his affidavit, Vasquez averred that defendant was at the bar until approximately 11:00 p.m. He was certain that defendant was at the bar because he was relieved for his nightly 30-minute break shortly after defendant left. Vasquez did not indicate in his affidavit whether he would be willing to testify at defendant's trial or post-conviction proceedings.

¶ 15 In her affidavit, Palacios averred that she, Arzola and defendant left the bar shortly after 11:00 p.m. On leaving, defendant offered her and Arzola a ride home, but she declined. Palacio had seen defendant being stopped by the police on the corner of 47<sup>th</sup> and Hermitage. Palacio additionally averred that she would have testified on defendant's behalf at trial had she been contacted by defense counsel.

¶ 16 Arzola's affidavit was substantively similar to Palacios' affidavit. She also averred that she would have appeared to testify on defendant's behalf had she been contacted by trial counsel.

¶ 17 After first-stage review of the petition, the trial court appointed an assistant public defender to represent defendant. Counsel did not supplement defendant's *pro se* petition. On March 15, 2014, the public defender was replaced by private counsel, Thomas Brandstrader, who filed a Rule 615 (c) certificate and indicated that he would not be amending defendant's *pro se* petition.

¶ 18 On March 11, 2015, the State filed its motion to dismiss. In its motion, the State argued that defendant's claims were barred by *res judicata* and waiver, and that he failed to make any cognizable post-conviction claims sufficient to surpass second stage review. Following arguments, the circuit court granted the State's motion to dismiss. Defendant appeals. Additional pertinent background will be discussed in the context of our analysis of the issues.

¶ 19 ANALYSIS

¶ 20 Defendant contends that the trial court erred in dismissing his post-conviction petition because it sets forth a substantial claim of a constitutional violation. Specifically, defendant alleges that trial counsel provided ineffective assistance when he (1) failed to present the results of the gun residue test to the jury; and, (2) failed to investigate and present the testimony of the three alibi witnesses placing him away from the scene of the crime at the time of occurrence. In response, the State contends that defendant forfeited his ineffective assistance claim regarding the gun residue test results. Additionally, the State argues that defendant's claim that counsel failed to investigate and present alibi witnesses does not satisfy the requirements of the *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 21 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated during trial or the sentencing hearing. *People v. Williams*, 209 Ill.

2d 227, 232 (2004). A post-conviction action is a collateral proceeding that permits inquiry only into constitutional issues that were not, and could not have been adjudicated on direct appeal. *Id.* Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*, and those issues that could have been raised, but were not, are considered waived. *Id.*

¶ 22 In a non-capital case, the Act provides a three-stage process for the adjudication of post-conviction petitions. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). At the first-stage, the defendant must clearly set forth the manner in which his constitutional rights were violated, and the trial court determines whether the petition is frivolous or patently without merit. *People v. Tyler*, 2015 Ill App (1<sup>st</sup>) 123470 ¶ 144. Once a petition advances to the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation (*People v. Pendleton*, 233 Ill. 2d 458,473 (2006)), and the State may either answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2014)). To prove a constitutional violation, the allegations in the petition must be supported by the trial record or by accompanying affidavits. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). Additionally, when a defendant alleges that trial counsel was ineffective for investigating or calling certain alibi witnesses, the petition must be supported by affidavits that show the potential testimony of those witnesses and explain the significance of their testimony. *People v. Barr*, 200 Ill. App. 3d 1077, 1080 (1990).

¶ 23 If the State moves to dismiss the petition, the circuit court must examine and rule on the legal sufficiency of each of the defendant's claims, taking all well-pleaded facts as true. *People v. Ward*, 187 Ill. 2d 249, 255 (1999). A post-conviction petitioner is not entitled to an evidentiary hearing as a matter of right; he or she must make substantial showing of a

constitutional violation. *Coleman* 183 Ill. 2d at 381. We review the dismissal of a second-stage post-conviction petition de novo. *People v. Childress*, 191 Ill. 2d 168, 175 (2000).

¶ 24 As a preliminary matter, we note that defendant fails to comply with Illinois Supreme Court Rule 341(h)(7) (eff. Jan 1, 2016). On appeal, defendant asserts, without more, that his counsel was ineffective by failing to present the results of the gun residue test to the jury. Rule 341 requires that an appellant's brief provide this court with an argument "which shall contain the contentions of the appellant and reasons therefor." (Ill. S. Ct. R. 341(h)(7)). Defendant's argument fails for lack of development. In that regard, we note that defendant refers to the gun residue test twice in his brief, and then summarily concludes that counsel was ineffective. He also asserts that the tests were "negative," however, he fails to cite us to any place in the record to support his claim. This court is not a repository into which an appellant may foist the burden of argument and research. *People v. Jacobs*, 405 Ill. App. 3d 210, 218 (2010). It is neither the function nor the obligation of this court to act as an advocate or search the record for error. *Id.* Defendant's conclusory statements, without any supporting analysis, are insufficient to satisfy Rule 341(h)(7), and his claim is, therefore, waived.

