

**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).

NO. 4-09-0486

Order filed 4/18/11

IN THE APPELLATE COURT  
OF ILLINOIS  
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Morgan County
NELSON A. YOUNG,	)	No. 05CF136
Defendant-Appellant.	)	
	)	
	)	Honorable
	)	Richard T. Mitchell,
	)	Judge Presiding.

JUSTICE STEIGMANN delivered the judgement of the court. Presiding Justice Knecht and Justice Pope concurred in the judgment.

**ORDER**

*Held:* The plaintiff failed to state the gist of a constitutional claim of ineffective assistance of counsel based on trial strategy, given that petitioner's testimony in effect locked trial counsel into the defense of accident.

In July 2006, a jury convicted defendant, Nelson A. Young, of first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)). Shortly thereafter, the trial court sentenced him to 40 years in prison. Young later appealed, and this court affirmed. *People v. Young*, 381 Ill. App. 3d 595, 887 N.E.2d 649 (2008).

In April 2009, Young *pro se* filed a petition for postconviction relief (725 ILCS 5/122-1 through 122-8 (West 2008)). In June 2009, the trial court rejected Young's petition at the first stage as frivolous and patently without merit.

Young appeals, arguing that the trial court erred by dismissing his postconviction petition at the first stage, given that he stated the gist of a constitutional claim of ineffective assistance of counsel. We disagree and affirm.

#### I. BACKGROUND

In July 2005, the State charged Young with first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)), alleging that Young had stabbed his girlfriend, Eva Mae Davis, killing her, knowing that his act created a strong probability of death or great bodily harm.

In June 2006, the State filed a motion *in limine* to admit, in pertinent part, Young's prior convictions for aggravated battery (committed with a knife) and aggravated assault (in which he threatened the victim with a knife). Young had pleaded guilty to both charges.

The trial court subsequently held a hearing on the State's motion *in limine*, at which Young was present. In support of its motion, the State argued that Young's prior convictions should be admitted for reasons other than propensity--namely, intent, *modus operandi*, motive, and absence of mistake or accident. Young's counsel responded that the crimes were not similar enough to show *modus operandi* because the prior crimes were similar only to the extent that a knife was used. Young's counsel argued that as a result, the probative value would be

outweighed by the prejudicial effect. Young's counsel, however, conceded that if accident was asserted as a defense, the prior convictions might be admissible to show lack of accident, but counsel added that no such defense was planned.

Following that July 2006 hearing, the trial court denied the State's motion, noting that it would not allow the State to present Young's prior convictions during the State's case in chief. The court cautioned, however, that were Young to testify that the stabbing was an accident or that he otherwise lacked intent, the court would allow the State to use his prior convictions to rebut Young's testimony.

At trial, Young testified in his own defense. Young claimed that Davis charged at him with a knife. He responded by grabbing her and taking the knife. They wrestled over the knife, she grabbed him, he fell with his back against her, and somehow the knife entered her chest. Young explained that he did not call the authorities because Davis was already dead and he feared her family.

After the defense rested, the State renewed its motion *in limine* to admit Young's prior convictions in light of Young's testimony that the stabbing was an accident. The trial court allowed the State's motion with respect to the prior convictions.

Following deliberations, the jury convicted Young of first degree murder (720 ILCS 5/9-1(a)(2) (West 2004)). The

trial court later sentenced him to 40 years in prison.

Young appealed, arguing that the trial court erred by allowing evidence of his prior convictions. In April 2008, this court affirmed. *Young*, 381 Ill. App. 3d 595, 887 N.E.2d 649.

In April 2009, Young *pro se* filed a petition for postconviction relief (725 ILCS 5/122-1 through 122-8 (West 2008)), to which he attached an affidavit outlining his claim that his counsel was ineffective for failing to raise various issues. In June 2009, the trial court rejected Young's petition at the first stage as frivolous and patently without merit.

This appeal followed.

