SIXTH DIVISION
Order filed: May 25, 2018

No. 1-16-0210

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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. 96 CR 7609
	)	
MARCUS DAVIS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing the defendant's *pro se* post-conviction petition where the petition did not have an arguable basis in law or fact that the defendant was denied his right to effective assistance of trial and appellate counsel.

¶ 2 The defendant, Marcus Davis, appeals from the trial court's first-stage summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). On appeal, he contends that his post-conviction petition stated arguable claims of ineffective assistance of counsel where his (1) trial counsel failed to question

the entire jury regarding gang bias, and (2) appellate counsel failed to raise this issue on direct appeal. For the following reasons, we affirm.

¶ 3 Based upon the shooting death of Quentin Anderson on July 28, 1995, the defendant was charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 1994)).

¶ 4 Before the defendant's trial commenced, the trial court conducted the *voir dire* examination of prospective jurors. The court questioned each member of the first panel individually, but before doing so, it admonished them, in relevant part, as follows:

> "You must keep your mind open until you have heard all the facts of the case. Your verdict must be one that's based only on law and evidence in the case. Sympathy, bias or prejudice have no basis in the trial.
>
> Your oaths as jurors require you leave out sympathy, bias and prejudice. If you return a verdict that is based only on law and evidence without regard to sympathy, bias and prejudice, it will be a true verdict and verdict that brings justice to each of the parties in the courtroom."

After the court concluded its questioning, defense counsel had an opportunity to do the same. At one point during counsel's questioning, he addressed the entire first panel of the *venire* as follows:

> "If you learned during this trial that [the defendant], two years ago when this offense occurred was a member of a gang, would that affect your ability to give him a fair trial, would you still be able to be fair and judge what occurred. Okay.
>
> Anybody here saying that they can't be fair?

Judge, I have no further questions at this time."

The parties eventually selected five of these *venire* members to sit as jurors at the trial; all five of them indicated that there was nothing "in the nature of the charge itself that would affect [their] ability to be fair and impartial in this case" and that, depending on the evidence, they would not have a problem rendering either a guilty or not guilty verdict.

¶ 5 Thereafter, a second panel of *venire* members was questioned and six of them were selected as jurors. Defense counsel asked all six of them whether the defendant's previous participation in a gang would affect their verdict at trial and they answered that it would not. They also affirmed that their verdict would be based on the sufficiency of the evidence presented.

¶ 6 In order to select the twelfth and final juror, as well as two alternate jurors, several more rounds of questioning ensued. The parties ultimately selected J.C. as the final juror, K.L. as the first alternate, and H.F. as the second alternate. Defense counsel did not question any of them as to whether they would be able to base their verdict solely on the evidence even after learning that the defendant was a former gang member. The trial court and J.C., however, engaged in the following colloquy:

"Q. Is there anything in the nature of the charges themselves that affect your ability to be fair and impartial?

A. No.

* * *

Q. If at the end of all evidence you felt the state had proven its case beyond a reasonable doubt, would you have any problems rendering a guilty verdict?

A. No I wouldn't.

Q. If on the other hand you felt they have not proven the case beyond a reasonable doubt, would you have any problems rendering a not guilty verdict?

A. No." [1]

The court went on to ask K.L. and H.F. the same series of questions, and they also responded in the negative.[2]

¶ 7 In July 1997, the case proceeded to a jury trial. We adopt the following recitation of the trial evidence from this court's disposition on direct appeal (*People v. Davis*, No. 1-97-4520 (June 15, 2000) (unpublished order under Supreme Court Rule 23)):

> "At trial, the State presented two occurrence witnesses, Jose Canales and Juan Bustillos Alvarez. Canales testified that, at about 10 p.m. on the night of the incident, he was sitting on the back of his truck, which was parked on Malden Street, talking to Bustillos. Canales saw the victim, 15 year old *** Anderson, riding on a bicycle ***. After the victim passed them, reaching the front of Canales' truck, he suddenly jumped off of his bicycle. Canales testified that he saw another man, later identified as the defendant, across the street. The defendant came out from between the parked cars with a gun pointed at the victim and began firing. As the victim ran away, the defendant chased him, continuously shooting until the victim fell on to [*sic*] the grass parkway. Canales testified that

[1] Although the record shows that defense counsel asked J.C. these questions, we find that this is a clerical error. It is clear that the trial court engaged in this colloquy with J.C. because, at the end of the questioning, the court asked: "Is there anything further you feel either side should know about you before I tender the cards to the attorneys?"

