2018 IL App (1st) 151732-U

No. 1-15-1732

Order filed April 20, 2018

Sixth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 17339
	)	
KENYATTA BROWN,	)	Honorable
	)	Thomas J. Hennelly,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 ***Held:*** We affirm the summary dismissal of defendant's postconviction petition. The circuit court timely ruled upon the petition within 90 days of its filing, even though the court did not enter an order stating the basis of its ruling and defendant did not promptly receive notice of that disposition. Defendant was not arguably prejudiced by trial counsel's failure to present various witnesses.

¶ 2 Defendant Kenyatta Brown appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). On appeal, defendant contends his petition should proceed to the second stage

of postconviction review because (1) although the trial court dismissed the petition within 90 days of its docketing, the court did not prepare a written order explaining the reasons for the dismissal, nor notify him of the dismissal for several months and (2) the petition states an arguable claim that trial counsel was ineffective in failing to present witnesses who would have countered the State's theory of the case.

¶ 3 Following a jury trial, defendant was convicted of first degree murder and attempted first degree murder. At trial, the State presented testimony that on February 4, 2007, defendant and Dwight Thomas[1] shot at Frank Lucas and Gloria Patterson, fatally striking Lucas.

¶ 4 Patterson testified that at about 1 a.m., she and Lucas picked up one of their children, stopped at a store, and then proceeded to 120th Place and Indiana Avenue in Chicago, where they planned to go to the home of a friend, Rhonda Wilson. Patterson had known defendant since she was 12 years old because they were classmates. She also knew Thomas by his nickname, Westside, and testified that defendant and Thomas were friends. Patterson said that several days before the shooting, Lucas had an argument with Thomas that resulted in a physical fight that Lucas won.

¶ 5 As Patterson and Lucas sat in the car near Wilson's house, Lucas called Wilson to say they were outside. Patterson then saw two men emerge from a gangway holding weapons. The gangway was on the passenger side of the car, where she was seated. Patterson could see the faces of both men and recognized them as defendant and Thomas. Defendant wore a black hoodie and black skull cap, and Thomas wore a brown jacket and "had a hood on too." Nothing was covering their faces. The men approached the car and started shooting, with defendant firing the first shot. Three or four shots were fired, and one bullet struck Patterson's lower lip. Lucas

[1] Defendant and Thomas were charged as co-defendants. Thomas was convicted in a separate jury trial and is not a party to this appeal.

died as a result of a wound to the heart. Police arrived as Patterson was trying to put Lucas in the backseat to take him to the hospital. Patterson told police that defendant and Thomas shot at them.

¶ 6 Patterson was asked on cross-examination if she knew Timothy Christmas, who she said was a friend of Thomas. She said she did and described his approximate height and weight as being shorter than defendant. On redirect examination, she said Christmas was not one of the gunmen.

¶ 7 Chicago police officer Victor Creed spoke to Patterson at the scene, and she told him the gunmen were defendant and Thomas and they had fled through a vacant lot and gangway. Another officer followed footprints in the direction Patterson indicated and recovered a cell phone in a recent impression in the snow. Another officer went to the home of defendant's mother, Evelyn Stewart, and searched the residence unsuccessfully for defendant.

¶ 8 Katahnna Washington testified she knew both victims and also knew defendant and Thomas. She acknowledged several prior convictions for possession of a controlled substance. Washington stated defendant's phone number and her phone number for the record. On February 5, Washington received a call from a blocked number, and defendant spoke, asking what had happened and where Patterson was.

¶ 9 Washington met with Chicago police detective Tim Stover that day. Washington saw a phone on the detective's desk and told the detective she would call defendant's number to see if that was defendant's phone. When she dialed defendant's number, the phone on the desk rang. Washington's nickname was listed in the phone's directory of contacts and her number appeared in the log of recent calls. On cross-examination, Washington stated defendant had more than one phone and loaned his phone to other people.

¶ 10 Detective Stover testified the phone on the desk was the phone recovered from the snow near the shooting. The detective requested records for incoming and outgoing calls for that phone number, which led him to interview Nicholas Griffin.

