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SIXTH DIVISION
March 25, 2011

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	
v.)	05 CR 20332
)	
DIMITRIUS THOMAS,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Garcia and Justice R.E. Gordon concurred in the judgment.

ORDER

HELD: Defendant failed to set forth a cognizable claim of ineffective assistance of trial counsel or actual innocence to warrant further proceedings under the Post-Conviction Hearing Act; summary dismissal of the defendant's post-conviction petition affirmed.

Defendant Dimitrius Thomas¹ appeals the first-stage dismissal of his postconviction

¹ Defendant's name also appears as Demetrius Thomas in the record.

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petition, arguing that the trial court erred in finding the petition to be frivolous and patently without merit because he raised the gist of a meritorious claim of ineffective assistance of trial counsel and a claim of actual innocence. Specifically, he argues that his trial counsel was ineffective for: (1) failing to present exculpatory witnesses; (2) denying defendant his right to testify in his defense; and (3) eliciting information on cross-examination that benefitted the State's case. Defendant asserts that he presented a cognizable claim of actual innocence based on statements made by codefendant Jeramiah Johnson that defendant was not present during the commission of the crime.

Because this is defendant's second appeal, we will discuss the only those facts relevant to defendant's postconviction petition. A detailed discussion of defendant's trial can be found in his direct appeal. *People v. Thomas*, 384 Ill. App. 3d 895 (2008).

Following a jury trial, defendant was convicted of armed robbery, home invasion and aggravated kidnaping. On March 10, 2005, Tammie Allen arrived at her home, located at 4515 South Leamington Avenue, with her children and parked in front of the house. David, age 11, and Tamera, age 7, walked to the side door while Tammie stayed in front of house as Tyla, age 5, played in the snow. David had his own key and went to unlock the door. As he was going into the house, two men approached them, later identified as codefendants Jeramiah Johnson and Tyrone Sanders. Sanders came up behind David and Tamera while Johnson grabbed Tammie and Tyla.

The men forced the family into their home and cornered them in the kitchen. The men were armed with firearms. One of the men grabbed Tammie by the collar and demanded to know

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where the money was and threatened to “deaden her ass” when she said she did not know. Sanders then fired his gun into the kitchen floor. The men emptied Tammie’s purse and took a cell phone and \$6 from David. Johnson forced Tammie around the house and Johnson went through the bedrooms looking for money.

David testified that Sanders called someone on his cell phone and told that person to bring duct tape. A third man then arrived at the house with duct tape. When Johnson and Tammie returned to the kitchen, she saw the third man, wearing a blue hooded sweatshirt with the hood partially covering his head. Tammie identified the third man in court as defendant. Defendant said, “Don’t let that bitch see my face.” Johnson then pushed Tammie into David’s bedroom. Johnson returned and put duct tape over her mouth and forehead, partially covering her eyes. Tammie’s hands were bound behind her back by the tape. Eventually the tape was removed from Tammie’s mouth and forehead.

Johnson and defendant took Tammie to the basement and the men began “rambling” through the basement and kept asking for the money. Sanders yelled from upstairs that “it’s a blue and white out here.” The men ran up the stairs and out of the house. Tammie was able to release herself from the duct tape and called for her children.

During the police investigation, Tammie initially identified a person who “resembled” defendant, but did not affirmatively identify him. In April 2005, Detective Thomas Kampenga, who was investigating the robbery, learned that a search warrant had been served at 1910 North Sawyer and three handguns were recovered from that address. He had the bullet recovered from the Allens’ kitchen floor compared with the recovered handguns. It was determined to be a

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match to one of the recovered guns. Subsequently, Tammie met with Detective Kampenga, at which time she identified Johnson and defendant in a photographic array. A lineup was conducted later and Tammie again identified Johnson and defendant. David viewed the lineup separately from his mother, and he also identified defendant and Johnson. In June 2005, Tammie identified Sanders in a photographic array and later in a lineup. David also identified Sanders separately at a lineup.