[2] Defense counsel attempted to peremptorily excuse K.L.; however, the court denied his request, reasoning that he had already used his allotted one preemptory challenge for the potential alternate jurors.

the defendant then stood over the victim, fired his weapon, and ran away. He further stated that the victim did not threaten the defendant and he was not armed. The State's other eyewitness, Bustillos, substantially corroborated Canales' account of the incident. Both Canales and Bustillos identified the defendant as the perpetrator in a photographic array and later in a police line-up. ***.

*** The State rested its case.

The defendant testified on his own behalf, admitting that he shot the victim, but claiming that he had done so in fear for his life. He stated that he and his best friend, Dwayne Green, were both members of the Imperial Insane Vice Lords gang. At 1 a.m. on July 28, 1995, the defendant and Green were walking on Sunnyside Avenue in the Uptown neighborhood. The defendant was unarmed at the time. He saw three or four men on bicycles, and recognized one of the men as a member of the Black P Stone gang[,] *** Jarrod Harris. *** Harris jumped off of his bicycle and started firing at the defendant and Green. The defendant ran, escaping injury. Green, who did not run, was shot 12 times and killed. ***.

The defendant stated that, later that day, he *** traveled to a*** friend's house to ask for a gun, which he wanted for protection. The defendant testified that he was 'scared of the guys.' The defendant stated that he did not enter the Black P Stone gang's territory or 'go looking to kill' anyone.

Around 10 p.m. that night, the defendant was walking on Malden Street when he saw Harris and the victim, whom he did not recognize, on bicycles. The defendant testified that when they jumped off of their bicycles, he became scared thinking that they were going to kill him in the same manner in which Harris had

killed Green earlier that day. He testified that he immediately began shooting and continued shooting at them as they ran away. The defendant denied shooting the victim after he fell to the ground. *** The defendant acknowledged that, after his arrest, he had given a statement to an assistant State's Attorney, admitting that he was 'pissed off' that his best friend was killed and that he wanted to 'get back at the guy' that did it. In his statement, he also admitted that neither Harris nor the victim had a gun. ***.

Jerrod Harris testified that he was a member of the Black P Stones gang. * * * He acknowledged that he pled guilty to the first degree murder of Green and received a 26 year sentence.

Harris testified that about 20 hours after he shot Green, he and the victim were riding bicycles on Malden Street on their way to a restaurant. According to Harris, neither he nor the victim was armed. He testified that, when he saw the defendant, he kept on pedaling and that the victim was three or four feet behind him. Harris maintained that he neither said anything to the defendant nor flashed any gang signs. Contrary to the defendant's testimony, Harris denied getting off of his bicycle near the defendant. He testified that, when he reached the restaurant, he heard gunshots. He saw the victim's bicycle halfway down the street and the defendant on the sidewalk pointing his hand down. He heard four or five more shots and saw sparks coming from the gun in the defendant's hand. Harris stated that the defendant ran away and the victim was laying on the grass."

¶ 8 Before the parties presented their closing arguments, the trial court sought to ensure that the jury understood their oaths. It explained:

> "you are to base your verdict on the evidence and the law that I will be presenting to you. *** [Y]ou cannot use any sympathy, bias or prejudice in arriving at your verdict.
>
> Does anyone have a problem with your oath and what those instructions are?
>
> Based on that[,] I believe we can proceed and go towards the conclusion at this point."

¶ 9 During its closing arguments, the State contended, *inter alia*, that Canales and Bustillos were more credible than the defendant, and that Harris corroborated their testimony. It further asserted that, when the defendant shot the victim, he was not acting in self-defense; rather, he was being vengeful and calculating. According to the State, this was evinced by the fact that the defendant went after the victim *instead of Harris*; the defendant wanted Harris, who was friends with the victim, to witness the victim's death, just like the defendant had to witness Green's death. To establish that the defendant's actions were unjustified, the State argued:

> "Ladies and gentlemen, gangs equal violence. And when that violence erupts, whether for retribution or vengeance or anger or because you're pissed off, people die.
>
> And while we hear about this violence on the news and we read about it in the newspapers, it's very difficult to understand how it affects the community.
>
> Well today you know how it affects the community. You know how it affected the victim in this case ***.
>
> * * *

> And you realize now how it affects the rest of the community; the people, the ordinary people who live in that community, who want to live there in safety without fear."