¶ 11 Griffin testified he and defendant had been close friends for 12 or 13 years and he also knew Thomas, Christmas and Washington. Griffin testified he and defendant both had Sprint Nextel phones and communicated by phone after Griffin moved to Iowa in 2003. On the night of the shooting, Griffin was at a club with Prince Johnson and left at 2 a.m. when the club closed.

¶ 12 Griffin went home with a female friend and noticed his phone indicated several missed calls from defendant. Griffin then received a phone call from defendant's mother and a call from defendant, who was calling from Thomas's phone. Griffin asked defendant to call him back at a different phone number "[b]ecause I didn't know exactly what was going on, and I didn't want the conversation to be on my phone." Griffin asked defendant to call him back at the phone number of his female companion, and defendant called back.

¶ 13 Griffin testified that a few days after that conversation, defendant arrived at Griffin's apartment and told Griffin and Johnson "what happened back in Chicago." Griffin said defendant told them he and Thomas had shot Lucas and Patterson, to whom he referred using nicknames, while those individuals sat in a vehicle. Defendant told them he might have dropped his cell phone while fleeing the scene and did not know during the shooting that "the baby was in the car."

¶ 14 After defendant stayed with Griffin for several days, Griffin took defendant to Sioux Falls, South Dakota, to live with a member of Griffin's family. Veronica Washington, the mother of defendant's children, moved to Sioux Falls in March 2007.

¶ 15 Griffin was arrested in Dickinson County, Iowa, in March 2007 and was charged with misdemeanor assault and with violating his parole. Griffin was interviewed by Chicago detectives in Iowa in May 2007. He testified he was not made any promises in exchange for his August 2007 testimony before the grand jury or his testimony at trial.

¶ 16 Griffin stated the phone number of defendant's Sprint Nextel phone for the record; it was the same phone number stated by Washington. Griffin said he would also call defendant at another number but said defendant had lost that phone.

¶ 17 During Griffin's testimony, he was handed the phone recovered near the scene of the shooting. He testified the phone's contact list included defendant's nickname for him, as well as defendant's nicknames for Christmas and Johnson. The log of recent calls from that phone showed a call to Griffin's phone at 12:53 a.m. on the night of the shooting and a call to Thomas's phone at 3:13 a.m. Later in his testimony, Griffin was shown a printout of calls made by that phone. He said the first five calls listed on the log were calls made to his phone number. Griffin was not asked the times of those calls.[2]

¶ 18 Jennifer Scheid, custodian of records for Sprint Nextel, also testified using the printout of calls from the phone recovered at the scene. The document listed calls from that phone between 12:50 a.m. and 3:38 a.m. on the night of the shooting. The record indicated 17 calls made during that period that lasted between five and eight seconds each. Schied testified the short duration of those calls indicates they went straight to voice mail. She stated that the phone recovered from the scene had a "chirp" function, meaning its user could connect with other phones directly and those communications would not be reflected in phone records.

[2] Although the cell phone record was admitted into evidence, it is not included in the record on appeal.

¶ 19 Defendant was arrested in Sioux Falls in April 2007. Paul Niedringhaus, a deputy sheriff in Minnehaha County, South Dakota, testified that when they located and questioned defendant, defendant gave his name as Reggie Coleman and offered a false date of birth and Social Security number.

¶ 20 The defense presented no evidence. Defense counsel argued the State did not prove defendant's guilt beyond a reasonable doubt and it was unreasonable that defendant would have become involved in a dispute between Thomas and Lucas. Counsel also asserted Patterson did not get a good look at the gunmen and that Katahnna Washington and Griffin lacked credibility due to their criminal backgrounds.

¶ 21 The jury found defendant guilty of first degree murder, attempted first degree murder and aggravated battery with a firearm. The jury further found that defendant was armed with a firearm during the commission of the murder and attempted murder. The court entered judgment on the murder and attempted murder counts.

¶ 22 After defendant's conviction, he stated his desire for new legal representation, and defendant's trial attorney, Thomas Peters, withdrew as counsel. Cook County Assistant Public Defender (APD) Michael X. Wilson filed a motion for a new trial raising various claims of Peters' ineffective assistance of counsel. The motion asserted Peters failed to (1) call forensic experts to impeach Patterson's version of the shooting; (2) investigate Griffin's criminal cases in Iowa; (3) interview Rhonda Wilson, Shermatta Willis, and others about a statement made by Patterson after the shooting; (4) investigate the cell phone record and recovery of the phone from the snow; and (5) call Veronica Washington as a witness because defendant told Peters he was with her at the time of the shooting.