A fingerprint was taken from the dryer, but it did not match defendant. No other suitable fingerprints were recovered from the house. Also, DNA analysis was performed on a cigarette butt smoked by one of the men and left at the crime scene. However, the DNA profile did not match any of the men.

Johnson testified for the State and said that he pled guilty to home invasion in exchange for an 11-year sentence. All other charges were dropped against him. According to Johnson, he was told by a person called "Ball" about a place they could rob. Ball picked up Johnson with other men. Johnson identified one of the men as defendant but did not identify the other as Sanders. The men parked away from the house and waited for the family to come home. His testimony mostly corroborated the testimony of Tammie and David. Johnson stated that defendant took all the guns after they left.

After the State rested, defendant moved for a directed verdict, which the trial court denied. Defense counsel then informed the court that defendant had decided not to testify. The trial court admonished defendant about his right to testify on his own behalf. Defendant indicated on the record that he understood it was his decision alone to testify and he made the

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decision not to testify of his own free will after consulting with his attorney. Defendant also stated that his decision not to testify was not the result of any promises or threats. The defense rested without presenting any evidence.

Following deliberations, the jury found defendant guilty of armed robbery, two counts of home invasion, and four counts of aggravated kidnaping.

At a subsequent hearing date, defendant's trial counsel sought leave to withdraw as defendant's attorney because defendant had filed a complaint against him with the Attorney Registration and Disciplinary Commission (ARDC). Defense counsel submitted the complaint and his answer to the trial court and was allowed to withdraw. The ARDC complaint filed by defendant set forth several allegations against his trial counsel including claims that his attorney did not investigate witnesses that defendant requested. Defense counsel's answer stated that defendant gave him a list of four witnesses, including defendant's brother, and the witnesses were contacted by the attorney's private investigator. Counsel further responded that "all four (4) witnesses refused to cooperate with our office to establish a defense to the defendant's charges." The response also stated that defendant had called his attorney on at least ten occasions and threatened the attorney with physical harm.

Defendant retained a new attorney for posttrial motions and sentencing. Defendant filed a motion for a new trial, which the trial court denied. The trial court sentenced defendant to 25 years for the home invasion and aggravated kidnaping of Tammie, 50 years for the home invasion, aggravated kidnaping and armed robbery of David, and 50 years for the aggravated kidnaping of Tamera and Tyla, all sentences to run concurrently.

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On direct appeal, defendant contended that the State failed to prove him guilty of home invasion because no one was present when the codefendants entered the residence, that one of his convictions for home invasion should have been vacated under the one-act, one-crime doctrine, the trial court abused its discretion in sentencing defendant to an extended-term sentence of 50 years; and the mittimus should have been corrected to reflect a conviction for armed robbery instead of armed violence. This court affirmed defendant's conviction for home invasion of a person under 12 years of age and sentence, but vacated one count of home invasion and ordered the mittimus corrected to reflect an armed robbery conviction. See *Thomas*, 384 Ill. App. 3d at 903.

In July 2009, defendant filed a postconviction petition prepared by private counsel. The petition alleged multiple claims of ineffective assistance of counsel and a claim of actual innocence. Defendant contended that his trial counsel was ineffective for: (1) failing to present exculpatory witnesses, specifically his brother Latrone Thomas and a friend George Davis, who asserted in affidavits that they informed defendant's trial counsel that defendant was with them at the time the home invasion occurred; (2) denying defendant his right to testify on his own behalf regarding defendant's connection to the weapon used in the home invasion; and (3) eliciting testimony from Johnson on cross-examination that defendant took the guns home after the crime, which helped the State's case against defendant. Defendant also raised a claim of actual innocence based on Johnson's statements to defendant's postconviction counsel that defendant was not involved in the home invasion. An unsworn, unsigned affidavit was attached to the postconviction petition stating that Johnson testified against defendant because the State told him

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he would get up to 60 years if he did not and he felt he had no choice, but defendant did not participate in the home invasion. An affidavit from defendant's postconviction counsel stated that he spoke with Johnson over the phone about the statements made in Johnson's unsigned affidavit. Defendant also attached affidavits from defendant's mother and two family friends stating that defendant's trial counsel was told of the existence of alibi witnesses. He also said that an affidavit was mailed to Johnson in prison, but had not been returned by the time the postconviction petition was filed.