The State went on:

> "[T]he law of our state *** is the law we are bound by and that is the oath that you guys took. Not whatever perverted cold law of the Blackstones, the Vice Lords, whatever.
>
> * * *
>
> Gangs do shoot. There is retaliation, and then there is retaliation from the retaliation.
>
> Well it stops here, ladies and gentlemen. It stops right here. Every single gang member who retaliates, who for the sake of revenge and somebody dies is guilty of first degree murder."

¶ 10 The defense, in contrast, argued that, after the incident involving Green, the defendant feared for his life; therefore, he obtained a gun and shot the victim.

¶ 11 Before deliberations, the trial court gave the jury instructions, which stated, in pertinent part, that "[n]either sympathy nor prejudice should influence" them. The jury ultimately found the defendant guilty of first degree murder and, following a sentencing hearing, he was sentenced to 60 years' imprisonment.

¶ 12 On direct appeal, this court affirmed the defendant's conviction and sentence, rejecting his contentions that: "the trial court erred by[: (1)] denying him the statutorily allotted number of peremptory challenges during the selection of alternate jurors, [(2)] making certain *** evidentiary rulings [that] limited his ability to present a defense, *** [(3)] dismissing two jurors

during trial[,]" and (4) imposing an excessive sentence. *People v. Davis*, No. 1-97-4520 (June 15, 2000) (unpublished order under Supreme Court Rule 23).

¶ 13 On October 14, 2015, the defendant filed a *pro se* post-conviction petition, alleging that his trial counsel was ineffective for, *inter alia*, failing to question all of the jurors about their bias toward gang members. He further alleged that his appellate counsel was ineffective for, *inter alia*, failing to raise this issue on direct appeal. In support of these claims, he alleged that, during *voir dire*, his trial counsel failed to question 3 of the 12 jurors who rendered the verdict at his trial: J.C., K.L., and H.F. He stated that "street gangs are regarded with considerable disfavor by other segments of our society[; t]herefore, when jurors [J.C., K.L., and H.F.] are not asked [*sic*] about gang bias" this "may have caused [his jurors] to be tainted by a bias juror [*sic*]." He went on: "Furthermore, prejudice can be presumed in this cause because no one can say that [the] jury was not tainted by a bias juror [*sic*] because beyond panel number one only certain prospective jurors, not all prospective jurors, were asked about gang biasness [*sic*]." In support of his petition, the defendant attached his own affidavit with exhibits; however, neither the affidavit nor the exhibits mentioned juror bias.

¶ 14 The trial court summarily dismissed the petition at the first stage of the proceedings on November 19, 2015, finding that the defendant's claims were "frivolous and patently without merit[.]" As to the defendant's claim concerning his trial counsel's failure to question three of the jurors about gang bias, the court found that counsel's decision was a matter of trial strategy and, even if counsel's performance was deficient, the defendant failed to present "evidence to show he was prejudiced by juror gang bias." It explained that the defendant was not prejudiced because, in light of the overwhelming evidence against him (including his confession), it was

"not reasonable" to conclude that, but for counsel's alleged deficient performance, a different outcome would have been reached. The court also reasoned that:

> "[w]hile the Illinois Supreme Court has noted that there may be strong prejudice against street gangs, *People v. Strain*, 194 Ill. 2d 467, 477 (2000), there is no evidence in the record that shows prejudice at trial. [The defendant] only alleges that three of the jurors *may* have had a gang bias because counsel did not ask them about it, but this is not evidence of actual bias." (Emphasis in original.)

Because the court held that trial counsel did not provide ineffective assistance, it went on to find that appellate counsel also did not provide ineffective assistance. As a result, the court denied the defendant's petition. This appeal followed.

¶ 15 On appeal, the defendant contends that the trial court erred in summarily dismissing his *pro se* post-conviction petition. According to the defendant, his ineffective-assistance-of-counsel claim relating to his trial counsel's *voir dire* examination of prospective jurors presented the gist of a constitutional violation and, consequently, we should reverse and remand the matter for second-stage post-conviction proceedings. We disagree.