¶ 23 Peters, defendant, and Yolanda Franklin testified at the hearing on defendant's posttrial motion. Franklin, who was not mentioned in the motion, testified she could have provided an alibi for defendant, who is her children's uncle. Franklin stated that between 9 and 10 p.m. on February 7, 2007,[3] defendant left her house to pick up his children and their mother, Veronica Washington. Defendant returned to Franklin's residence between 10 and 10:30 p.m. and remained there for the rest of the night.

¶ 24 Franklin testified her room was near the stairs and defendant was in a different bedroom in the back. Franklin stayed up until 2 a.m. and did not see defendant leave, and given the layout of her home, defendant could not have left without her knowledge. Franklin testified she could see "anybody who comes out of any room," other than a room next to hers which was not where defendant stayed. Franklin said Peters contacted her and she related those facts, and Peters told her she would testify at defendant's trial.

¶ 25 Peters testified he had practiced law for 34 years and had completed several dozen murder trials. Peters said his defense strategy in this case was to show that Patterson's account of the shooting, namely that she looked at the gunmen as they began firing, was inconsistent with the location of her wounds. When asked about the cell phone recovered near the scene, Peters testified his trial strategy was "to stay away from it as much as possible because anything related to the phone [] was very detrimental" to defendant's case, as the phone connected defendant to the scene of the shooting.

¶ 26 As to Griffin, Peters testified his strategy was to expose whether Griffin testified in this case in exchange for leniency in his Iowa cases. Peters contacted prosecutors in Dickinson

[3] Defense counsel "subsequently maintained that he made a mistake" in asking about defendant's activities on February 7, 2007, not February 4, 2007. *People v. Brown*, 2013 IL App (1st) 112692-U, ¶ 18 n.2.

County and another Iowa county and was told the dispositions of those cases "had nothing to do with any prosecution in Illinois."

¶ 27 Peters testified he interviewed Franklin but did not call her as an alibi witness because she could not account for defendant during the time of the offense and the jury would have considered her bias as a family member of defendant. He also spoke to Veronica Washington, defendant's girlfriend, five or six times and she never said she was with defendant at the time of the shooting. In addition, Peters testified he attempted to locate Wilson, Willis, and others in the house near the shooting, but the police reports indicated none of them actually saw it take place.

¶ 28 Defendant testified that he told Peters about the witnesses named in his posttrial motion and also told Peters about Charmaine Cotton and Christopher Green, who lived with Christmas and could have testified to Christmas's involvement in the shooting. Defendant said Peters told him he did not need their testimony to establish Christmas was one of the gunmen and did not need Franklin or Veronica Washington to provide an alibi. Defendant admitted he agreed with the strategy to not present alibi witnesses.

¶ 29 The circuit court denied defendant's motion for a new trial. The court sentenced defendant to consecutive terms of 75 years in prison for first degree murder and 45 years for attempted murder, for a total sentence of 120 years. Each term included a mandatory 15-year enhancement based on the jury's finding that defendant was armed with a firearm.

¶ 30 On direct appeal, the sole issue raised by defendant was that Peters was ineffective in failing to call Franklin as an alibi witness to support the theory that Christmas was the second shooter. *People v. Brown*, 2013 IL App (1st) 112692-U, ¶ 23 (unpublished order under Supreme Court Rule 23). In affirming defendant's convictions, this court found defendant "failed to overcome the presumption that counsel's decision not to call Franklin was sound trial strategy."

Id. ¶ 26. The court noted the weakness of Franklin's purported alibi and the strength of the State's case against defendant, including Patterson's identification, Griffin's testimony that defendant confessed to him, and the corroboration of Griffin's account by defendant's presence in South Dakota. *Id*. ¶ 28. This court also noted the cell phone represented "substantial evidence against defendant" because the phone rang when defendant's number was dialed and the phone displayed recent calls to Griffin and other witnesses. *Id*.