In September 2009, the trial court dismissed defendant's postconviction petition as frivolous and patently without merit. Specifically, the trial court found defendant's claims of ineffective assistance of trial counsel forfeited because they could have been raised on direct appeal, defendant failed to raise a cognizable claim that his attorney prevented him from testifying at trial, and defendant failed to properly raise a claim of actual innocence because there was no newly discovered evidence presented, only allegations of Johnson's perjury.

This appeal followed.

On appeal, defendant argues that the trial court erred in summarily dismissing his postconviction petition as frivolous and patently without merit because he stated the gist of a meritorious claim of ineffective assistance of trial counsel and actual innocence.

The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West

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2008); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. “A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment.” *People v. Evans*, 186 Ill. 2d 83, 89 (1999). “The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.” *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005); *Barrow*, 195 Ill. 2d at 519. The standard of review for dismissal of a postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 389.

At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or fact if it is “based on an indisputably meritless legal theory,” such as one that is “completely contradicted by the record,” or “a fanciful factual allegation,” including “those which are fantastic or delusional.” *Hodges*, 234 Ill. 2d at 16-17. If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2002). At the dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining

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whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. At this stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations, as all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385.

The “gist” standard is a low threshold. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). To set forth the “gist” of a constitutional claim, the postconviction petition need only present a limited amount of detail and hence need not set forth the claim in its entirety. Further, the petition need not include legal arguments or citations to legal authority. *Edwards*, 197 Ill. 2d at 244. However, the supreme court in *Hodges* clarified that “gist” does not refer to the legal standard used in our review. “[O]ur use of the term ‘gist’ describes what the defendant must allege at the first stage; it is not the legal standard used by the circuit court to evaluate the petition, under section 122-2.1 of the Act, which deals with summary dismissals. Under that section, the ‘gist’ of the constitutional claim alleged by the defendant is to be viewed within the framework of the ‘frivolous or *** patently without merit’ test.” *Hodges*, 234 Ill. 2d at 11. If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2008).

Defendant contends that the trial court erred in dismissing his postconviction petition because he stated the gist of a meritorious claim of ineffective assistance of counsel and a claim of actual assistance.

Defendant first asserts that his trial counsel was ineffective for failing to investigate and

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call exculpatory witnesses at trial. In support of this claim, defendant attached affidavits from his brother, Latrone Thomas, and a friend, George Davis. Davis stated that on March 10, 2005, defendant picked him up around 3 p.m. The men drove around and “hung out” until defendant received a call from his girlfriend, Ann Rice. Defendant told Davis that Rice said defendant needed to get his “stuff” out of their apartment, located at 1111 S. Laflin. Sometime between 5:30 and 6:30 p.m., defendant called his brother Latrone to tell him that defendant was moving his belongings out of Rice’s apartment and asked if he could store it at Latrone’s residence. They arrived at 1111 S. Laflin at around 7 p.m. and defendant and Davis spent half an hour to an hour removing defendant’s belongings. They then drove to Latrone’s home at 1112 S. Francisco. Latrone met them there and they emptied the belongings from the car and placed them in Latrone’s apartment. After that, Davis drove around with defendant until midnight when defendant drove Davis home.

Davis further stated that he was called by defendant’s attorney before trial and they spoke for about ten minutes. He told his attorney about the above statement, but was never contacted again by defendant’s attorney and was not subpoenaed to testify at trial. Davis said he would have testified at trial to the information in the affidavit.

Latrone’s affidavit contained a corroborating timeline to the statements made in Davis’s affidavit. Latrone stated he was contacted by defendant between 5:30 and 6:30 p.m. on March 10, 2005, and defendant told him that he had been in an argument with his girlfriend and she demanded him to remove his belongings from her home. Defendant asked if he could store his things at Latrone’s apartment, and Latrone agreed. Defendant arrived around 7:45 to 8 p.m. with

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Davis and they unloaded defendant's belongings from the car.

