

NOTICE

Decision filed 02/02/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0275

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | St. Clair County. |
| |) | |
| v. |) | No. 03-CF-967 |
| |) | |
| MONTEZ ARTIS, |) | Honorable |
| |) | Annette A. Eckert, |
| Defendant-Appellant. |) | Judge, presiding. |

PRESIDING JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Spomer concurred in the judgment.

RULE 23 ORDER

Held: The circuit court properly dismissed the defendant's postconviction petition where the claims made therein were vague and conclusory, unsupported by the record, or insufficient as a matter of law.

The defendant, Montez Artis, appeals the dismissal of his petition for postconviction relief. The Office of the State Appellate Defender has been appointed to represent him. The State Appellate Defender has filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644, 627 N.E.2d 715 (1994). Artis was given proper notice and was granted an extension of time to file briefs, objections, or any other documents supporting his appeal. He has filed a response. We have considered the State Appellate Defender's motion to withdraw as counsel on appeal, as well as Artis's response thereto. We have examined the entire record on appeal and find no error or potential grounds for appeal. For the following reasons, we now grant the State Appellate Defender's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of St. Clair County.

I. BACKGROUND

Artis was convicted of first-degree murder and sentenced to 50 years' imprisonment. His conviction and sentence were affirmed on direct appeal. *People v. Artis*, No. 5-05-0027 (March 20, 2007) (unpublished order pursuant to Supreme Court Rule 23 (eff. July 1, 1994)). Artis subsequently filed a petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). Counsel was appointed to represent him, and appointed counsel filed an amended postconviction petition on Artis's behalf. The amended petition alleged (1) that the State committed prosecutorial misconduct by allowing Traveon Hunter to testify falsely and by failing to disclose that Hunter was not charged with murder in exchange for his testimony, (2) that Artis was denied his constitutional rights to equal protection and due process where he was not brought to trial within 120 days, as required by section 103-5 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/103-5 (West 2006)), (3) that he was denied the effective assistance of trial counsel, and (4) that he was denied the effective assistance of appellate counsel. Artis's amended postconviction petition was dismissed on the State's motion. Artis appeals.

II. ANALYSIS

The Act provides a mechanism by which state prisoners may collaterally challenge their convictions and/or sentences for substantial violations of their federal or state constitutional rights that occurred at their trial and that were not, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183, 840 N.E.2d 658, 663 (2005). In noncapital cases, the Act provides for postconviction proceedings that may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72, 861 N.E.2d 999, 1008 (2006). At the first stage, the circuit court has 90 days to examine the petition and to determine, without input from the State, whether it is frivolous and patently without merit

and, if so, to summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 1996). If the petition is not dismissed at the first stage or if the circuit court fails to rule on it within 90 days, the petition must be docketed for further consideration. 725 ILCS 5/122-2.1(a)(2) (West 1996). At the second stage, the circuit court must determine whether the petitioner is indigent and, if so, whether he wishes to have counsel appointed to represent him. 725 ILCS 5/122-4 (West 1996). After appointed counsel has made any necessary amendments to the petition, the State may file a motion to dismiss it. 725 ILCS 5/122-5 (West 2006). To survive a second-stage dismissal, the postconviction petition must make a substantial showing of a constitutional violation. *People v. Quigley*, 365 Ill. App. 3d 617, 618, 850 N.E.2d 903, 905 (2006). When ruling on a motion to dismiss a postconviction petition, the circuit court must accept as true all well-pleaded facts that are not positively rebutted by the record. *People v. Williams*, 209 Ill. 2d 227, 233, 807 N.E.2d 448, 453 (2004). A second-stage dismissal of a postconviction petition is reviewed *de novo*. *People v. Boyd*, 347 Ill. App. 3d 321, 327, 807 N.E.2d 639, 645 (2004).

A. Perjured Testimony/*Brady* Violation

Artis's first postconviction claim was that the State allowed perjured testimony from its primary witness, Traveon Hunter. Specifically, Artis alleged that Hunter's trial testimony that he was not present when the victim was shot and that he did not see who shot the victim is contradicted by Hunter's statement to police, wherein he stated that he saw Artis shoot the victim.

The State's knowing use of perjured testimony violates a defendant's due process rights. *People v. Truly*, 318 Ill. App. 3d 217, 235, 741 N.E.2d 1115, 1129 (2000) (citing *People v. Jimerson*, 166 Ill. 2d 211, 223, 652 N.E.2d 278, 284 (1995)). "If false evidence is introduced to the jury, the State is required to correct it, whether the State solicited the false evidence or not." *People v. Potter*, 384 Ill. App. 3d 1051, 1059, 894 N.E.2d 490, 497

(2008) (citing *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

Reviewing the transcript of Artis's trial, we find that this is based upon a misapprehension of Hunter's testimony. Contrary to what Artis alleged in his postconviction petition, Hunter testified that he saw Artis shoot the victim, although at one point he admitted having told some people that he was not present when the victim was killed. Hunter explained that he told those people that he was not present because he feared that Artis would have him killed if he admitted being a witness to the murder. This is the testimony upon which Artis bases his prejudice claim that Hunter falsely testified that he was not present. It is clear, however, that Hunter was merely explaining a prior inconsistent statement rather than denying being present at the murder.