¶ 16 Under the Act, a defendant may challenge his conviction by contending that it was "the result of a substantial denial of [his constitutional] rights[.]" *People v. Tate*, 2012 IL 112214, ¶ 8. In noncapital cases, like the case at bar, the post-conviction process involves three stages. *Id.* ¶ 9. At the first stage, which applies here, a trial court independently reviews a defendant's petition. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If the court determines that the petition "is frivolous or patently without merit[,]" it must summarily dismiss the petition. *Id.*; see also 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is frivolous or patently without merit only if it "has no arguable basis either in law or in fact[,]' *i.e.*, it "is based on an indisputably meritless

legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). "[A]n indisputably meritless legal theory is one which is completely contradicted by the record" and a fanciful factual allegation is one that is "fantastic or delusional." *Id.* at 16-17. The petition's allegations, which the court should accept as true and construe liberally, "need only present the gist of a constitutional claim[,]" which is a "low threshold[.]" *Brown*, 236 Ill. 2d at 184; see also *Tate*, 2012 IL 112214, ¶ 9 ("Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low."). We review a trial court's summary dismissal of a post-conviction petition *de novo. Brown*, 236 Ill. 2d at 184.

¶ 17 In assessing ineffective-assistance-of-counsel claims, we use the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which requires a defendant to establish that: (1) his "counsel's performance was deficient[,]" and (2) "prejudice resulted from the deficient performance." *Brown*, 236 Ill. 2d at 185. We can opt to address the second prong—"the prejudice prong"—first and, if we find that the defendant has not satisfied it, we may forego addressing the first prong. *People v. Hale*, 2013 IL 113140, ¶ 17 (courts may "proceed*** directly to the prejudice prong without addressing counsel's performance."). This is because *both* of the *Strickland* prongs must be satisfied in order to prevail on a claim of ineffective assistance of counsel. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). During the first stage of post-conviction proceedings, however, a defendant is not required to prove or establish that is counsel was ineffective under both prongs; instead, he must show that it is *arguable* that: (1) "counsel's performance fell below an objective standard of reasonableness[,]" and (2) he was prejudiced by the performance. *Hodges*, 234 Ill. 2d at 17; see also *Tate*, 2012 IL 112214, ¶ 19.

¶ 18 According to the defendant in this case, the trial court's dismissal of his *pro se* post-conviction petition was inappropriate because it is arguable that he met both of the *Strickland* prongs. We address the prejudice prong first. See *Hale*, 2013 IL 113140, ¶ 17.

¶ 19 "[T]he prejudice prong of *Strickland* is not simply an 'outcome-determinative' test but, rather, may be satisfied if [the] defendant can show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair." *People v. Jackson*, 205 Ill. 2d 247, 259 (2001); see also *People v. Evans*, 209 Ill. 2d 194, 220 (2004) ("a reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel's deficient performance rendered the result of the trial unreliable or fundamentally unfair").

¶ 20 The defendant contends that his trial counsel's failure to ask 3 of the 12 jurors—namely, J.C., K.L., and H.F.—about gang bias during *voir dire* deprived him of an informed and intelligent basis to exercise challenges to those jurors; thus, he was denied his right to an impartial jury and the outcome of his trial is unreliable. The defendant would have us hold that prejudice should be presumed where counsel fails to obtain information about jurors' potential gang bias if gang-related evidence permeates the trial, as it did here.

¶ 21 The defendant's petition did not allege any facts establishing that the jurors who sat at his trial were biased against gangs or that he was convicted solely because he was a member of a gang. He did not attach any affidavits from jurors or otherwise support his petition with any evidentiary material demonstrating juror bias. Instead, his allegations were based on mere speculation that J.C., K.L., and H.F. "may have" been biased because gangs are highly disfavored by most of society. Moreover, our review of the record did not undercover anything to suggest that any of the jurors who rendered the defendant's verdict—including J.C., K.L., and

H.F.—harbored bias towards the defendant or gangs. On more than one occasion, the trial court admonished the jurors that their verdict should not result from bias or prejudice; rather, it should be based on the law and evidence presented to them. All 12 of the jurors affirmed that they could be fair and impartial, and would return a verdict of "not guilty" if the State failed to prove the defendant guilty beyond a reasonable doubt. See *People v. Benford*, 349 Ill. App. 3d 721, 731-34 (2004) (where, in holding that counsel was not ineffective for "not attempting to ascertain*** whether the jurors would be prejudiced by evidence of defendant's gang involvement," the court reasoned, *inter alia*, that: "[the d]efendant does not allege that any juror displayed a potential gang bias, and dismisses the fact that the jurors each agreed that they could decide the case fairly.").