¶ 25 Notwithstanding defendant's waiver, he could not have prevailed on his ineffective assistance claim. In order to make a substantial showing of a constitutional violation, a defendant must support his claim with affidavits or other documentation. See *Coleman*, 183 Ill. 2d at 381. Defendant does not support his claim with the lab report. Our review of the record reveals that at trial, counsel showed Detective Padilla a lab report on the gun residue test. Thus, the report was available and defendant could have included it in support of his ineffective assistance claim. Defendant has failed to do so, and therefore, he has not made a substantial showing of a constitutional violation.

¶ 26 We now turn to defendant's claim that trial counsel was ineffective for failing to investigate and present alibi witnesses. Defendant contends that the testimonies of the three affiants would place him at a different location at the time of the shooting. He further argues that the failure to present "exonerating testimony" was not sound trial strategy and prejudiced him "to the extent no justiciable confidence can be afforded." The State responds that defendant did not receive ineffective assistance of counsel as evidenced by the record, and he cannot establish that he suffered any prejudice or that trial counsel's decision was unreasonable under *Strickland*.

¶ 27 To prove a claim of ineffective assistance, a defendant must meet both prongs of *Strickland's* two-prong test. *Strickland*, 466 U.S. at 687. Under *Strickland*, a defendant must allege facts which demonstrate that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *People v. Enis*, 194 Ill. 2d 361, 376 (2000). A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* The failure to satisfy the prejudice prong of *Strickland* precludes a finding of ineffective assistance of counsel. *Id.* at 377. Thus, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was constitutionally deficient. *People v. Graham*, 206 Ill. 2d 465, 476 (2003); see also *People v. Griffin*, 178 Ill. 2d 65, 74 (1997).

¶ 28 In the case at bar, defendant cannot satisfy the prejudice prong because the affidavits do not show that but for trial counsel's alleged error, defendant would have been exonerated, and thus, entitled to an evidentiary hearing. At trial, it was established that the shooting



occurred at approximately 10:50 p.m., and that shortly after firing between five to seven shots, defendant fled the scene. We note, that none of defendant's affidavits indicate defendant's time of arrival at El-Intemo. The three affiants only indicated that defendant was at the bar at 11:00 p.m. Additionally, Palacios' and Arzola's affidavits corroborate Martin's and Sergeant Hernandez's testimony that defendant was stopped and arrested shortly after 11:00 p.m. on 47<sup>th</sup> Street.

¶ 29 In his testimony, Sergeant Hernandez recalled that Martin described defendant's car as a four-door Chrysler, champagne in color. After a brief tour of the neighborhood, Hernandez stopped defendant's car based on that description. Furthermore, Gill, Ward, and Martin, consistently testified that before defendant began shooting, he sat in the champagne or tan colored car for at least one minute and smiled at the group.

¶ 30 Additionally, besides seeing defendant earlier that night, both Gill and Martin were able to identify defendant as the driver and shooter because defendant's mother previously worked at an area pizza shop. Also, Gill recalled seeing defendant two days earlier arguing with his neighbor. We find that trial counsel's failure to call these witnesses did not prejudice defendant and the affidavits do not present a probability sufficient to undermine the outcome of trial. In light of the overwhelming evidence against defendant, the circuit court did not err in dismissing his second-stage post-conviction petition. Thus, we conclude that defendant has failed to make a substantial showing of a constitutional violation under *Strickland*.

¶ 31 Defendant cites *People v. Garza* 180 Ill. App. 3d 263 (1989), in support of his argument that the allegations set out in the affidavits provide an arguable basis in fact for the defendant's claim of ineffective assistance of trial counsel. In *Garza*, the court found that counsel was ineffective when he failed to investigate and call defendant's alibi witness to

rebut the state's only witness whose testimony contained many discrepancies. The court in *Garza* considered the evidence in that case to be "closely balanced" and determined that trial counsel's failure to call the alibi witness ultimately prejudiced the defendant. *Id* at 269. Unlike the evidence in *Garza*, we find the evidence of defendant's guilt to be overwhelming. Thus, *Garza* is unavailing.

¶ 32 We note briefly defendant's contention that his petition presented a claim for actual innocence. To succeed on a claim of actual innocence, evidence in support of the claim must be (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the result at a retrial. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). First, defendant's affidavits were not newly discovered evidence. Newly discovered evidence is evidence which was unavailable at the time of the trial and which could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 298, 301 (2002). In defendant's affidavit, he avers that he informed trial counsel that there were three witnesses who could place him at El-Intemo bar around the time of the shooting. Thus, defendant's affidavits do not qualify as newly discovered evidence because defendant knew of the alibi and witnesses at the time of trial and at least two of the witnesses averred that they would have testified at trial. Furthermore, defendant's affidavits would not have changed the outcome at trial because the affidavits do not contradict the testimonies identifying defendant at the scene of the shooting. Rather, the affidavits leave open the possibility that defendant committed the shooting before having drinks at El-Intemo at 11:00 p.m. Therefore, defendant has failed to make a substantial showing of actual innocence in his petition.

¶ 33

#### CONCLUSION

¶ 34 For the foregoing reasons, the trial court properly dismissed defendant's second-stage post-conviction petition because the allegations in defendant's petition and supporting affidavits failed to make a substantial showing of any constitutional deprivation to warrant a third-stage evidentiary hearing.

¶ 35 Affirmed.