¶ 31 On August 25, 2014, defendant filed a *pro se* petition for postconviction relief. Relevant to this appeal, defendant contended Peters was ineffective for failing to call various witnesses to testify that Christmas committed the shooting with Thomas. Defendant also asserted in his petition that (1) APD Wilson was ineffective for failing to present witnesses to substantiate the claims raised in his posttrial motion; (2) appellate counsel was ineffective for failing to raise these claims of Peters' ineffectiveness on direct appeal; and (3) his claims were not barred on appeal by waiver or *res judicata*.

¶ 32 On November 7, 2014, the circuit court addressed defendant's petition in court, stating:

> "In the matter of Kenyatta Brown, the court has reviewed the postconviction petition filed by Mr. Brown. I was the trial judge. I reviewed the record.
>
> Based on the record and the [] posttrial motion that was heard by the court regarding ineffective assistance, all the allegations raised by Mr. Brown are *res judicata*. The court finds the motion to be frivolous and patently without merit. The motion is denied."

¶ 33 The record contains a certified report of disposition dated April 21, 2015, indicating that the circuit court denied defendant's petition as frivolous and patently without merit on November 7, 2014. This court granted defendant leave to file a late notice of appeal on June 29, 2015.

¶ 34 On appeal, we first address defendant's contentions that the circuit court failed to comply with the procedure set out in the Act when dismissing his postconviction petition. Defendant argues his petition should receive further review because the circuit court did not enter a written order explaining its reasons for dismissing the petition and he did not receive timely notification of that dismissal.

¶ 35 The Act provides a criminal defendant with a remedy for a substantial violation of constitutional rights at trial or at sentencing. *People v. Allen*, 2015 IL 113135, ¶ 20. The circuit court must examine a post-conviction petition within 90 days of its filing. 725 ILCS 5/122-2.1(a) (West 2014). The 90-day period is mandatory, not directory. *People v. Brooks*, 221 Ill. 2d 381, 389 (2006). The court can summarily dismiss the petition within that period if the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 36 Section 122-2.1(a)(2) further provides:

> "If the petitioner is sentenced to imprisonment and the court determines the petition is frivolous or is patently without merit, it shall dismiss the petition in a written order, specifying the findings of fact and conclusions of law it made in reaching its decision. Such order of dismissal is a final judgment and shall be served upon the petitioner by certified mail within 10 days of its entry." 725 ILCS 5/122-2.1(a)(2) (West 2014).

¶ 37 Here, defendant filed his postconviction petition on August 25, 2014. The report of proceedings indicates, and defendant does not dispute, that the circuit court addressed defendant's petition in court on November 7, 2014, and summarily dismissed the petition in an oral ruling. The court stated the petition was dismissed as frivolous and patently without merit because "all the allegations raised by Mr. Brown are *res judicata*." Although a more thorough exposition of the court's rationale is desirable, this minimal explanation sufficed to fulfill the circuit court's obligation to rule on defendant's petition within 90 days as required by section 122-2.1(a) of the Act.

¶ 38 Defendant nevertheless contends his petition should advance because the circuit court did not issue a written order detailing its findings and conclusions to accompany its oral pronouncement and also because he did not receive notice until April 2015 that his petition had been dismissed. Both of those contentions can be resolved based on our supreme court's interpretation of the term "shall" in section 122-2.1(a)(2).

¶ 39 Although the term "shall" generally denotes a mandatory obligation (*People v. Reed*, 177 Ill. 2d 389, 393 (1997)), the use of "shall" in section 122-2.1(a)(2) is directory. *People v. Porter*, 122 Ill. 2d 64, 81 (1988) (noting the use of "shall" is mandatory only as it applies to "the court's duty to dismiss a petition if it is frivolous or patently without merit"). Thus, the absence of a written order setting out findings of fact and conclusions of law does not invalidate a petition's dismissal. *Id*. at 82.

