

No. 1-10-0255

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 00 CR 8905
)	
JUAN OCON,)	Honorable
)	Joseph G. Kazmierski, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBride delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to indicate at trial that he wished to testify, and his purported testimony would not have changed the outcome of trial, we affirm the circuit court's dismissal of his petition without an evidentiary hearing.

¶ 2 Defendant Juan Ocon appeals from the circuit court order granting the State's motion to dismiss his petition filed under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2004). On appeal, defendant contends that his petition sufficiently alleged his counsel prevented him from testifying and was, therefore, ineffective. We affirm.

¶ 3 On March 26, 2002, following a simultaneous but separate jury trial with codefendant Alvaro Vera, defendant was convicted of first degree murder and attempted first degree murder where defendant fired a gun into a car while he was riding in a van during the early morning hours of January 9, 2000, in the area of Ashland Avenue and Jackson Boulevard in Chicago. The evidence at trial included defendant's confessions, identification of defendant by two eyewitnesses, and physical evidence. Defendant was sentenced to 45 and 15 years' imprisonment, respectively, with the sentences to be served concurrently. On direct appeal, this court remanded the cause for defendant to be sentenced to consecutive terms of imprisonment and affirmed the trial court's judgment in all other respects. *People v. Ocon*, No. 1-02-1567 (2003) (unpublished order under Supreme Court Rule 23).

¶ 4 On September 10, 2004, defendant filed a *pro se* post-conviction petition, alleging numerous claims of ineffective assistance of trial counsel including, in pertinent part, that

"Defense counsel prevented defendant from testifying by telling him all along that he would not be preparing him to testify, and if defendant persisted in wanting to testify then defense counsel would withdraw from his case. He also stated what did defendant expect from [the] public defenders office as they had more clients than lawyers. Defendant therefore agreed to not testify when in fact he wanted to ***. *** Also, defense counsel said [defendant would] be 'impeached' due to his purported confession statement."

¶ 5 The circuit court appointed defendant post-conviction counsel, who later filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984), but did not amend defendant's *pro se* petition. The State filed a motion to dismiss defendant's petition, which was granted by the circuit court. In doing so, the circuit court found that the record refuted

defendant's claim that he was denied his right to testify.

¶ 6 On appeal, defendant asserts that trial counsel was ineffective because he denied defendant his right to testify. The State maintains that defendant's petition was properly dismissed without an evidentiary hearing because defendant failed to attach any sworn affidavits. The State further contends that the record refutes defendant's claim that his trial counsel prevented him from testifying.

¶ 7 We review a second stage dismissal of a post-conviction petition *de novo*. *People v. Harris*, 206 Ill. 2d 1, 13 (2002). To survive dismissal at the second stage of a post-conviction proceeding, defendant must make a substantial showing that his constitutional rights were violated. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). Defendant must support his claims with affidavits, records, or other evidence. 725 ILCS 5/122-2 (West 2004); *People v. Harris*, 224 Ill. 2d 115, 141 (2007).

¶ 8 When asserting a claim of ineffective assistance of counsel, the defendant's petition must allege facts showing that counsel's performance was objectively unreasonable and that it resulted in prejudice to defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Defendant must provide evidence to support both prongs of the *Strickland* test to succeed on his claim. *People v. Wilson*, 191 Ill. 2d 363, 370 (2000). As a general rule, a defendant has a fundamental right to testify and the decision to testify can only be made by the defendant, regardless of counsel's advice. *People v. Clemons*, 277 Ill. App. 3d 911, 922 (1996).

¶ 9 Initially, we reject the State's argument that defendant's failure to attach an affidavit from trial counsel is fatal to his claim. See *People v. Williams*, 47 Ill. 2d 1, 4 (1970) (holding that defendant's post-conviction petition should not be dismissed based on his failure to attach an affidavit from his trial counsel to support his ineffective assistance of counsel claim because

"[t]he difficulty or impossibility of obtaining such an affidavit is self-apparent"); see also *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005).

¶ 10 Nonetheless, defendant's ineffective assistance of counsel claim still fails because although defendant's petition alleges that defendant indicated his desire to testify to his counsel in a private conversation, there is no evidence that he reaffirmed his intention when it was time for the defense to present its case, or that he objected when counsel rested its case without calling him to testify. Absent "a contemporaneous assertion by the defendant of his right to testify, the trial judge properly denied an evidentiary hearing." *People v. Thompkins*, 161 Ill. 2d 148, 178 (1994), quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973). In fact, the record shows that defendant explicitly told the court that he did not want to testify. The following colloquy occurred between the trial court and defendant:

"THE COURT: I want to advice [*sic*], Mr. Ocon, you probably already talked to Mr. Brice. But in any case, the person charged with a crime has a right to testify. You also have a right not to testify. That's only the decision that you can make. Do you understand that?

DEFENDANT: I understand.

THE COURT: Is your decision you don't want to testify today?

DEFENDANT: Yes, your Honor."

¶ 11 Moreover, defendant is unable to establish prejudice under the *Strickland* test, as evidence of his guilt was overwhelming. At trial, two eyewitnesses identified defendant as a shooter. Their testimony was corroborated by each other's testimony, defendant's confessions, the surviving persons' testimony of the sequence of the events of the shooting, and the physical evidence. Thus, defendant fails to make a substantial showing that his constitutional rights were

violated, and therefore dismissal of this claim was proper. See *People v. Madej*, 177 Ill. 2d 116, 146-47 (1997) (affirming the second-stage dismissal of the defendant's post-conviction petition when defendant could not show that the violation of his right to testify created a reasonable probability that the trial outcome would have differed because evidence of his guilt was overwhelming); *People v. Hernandez*, 351 Ill. App. 3d 28, 39-40 (2004) (affirming the dismissal of defendant's post-conviction petition when he could not show he was prejudiced by trial counsel's alleged violation of his right to choose whether or not to testify).

¶ 12 In reaching this conclusion, we find *People v. Lester*, 261 Ill. App. 3d 1075 (1994), relied on by defendant, unpersuasive. In *Lester*, the defendant alleged in his post-conviction petition that his trial attorney told him that if he testified, his appeal would suffer. The circuit court dismissed defendant's petition without an evidentiary hearing. In reversing the circuit court's dismissal, this court held that an attorney's "incomplete or inaccurate information to the defendant regarding the defendant's right to testify is arguably a factor in consideration of whether counsel was ineffective." *Lester*, 261 Ill. App. 3d at 1079, quoting *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986). We ultimately held that the defendant in *Lester* had been misled into not testifying by his attorney's statement that testifying would cause his appeal to suffer. *Lester*, 261 Ill. App. 3d at 1079.

¶ 13 However, more recently in *People v. Buchanan*, 403 Ill. App. 3d 600 (2010), this court declined to follow the reasoning in *Lester*, even though it was factually on all fours with that case. In doing so, we held that it is not necessarily misleading for an attorney to tell a client that testifying might hurt his chances on appeal, even if the attorney assumes that the trial is lost before it begins. *Buchanan*, 403 Ill. App. 3d at 607. More importantly, we also declined to follow *Lester* because it completely failed to address the prejudice prong of the ineffective assistance of counsel test. *Buchanan*, 403 Ill. App. 3d at 608. Here, similarly to *Buchanan*, we

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find that counsel's alleged statements that defendant's testimony at trial would be impeached by his confession and that he should not testify was not misleading. Furthermore, as stated above, the evidence against defendant was very strong and any statements that he would have made at trial would not have changed the outcome.

¶ 14 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 15 Affirmed.