## II. THE TRIAL COURT'S FIRST-STAGE DISMISSAL OF YOUNG'S *PRO SE* PETITION FOR POSTCONVICTION RELIEF

### A. Proceedings Under the Act and the Standard of Review

A defendant may proceed under the Post-Conviction Hearing Act by alleging that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2008). A petition brought under the Act is a collateral proceeding that permits inquiry only into constitutional issues that the defendant did not raise and could not have raised on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 447, 831 N.E.2d 604, 617 (2005). In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition. See 725 ILCS

5/122-1 through 122-8 (West 2008).

At the first stage, the trial court determines, without input from the State, whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2008). To avoid dismissal at the first stage, the petition need only state the gist of a constitutional claim. *People v. Foster*, 391 Ill. App. 3d 487, 491, 909 N.E.2d 372, 377 (2009). To set forth the "gist" of a constitutional claim, the petition need not be in great detail nor set forth the claim in its entirety. *People v. Williams*, 364 Ill. App. 3d 1017, 1022, 848 N.E.2d 254, 258 (2006). In considering the petition, the trial court may examine the court file of the proceeding in which the petitioner was convicted, any transcripts of that proceeding, and any action taken by the appellate court. *Williams*, 364 Ill. App. 3d at 1022-23, 848 N.E.2d at 258. "'The court should examine those records to determine whether the allegations [in the complaint] are positively rebutted by the record.'" *Williams*, 364 Ill. App. 3d at 1023, 848 N.E.2d at 258 (quoting *People v. Little*, 335 Ill. App. 3d 1046, 1051, 782 N.E.2d 957, 962 (2003)).

We review *de novo* a first-stage dismissal of a petition under the Act. *Foster*, 391 Ill. App. 3d at 491, 909 N.E.2d at 377.

B. Young's Claim That His Postconviction Petition  
Stated the Gist of a Constitutional Claim

Young argues that the trial court erred by dismissing

his postconviction petition at the first stage, given that he stated the gist of a constitutional claim of ineffective assistance of counsel. Young contends that he stated the gist of a constitutional claim of ineffective assistance because despite the court's adverse ruling on the State's motion *in limine*, his trial counsel "made accident his main defense." We disagree.

It is well established that a defendant is entitled to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). To demonstrate ineffective assistance, however, a defendant must show that (1) counsel's performance was deficient and (2) he was prejudiced by that deficient performance. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010).

Generally, trial counsel has broad control of trial strategy. *People v. Ward*, 187 Ill. 2d 249, 261-62, 718 N.E.2d 117, 127 (1999) ("Decisions on what evidence to present and which witnesses to call on a defendant's behalf rest with trial counsel and, as matters of trial strategy, are generally immune from claims of ineffective assistance of counsel"). However, certain decisions, such as whether to testify (and what to say when testifying), are retained by the defendant alone. See *People v. DeBerry*, 375 Ill. App. 3d 822, 826-27, 875 N.E.2d 1, 4 (2007) ("The decision whether to testify ultimately rests with the

defendant").

Here, Young's decision to testify that the incident was an accident--which was his decision alone--locked counsel into presenting the defense of accident. Trial counsel appears to have been against pursuing such a defense, given counsel's comment to the trial court at the hearing on the State's motion *in limine* that he did not intend to pursue the defense of accident. Nevertheless, Young presented that defense through his testimony.

We note that Young was present for the court's ruling on the State's motion and appears to have understood the ramifications of his testifying that the incident was an accident in light of his *pro se* postconviction petition in this case. At trial, the court even explained to Young that he alone had the right to choose to testify:

"[Whether to testify] is your decision and your decision alone. So when \*\*\* your counsel starts to put on your defense in this case, it will be your decision \*\*\* whether you wish to take the stand \*\*\*."

Young acknowledged that he understood the court's admonishment. Given Young's decision to testify that the stabbing was an accident, counsel was in effect stuck with that defense as a strategy. Therefore, Young's complaint that trial counsel's

performance--that is, his strategy--was deficient is not only unpersuasive, it is frivolous and patently without merit.

Accordingly, we conclude that the trial court did not err by dismissing Young's postconviction petition at the first stage of postconviction proceedings as frivolous and patently without merit.

### III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$50 statutory assessment against defendant as costs.

Affirmed.