¶ 40 In arguing the circuit court's oral ruling lacked effect absent the entry of a written order, defendant cites *People v. Perez*, 2014 IL 115927. We do not find that *Perez* supports his position; rather, *Perez* supports a conclusion that the court's oral ruling constituted a valid summary dismissal. The supreme court held in *Perez* that the date on which an order summarily

dismissing a postconviction petition is "entered" is when the judgment is placed of record. *Id*. ¶ 24; see also *People v. Cooper*, 2015 IL App (1st) 132971, ¶ 14 (stating that a written order of summary dismissal is not required). As the State points out, the court's November 7, 2014, ruling was made of record on that day by being noted on the Criminal Disposition Sheet and the half-sheet. Because the circuit court's final judgment took place on November 7, 2014, defendant's attempt to appeal that ruling in June 2015 was beyond the time limit allowed by Supreme Court Rule 606. However, this court granted defendant leave to file a late notice of appeal on June 29, 2015, making note of the April 21, 2015, order of the circuit court. See *People v. Lilly*, 291 Ill. App. 3d 662, 666 (1997) (allowing postconviction petitioner late notice of appeal where petitioner did not receive timely notice of the petition's dismissal).

¶ 41 Similarly, the language in section 122-2.1(a)(2) that an order dismissing a postconviction petition as frivolous or patently without merit "shall be served upon the petitioner by certified mail within 10 days of its entry" is directory because the statute does not indicate the dismissal lacks effect if a defendant is not timely served with notice of the disposition. *People v. Robinson*, 217 Ill. 2d 43, 50, 58-59 (2005). Thus, neither the absence of a written ruling dismissing the petition nor the failure to serve defendant with notice of the dismissal within 10 days invalidated the circuit court's action.

¶ 42 Having rejected defendant's procedural arguments for reversing the petition's dismissal, we next consider whether the petition was properly dismissed under the Act as frivolous or patently without merit. Defendant argues that contrary to the circuit court's ruling, his claims were not previously adjudicated and are not barred by *res judicata*. He also asserts his petition states an arguable claim that Peters was ineffective for failing to call various witnesses at trial.

¶ 43 As a threshold matter, defendant is correct that even though the circuit court examined some of his claims at the hearing on his posttrial motion, the doctrine of *res judicata* does not bar the presentation of his claims on appeal. A postconviction proceeding allows "inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal*."* *People v. Davis*, 2014 IL 115595, ¶ 13 (quotin*g People v. Towns,* 182 Ill. 2d 491, 502 (1998)). Only issues that were raised and decided in a defendant's direct appeal are barred from reconsideration by *res judicata. Davis*, 2014 IL 115595, ¶ 13; see also *In re Christopher K.*, 217 Ill. 2d 348, 363 (2005) (*res judicata* prohibits review of issues "that have been decided by a reviewing court in a prior appeal.")

¶ 44 Here, even though several issues now raised by defendant were explored in the proceedings on his posttrial motion, they were not raised before this court in his direct appeal. The only issue presented on appeal was whether trial counsel was ineffective for not calling Franklin to testify as an alibi witness. *Brown*, 2013 IL App (1st) 112692-U, ¶ 23. Therefore, defendant's postconviction claims are not barred by *res judicata*.

¶ 45 Moreover, defendant's claims of trial counsel's ineffectiveness are not subject to waiver. Although issues that could have been raised on direct appeal, but were not, are forfeited (*Davis*, 2014 IL 115595, ¶ 13), defendant has included in his *pro se* petition the assertion that his appellate counsel was ineffective for failing to raise them on direct appeal. Therefore, defendant has avoided forfeiting those claims for purposes of postconviction review. See *People v. Fair*, 193 Ill. 2d 256, 268 (2000) (an "ineffective assistance of appellate counsel argument is a well-recognized exception to the waiver doctrine in postconviction proceedings"). Thus, there are no procedural bars to defendant's claims.

¶ 46 Defendant argues his trial counsel, Peters, was ineffective for failing to present testimony from six witnesses: Shermatta Willis, Phenice Mister, Prince Johnson, Charmaine Cotton, Evelyn Stewart, and Veronica Washington. Defendant contends Peters knew of these individuals and their potential testimony, and he asserts those witnesses would have exonerated him by establishing that Christmas committed the shooting with Thomas.