¶ 22 Furthermore, it is unlikely that the outcome of the trial would have been different but for counsel's alleged deficient performance because the evidence against the defendant was overwhelming.[3] Canales and Bustillos testified that they observed the defendant shoot the unarmed victim multiple times, even after he had fallen to the ground. Canales's and Bustillos's testimony was corroborated by Harris. Harris stated that he was riding his bicycle ahead of the victim on Malden Street and, when he reached the restaurant, he heard gunshots. He looked back, and saw the victim's bicycle in the middle of the street and the defendant standing on the sidewalk pointing a gun, which was emitting sparks, downward. The State also presented evidence that the defendant confessed to shooting the victim because he was "pissed off" that his best friend was killed and he wanted to "get back at the guy" who did it. The defendant's own testimony established that he shot and killed the victim. Because the evidence against the

[3] The defendant points out that, in *People v. Strain*, 194 Ill. 2d 467 (2000), the court "did not engage in any analysis of the strength of the evidence[;]" however, for the reasons set forth *infra*, the defendant's reliance on *Strain* is misplaced.

defendant was overwhelming and the record does not establish that any of the jurors harbored gang bias, it is not arguable that the defendant was prejudiced when his trial counsel did not question J.C., K.L., and H.F. about their ability to fairly judge the case although the defendant was a gang member. See *People v. Metcalfe*, 202 Ill. 2d 544, 562-63 (2004) (where "the evidence was more than sufficient to prove [the] defendant guilty beyond a reasonable doubt *** [and] there [was] absolutely no evidence that [a juror's] bias *** was directed at [the] defendant ***[,] *** we cannot say that the result of the proceedings would have been different"). The trial court, therefore, did not err in denying his *pro se* post-conviction petition.

¶ 23 The defendant relies on *People v. Strain*, 194 Ill. 2d 467 (2000), to argue that we should presume prejudice where counsel fails to ask jurors about gang bias in cases where gang-related evidence permeates the trial. We find that the defendant's reliance on *Strain* is misplaced.

¶ 24 In *Strain*, defense counsel requested that the trial court ask each *venire* member two questions regarding potential gang bias, but the court refused. *Id.* at 469. The appellate court reversed and remanded the matter for a new trial, and the supreme court affirmed, reasoning: "when testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias." *Id.* at 469, 477, 481. The defendant argues that, pursuant to *Strain*, "questioning *** jurors about their potential for gang bias *** is 'mandated' by the Constitution" when testimony about gangs is an integral part of the trial. *Strain*, however, did not establish such a rule; rather, our supreme court merely held that the defendant must be afforded an opportunity to question prospective jurors about gang bias. *Id.* at 481; see also *People v. Gardner*, 348 Ill. App. 3d 479, 482 (2004). Here, the defendant was given an opportunity to question the jurors about gang bias. *Strain* is

also inapposite from the case at hand because it did not involve a claim of ineffective assistance of counsel. See *People v. Furdge*, 332 Ill. App. 3d 1019, 1026 (2002) (where, in finding that *Strain* did not "support*** [the] defendant's claim of ineffective assistance of trial counsel[,]" the court noted that "*Strain* did not address whether defense counsel was ineffective for failure to question potential jurors about gang bias.").

¶ 25 Having found that the defendant has not met the prejudice prong of *Strickland*, we need not address his arguments regarding the first prong, *i.e.*, whether counsel's performance was deficient. See *Hale*, 2013 IL 113140, ¶ 17.

¶ 26 Because we find that the defendant's ineffective-assistance-of-trial-counsel claim is patently without merit, so too is his claim that appellate counsel provided ineffective assistance by failing to raise this issue on direct appeal. See *People v. Smith*, 2014 IL 115946, ¶ 37 ("[the d]efendant's underlying claim has no merit and, necessarily, [the] defendant's post[-]conviction counsel and appellate counsel cannot be ineffective for failing to raise the meritless claim.").

¶ 27 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 28 Affirmed.