Latrone also stated that he was contacted by defense counsel prior to trial. He spoke with defendant's attorney for five to ten minutes over the phone and Latrone told the attorney that he was available to testify at defendant's trial. Latrone said he was never subpoenaed for defendant's trial.

Defendant also attached affidavits from his mother Bonnie Thomas, his cousin Monique Day, and Moses Brisbon, a friend of defendant's mother. Bonnie and Brisbon both stated that they informed defense counsel about the evidence Davis and Latrone could provide. Day stated that she heard defendant tell his attorney about Davis and Latrone's evidence, but his attorney did not express any interest in the witnesses and hung up when defendant asked questions.

However, this issue has been forfeited. Contrary to defendant's claim that this evidence was not contained in the record, defendant's complaint to the ARDC specifically asserted that his trial attorney failed to investigate exculpatory witnesses. The complaint and trial counsel's response were part of the trial record and could have been raised on direct appeal. Defendant's trial counsel stated in his response that he or his investigator contacted the witnesses, including defendant's brother, and they were uncooperative. Further, a claim of ineffective assistance of trial counsel for the failure to call witnesses, including defendant's brother, was included in defendant's supplemental motion for a new trial. Since this issue was apparent on the record and could have been raised on appeal, defendant has forfeited this claim.

Defendant also contends that his trial counsel was ineffective for denying defendant his right to testify. Specifically, defendant argues that although he advised his attorney that he had

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an explanation for the existence of the gun found in his residence after the crime, he did not insist on his right to testify because his attorney “repeatedly assured [defendant] ‘that the case would be beaten.’ ” The State maintains that defendant has forfeited this issue for failing to raise it on direct appeal. Even if this issue were not forfeited, the State responds that defendant did not make a contemporaneous assertion of his right to testify.

As we have previously stated, any issue that could have been raised on direct appeal, but was not, is forfeited for a postconviction review. See *Blair*, 215 Ill. 2d at 443-47. Here, defendant stated at his sentencing hearing that he felt he had been denied the right to testify because of his trial counsel’s assertions that defendant would not be convicted.

“You know, the jury found me guilty, your Honor, but they — I didn’t get a chance to reveal my testimony, your Honor, because of my last attorney, Mr. Wiener, promised me that I would be going home, he promised me these things to not testify, to not testify that you’re going home, you know, to not give a testimony [*sic.*], you know. He promised these things.

At the time of you asking me those questions when this trial went on, your Honor, I sat up there and didn’t say anything because I thought that I was gonna have a not guilty verdict. But this is what Mr. Wiener promised me, and I just truly feel that I should be given a chance to look over this trial and do this trial, have a re-trial, your Honor, because I did not commit this crime.

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You know, I understand that a weapon was found at my house and, yes, it was, but at the same time, your Honor, it was sold to me, your Honor, it was sold to a friend of mine [sic.], your Honor. And this case haven't been revealed the right way, your Honor, it have not. [sic.] This case have not been revealed.”

However, this issue was not raised in defendant's direct appeal. See *Thomas*, 384 Ill. App. 3d 895. Since this issue was readily apparent on the record and could have, but was not, raised on direct appeal, this issue has been forfeited for postconviction review.

Forfeiture aside, defendant's claim still fails. A defendant's right to testify at trial is a fundamental constitutional right, as is his or her right to choose not to testify. *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997), see *Rock v. Arkansas*, 483 U.S. 44 (1987). It is now generally recognized that the decision whether to testify ultimately rests with the defendant. *Madej*, 177 Ill. 2d at 146. Therefore, it is not one of those matters which is considered a strategic or tactical decision best left to trial counsel. *Madej*, 177 Ill. 2d at 146. Consequently, even though counsel's decision requiring defendant to testify in this case may be explained in terms of trial strategy, it cannot be justified on those grounds. Only the defendant may waive his right to testify. *Madej*, 177 Ill. 2d at 146. However, “[w]hen a defendant's postconviction claim that his trial counsel was ineffective for refusing to allow the defendant to testify is dismissed, the reviewing court must affirm the dismissal unless, during the defendant's trial, the defendant made a ‘contemporaneous assertion * * * of his right to testify.’ ” *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009) (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973)).