¶ 47 Our review of the summary dismissal of a postconviction petition is *de novo*. *Allen*, 2015 IL 113135, ¶ 19. At this first stage of review, a postconviction petition may be dismissed as frivolous or patently without merit only if it "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). To establish the ineffective assistance of counsel, a defendant must show counsel's performance fell below an objective standard of reasonableness and the deficient representation prejudiced his case. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Combining the standards in *Strickland* and *Hodges*, a postconviction petition that alleges ineffective assistance of counsel may not be summarily dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced by counsel's deficient performance. *Hodges*, 234 Ill. 2d at 17. At this initial stage, all well-pleaded allegations in the petition are taken as true and are liberally construed in favor of the defendant. *People v. Brooks*, 233 Ill. 2d 146, 153 (2009).

¶ 48 We first address the potential testimony of Willis and Mister. Defendant did not attach affidavits from Willis or Mister to his petition; rather, he offers his own version of what their testimony would be, in his own petition and in an unsigned document bearing Mister's name.

¶ 49 A postconviction claim that trial counsel failed to investigate and call a witness to testify must be supported by an affidavit of the proposed witness. 725 ILCS 5/122-2 (West 2014); *People v. Guest*, 166 Ill. 2d 381, 402 (1995). If no affidavit from the proposed witness is

provided, the defendant filing the petition must explain why that documentation was unobtainable. *People v. Harris*, 224 Ill. 2d 115, 142 (2007); *People v. Collins*, 202 Ill. 2d 59, 68 (2002). Defendant appended to his petition a letter from a private investigator describing unsuccessful attempts to contact both Willis and Mister. Defendant has thus provided evidence addressing the absence of affidavits from those potential witnesses. If a defendant seeking postconviction relief explains why no affidavit or other evidentiary material is attached to the petition, the omission is not a ground for dismissal. *People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15 (citing *People v. Hall*, 217 Ill. 2d 324, 332 (2005)).

¶ 50 In defendant's own affidavit, he described Willis's potential testimony. According to defendant, Willis would have testified Patterson "did not know who the shooters were" and that she named defendant and Thomas when told to do so by individuals who were inside the house near the shooting, including Rhonda Wilson. At the hearing on defendant's posttrial motion, Peters testified he was aware that Willis and others were inside Wilson's home when the shooting occurred and attempted to interview them "several times" but his understanding was that none of them saw the shooting take place.

¶ 51 As to Mister, defendant attached to his petition a document stating that in 2007, Mister was in a relationship with "Stank," who was a friend of both victims of the shooting. According to the document, "Stank" told Mister he found a cell phone on the ground near the crime scene and gave it to Katahnna Washington. Peters was not asked about Mister at the hearing and did not say he was aware of Mister's potential account.

¶ 52 The putative testimony of both Willis and Mister is based in hearsay because it involves statements made by persons other than the proposed affiants. Willis would testify that she heard an unidentified person or persons tell Patterson to identify defendant and Thomas as the gunmen.

Mister would testify he was told by "Stank" that he found a cell phone near the scene. Because an affidavit must contain first-hand knowledge of the factual allegations therein, an affidavit that contains only hearsay is insufficient to support a postconviction claim. The State notes that Rule 1101(b)(3) of the Illinois Rules of Evidence has been amended to include postconviction hearings to the list of proceedings to which the rules of evidence (such as the general admissibility of hearsay statements) do not apply. Ill. R. Evid. 1101(b)(3) (eff. Apr. 8, 2013). However, hearsay statements predating that amendment cannot support a post-conviction claim. *People v. Salgado*, 2016 IL App (1st) 133102, ¶ 47; *People v. Walker*, 2015 IL App (1st) 130530, ¶ 25; *People v. Brown*, 2014 IL App (1st) 122549, ¶ 56.

¶ 53 Even if we consider the accounts presented in defendant's petition, whether trial counsel was ineffective for failing to investigate witnesses is "determined by the value of the evidence not presented at trial and the closeness of the evidence that was presented at trial." *People v. Montgomery*, 327 Ill. 2d 180, 185 (2001). Patterson said she saw the faces of both gunmen and she identified them as defendant and Thomas to police as the shooters immediately after the shooting.

¶ 54 As to Mister's potential testimony, Katahnna Washington did not testify she was given a phone that she turned over to police. Her testimony was consistent with that of Detective Stover, namely that she called the phone that was already in the possession of the police and was sitting on the detective's desk. She testified her phone number and name were stored in that phone and that was the phone police had recovered from the snow near the shooting. Griffin also testified that phone had defendant's phone number and contacts. Therefore, even assuming *arguendo* that the testimony of Willis and Mister was admissible, it is not arguable that their testimony would have changed the result of defendant's trial.

¶ 55 Next, we consider the potential testimony of the four individuals whose affidavits defendant attached to his petition. Defendant asserted in his petition that his trial counsel was arguably ineffective for failing to call Prince Johnson, Charmaine Cotton, Evelyn Stewart, and Veronica Washington to testify. He argues their collective accounts would have established Christmas was the second gunman, which was a different defense theory than was pursued at his trial.

¶ 56 An attorney has a professional duty to conduct a reasonable investigation as to a potential witness's testimony or make a reasonable decision whether to even investigate the witness. *People v. Henry*, 2016 IL App (1st) 150640, ¶ 56. If a potential witness is known to defendant's trial counsel, the failure of counsel to interview that witness and present his or her testimony may constitute ineffective assistance if that testimony may have exonerated the defendant *(People v. Davis*, 203 Ill. App. 3d 129, 140-41 (1990)), supported an otherwise uncorroborated defense (*People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005)) or contradicted the State's theory of the case. *People v. Campbell*, 332 Ill. App. 3d 721, 731 (2002).

¶ 57 Although a claim of counsel's deficiency can generally be defeated by a showing that the decision not to present a witness amounted to trial strategy, any arguments that relate to trial strategy are more appropriate to the second stage of postconviction proceedings. *People v. Tate*, 2012 IL 112214, ¶ 22. Thus, our analysis is limited to whether defendant was arguably prejudiced by counsel's failure to call the named individuals. We must take the contents of the relevant affidavits to be true, and refrain from making credibility determinations. *People v. Sanders*, 2016 IL 118123, ¶ 42; *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Nevertheless, the potential testimony still must present a claim for relief that is arguably meritorious when considered in light of the record of the trial court proceedings. *People v. Deloney*, 341 Ill. App.

3d 621, 627 (2003). Our inquiry is whether it is arguable that a reasonable probability exists that the result of the defendant's trial would have been different had the testimony in question been presented. *Hodges*, 234 Ill. 2d at 17.

¶ 58 Prince Johnson states in his affidavit that he was with Griffin in Iowa in the early morning hours of February 4, 2007, when Griffin received phone calls that he did not answer. Johnson said Griffin told him Christmas "keeps calling me." Griffin called Christmas and spoke to him briefly, saying he would call him again later. Johnson said Griffin then received a call from defendant's mother (Stewart), who said police were at her house seeking defendant in a murder investigation. According to Johnson, Griffin told Stewart to call Christmas if she wanted to locate defendant.

¶ 59 Johnson attests that defendant arrived in Iowa a few days later and "never said that he killed anybody or was involved in a shooting." Johnson attested defendant said he needed to "lay low" until Christmas "cleared his name up" and "may need to put some money up just in case he did go to jail." Johnson stated Peters never contacted him to testify at defendant's trial.

¶ 60 Defendant asserts that an investigation of Griffin should have led Peters to interview Johnson, whose presence at the club with Griffin was established by Griffin's testimony. He argues Johnson would have refuted Griffin's testimony that defendant told them he participated in the shooting.

¶ 61 There is no indication Peters knew about Johnson prior to Griffin's testimony. Also, Johnson's testimony is contradicted by the record. Griffin's testimony does not indicate Johnson would have overheard any phone calls; Griffin testified he was home with his female friend when he received phone calls. It also is not arguable that Johnson's testimony about the

statements made by defendant after he arrived in Iowa would have changed the result of defendant's trial, given the testimony of Griffin and Patterson.

¶ 62 We next consider the affidavit of Cotton, who attests she lived with her boyfriend and Christmas at the time of these events. Cotton stated Christmas was a best friend of Thomas and that Thomas argued with Lucas several days before the shooting. Cotton attested that Christmas and Thomas left the house at about midnight with weapons they retrieved by moving ceiling tiles in their apartment.