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Here, defendant does not allege that he made a contemporaneous assertion at trial that he wanted to testify. Rather, defendant admits that his attorney advised him of his right to testify and he also was admonished as to that right by the trial court. Defendant asserts in his petition that he chose not to testify because his trial counsel “repeatedly” told him that “the case would be beaten.” “In the absence of a contemporaneous assertion by defendant of his right to testify, the trial court properly rejected this post-conviction claim.” *People v. Enis*, 194 Ill. 2d 361, 399-400 (2000). Accordingly, the trial court properly dismissed this claim of ineffective assistance of counsel.

Next, defendant asserts that his trial counsel was ineffective in regards to his cross-examination of Jeramiah Johnson. Specifically, defendant argues that his trial attorney provided the connection for the State’s case as to how the guns used in the home invasion, including the gun fired by Sanders, were found later at defendant’s residence. During cross-examination, defense counsel asked what happened to the guns that day and Johnson answered that defendant took them to his house after the home invasion. However, this issue could have been raised on direct appeal, but was not. Since Johnson’s cross-examination was readily apparent in the transcript of defendant’s trial, the issue has been forfeited. See *Blair*, 215 Ill. 2d at 443-47; see also *People v. Porter*, 164 Ill. 2d 400, 404 (1995) (“Thus, a claim of ineffectiveness not raised in relation to the representation shown—for example, the vigorousness of cross-examination—cannot be resurrected in a post-conviction proceeding”).

Finally, defendant contends that the trial court erred in dismissing his postconviction petition when he presented a claim of actual innocence. The basis of defendant’s actual

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innocence claim is an unsworn, unsigned affidavit from Johnson. In the affidavit, Johnson stated his testimony at defendant's trial was not true. He further stated that defendant did not participate in the home invasion and "was not even there." He said he testified against defendant because he felt he had no choice because the State told him he would get up to 60 years if he did not. Johnson also stated that he was aware of the possibility of perjury charges if he signed the affidavit, which he did not sign. Defendant's postconviction counsel stated in his affidavit that Johnson made this statements to him over the phone and an affidavit was sent to Johnson in prison for signature, but was not returned by the time postconviction petition was filed.

In *People v. Washington*, 171 Ill. 2d 475, 489 (1996), the supreme court held that a postconviction petitioner may pursue a claim of actual innocence based on newly discovered evidence. To succeed under that theory, the supporting evidence must be new, material, and noncumulative, and it must be of such conclusive character that it would probably change the result on retrial. *Washington*, 171 Ill. 2d at 489. Newly discovered evidence must be evidence that was not available at defendant's trial and that the defendant could not have discovered sooner through diligence. *Barrow*, 195 Ill. 2d at 541. Further, the recantation of testimony is regarded as inherently unreliable. As a result, the courts will not grant a new trial on that basis except in extraordinary circumstances. *People v. Morgan*, 212 Ill. 2d 148, 155 (2004).

However, in the present case, defendant failed to submit newly discovered evidence to support his claim of actual innocence. Instead, he attached the unsigned, unsworn "affidavit" of Johnson, prepared by defendant's postconviction counsel. We point out that the failure to either attach the necessary affidavits, records, or other evidence or explain their absence is fatal to a

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post-conviction petition and by itself justifies the petition's summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 66 (2002); see also *People v. Enis*, 194 Ill. 2d 361, 380 (2000) (“In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary”).

Defendant offered an explanation for the absence of Johnson’s signed, sworn affidavit, that it had not been returned by the time the petition was filed. We note that defendant filed a supplemental affidavit of Monique Day on September 9, 2009, more than a month after the postconviction petition was filed, but a supplemental affidavit from Johnson was not filed. The record before us does not contain any newly discovered evidence to support a claim of actual innocence. The unsigned, unsworn “affidavit” from Johnson was insufficient to raise a claim of actual innocence and the trial court properly dismissed this claim.

Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

Affirmed.