¶ 63 Cotton's testimony would not have arguably changed the result of defendant's trial. Cotton would have testified that at about 12 a.m., Christmas and Thomas left the house with guns. Cotton therefore would have testified that Thomas, who was identified as one of the shooters, possessed a gun shortly before the shooting. Patterson testified the shooting took place sometime after 1 a.m., which would have allowed time for Christmas and Thomas to meet up with defendant. Furthermore, Griffin testified defendant called him from Thomas's phone number that night, which implies that defendant and Thomas were together. Defendant contends Cotton's testimony should be considered in light of the fact that "Thomas and Christmas fled Illinois and were located together after the shooting." However, it is undisputed that defendant left Chicago as well, arriving in Iowa several days later. Any testimony that Christmas and Thomas had guns in their possession shortly before the shooting would not have arguably changed the result of defendant's trial.

¶ 64 Stewart, defendant's mother, states in her affidavit that between 1:30 and 2:30 a.m. on the night of the shooting, Chicago police came to her house looking for defendant and she "immediately" called Griffin to see if he knew of defendant's whereabouts, which is consistent with Griffin's testimony for the State. Stewart said she called Griffin instead of defendant

because defendant's phone had been stolen in Atlanta two days earlier. Stewart attested Griffin told her to call Christmas to locate defendant because Christmas and defendant had returned to Chicago from Atlanta on February 3. Stewart said she called Christmas but no one answered; she then called the number of defendant's phone that had been stolen and received no answer.

¶ 65 Defendant contends Stewart's account would have "placed the recovered phone in Christmas's possession." However, the fact that defendant had a phone that was stolen several days earlier did not mean defendant did not possess another phone that was used and dropped on the night of the shooting. Katahnna Washington and Griffin testified as to defendant's same phone number, and the evidence at trial established that was defendant's phone. Stewart's potential testimony would not have changed the result of defendant's trial.

¶ 66 Lastly, Veronica Washington, defendant's girlfriend, states in her affidavit that she could have provided an alibi for defendant. She attested that she and defendant lived with defendant's brother and his girlfriend and were home starting at about 10 p.m. on the night of the shooting and that they remained home all night.

¶ 67 Peters testified he spoke to Washington several times before trial and she did not provide an alibi for defendant. Although Washington's affidavit does not specifically name Yolanda Franklin, Washington essentially states she was with defendant and Franklin at Franklin's residence. Thus, she would have offered testimony cumulative to that offered by Franklin, whose alibi testimony was offered for the first time in the hearing on defendant's posttrial motion. On direct appeal, this court found defendant was not prejudiced by Peters' strategic decision not to call Franklin to provide that alibi for defendant, given the strength of the State's case against defendant, including Patterson's testimony identifying defendant, defendant's admission to

Griffin, and the recovered cell phone, which featured recent calls to Griffin, Thomas and others in its call log. *Brown*, 2013 IL App (1st) 112692-U, ¶ 28.

¶ 68 Defendant must show that it is arguable that the outcome of his trial would have been different had counsel presented additional alibi testimony from Washington. See *Hodges*, 234 Ill. 2d at 17. Because this court has already rejected a claim of prejudice as to alibi testimony from Franklin based on the considerable evidence presented against defendant, it is not arguable that Washington's cumulative testimony would have changed the result of defendant's trial. See *People v. Jarnagan*, 154 Ill. App. 3d 187, 194 (1987) (the failure to investigate a witness whose testimony is cumulative does not demonstrate ineffective assistance of counsel).

¶ 69 In all, the testimony of those four potential witnesses does not state an arguable claim of trial counsel's ineffectiveness for failing to present their testimony, as it was countered by Patterson's identification of defendant as one of the gunmen and the fact that defendant's phone was recovered near the scene.

¶ 70 Defendant's procedural challenges to the circuit court's dismissal of his petition are rejected because the petition was ruled upon within 90 days of its filing and that disposition was made of record on the day of the court's ruling. Furthermore, even though defendant's claim that his trial counsel was ineffective for failing to present the testimony of various witnesses is not barred by *res judicata* because it was not raised in his direct appeal, the testimony of those witnesses would not have arguably changed the result of defendant's trial.

¶ 71 Accordingly, we affirm the summary dismissal of defendant's postconviction petition.

¶ 72 Affirmed.