Artis also argued that the State failed to disclose that Hunter was not charged with murder and failed to disclose Hunter's statement to police.

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Because it violates a defendant's constitutional right to due process, an alleged *Brady* violation is cognizable in a postconviction proceeding. *People v. Harris*, 206 Ill. 2d 1, 44, 794 N.E.2d 314, 341 (2002). To prevail on an alleged *Brady* violation, the defendant must show that (1) the undisclosed evidence is favorable to him because it is either exculpatory or impeaching, (2) the evidence was either willfully or inadvertently withheld by the State, and (3) he was prejudiced as a result. *People v. Anderson*, 375 Ill. App. 3d 990, 1011, 874 N.E.2d 277, 296 (2007).

We note that Artis did not specifically allege that there was an agreement between the State and Hunter not to prosecute him in exchange for his testimony; he merely alleged that the State did not prosecute him. The State cannot be faulted for failing to disclose

something that did not exist. Moreover, even if there had been an agreement between Hunter and the State, the State's failure to disclose its existence would not constitute a *Brady* violation because the State does not have an affirmative duty to disclose promises of leniency in exchange for a witness's testimony. *People v. Potter*, 384 Ill. App. 3d 1051, 1059, 894 N.E.2d 490, 497 (2008) (citing *People v. Pecoraro*, 175 Ill. 2d 294, 313, 677 N.E.2d 875, 885 (1997)). On direct appeal, Artis argued that the trial court erred in failing to give the accomplice-witness instruction (Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000)) regarding Hunter's testimony. We rejected this argument, holding that there was no evidence that Hunter was an accomplice to the murder. *Artis*, No. 5-05-0027, order at 7. Thus, it is evident that Hunter was not charged with the murder because there was no evidence that he was a participant, not because of any agreement between him and the State. We agree with the circuit court's determination that Artis failed to demonstrate a constitutional deprivation based on the State's having failed to disclose that it was not prosecuting Hunter.

With respect to Artis's claim that the State failed to provide defense counsel with a copy of Hunter's statement, we find that the record contradicts this allegation. On December 3, 2003, defense counsel filed a motion to compel discovery, acknowledging that he had received videotaped statements of the State's witnesses, but seeking transcripts thereof. Because the record demonstrates that the State provided the defense with Hunter's statement, this claim is meritless.

B. Speedy Trial

Artis next claimed that he was denied his constitutional rights to due process and equal protection because he was not brought to trial within 120 days, as required by section 103-5(a) of the Code.

In Illinois, a defendant possesses both a constitutional right and a statutory right to

a speedy trial. *People v. Woodrum*, 223 Ill. 2d 286, 298, 860 N.E.2d 259, 268-69 (2006) (citing U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8; 725 ILCS 5/103-5(a) (West 1998)). Although section 103-5 of the Code implements the constitutional right to a speedy trial, the statutory right and the constitutional right are not coextensive. *People v. Cordell*, 223 Ill. 2d 380, 385-86, 860 N.E.2d 323, 327 (2006); *People v. Ingram*, 357 Ill. App. 3d 228, 230, 828 N.E.2d 763, 765 (2005). To demonstrate a violation of his statutory right to a speedy trial, a defendant need only show that he was not tried within the time period set by the statute and that he did not cause or contribute to the delay. *People v. Castillo*, 372 Ill. App. 3d 11, 865 N.E.2d 208 (2007). Determining whether a defendant's constitutional right to a speedy trial has been violated requires the court to consider such factors as the length of the delay, the reasons for the delay, the defendant's assertion of his speedy trial right, and the prejudice to the defendant caused by the delay. *People v. Campa*, 217 Ill. 2d 243, 250, 840 N.E.2d 1157, 1163 (2005). To the extent Artis argued that he was denied his *statutory* right to a speedy trial, his claim is not cognizable in a postconviction proceeding because postconviction proceedings are limited to alleged violations of a defendant's *constitutional* rights. *People v. French*, 46 Ill. 2d 104, 262 N.E.2d 901 (1970). To the extent Artis alleged a denial of his *constitutional* right to a speedy trial, his claim fails because he did not allege that the delay prejudiced him in any way.

C. Ineffective Assistance of Trial Counsel

Artis next claimed that he had been denied the effective assistance of trial counsel. Specifically, Artis argued that trial counsel (1) failed to seek a discharge based on the violation of Artis's speedy trial rights, (2) failed to object to the *Brady* violation and the State's use of perjured testimony, (3) failed to "properly challenge" Hunter's statement and testimony, (4) failed to challenge the stipulation to Wong's proposed testimony, (5) failed to investigate his self-defense theory, (6) failed to seek a mistrial when Hunter's alleged

perjury was "disclosed," (7) failed to examine police and lab reports, (8) failed to object to Hall's testimony that two guns were used, and (9) failed to object to the prosecutor acting as both a witness and a prosecutor.

Claims of ineffective assistance of counsel are evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), and adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504, 525-26, 473 N.E.2d 1246, 1255-56 (1984). To prevail under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that he was denied a fair trial. *People v. Cordell*, 223 Ill. 2d 380, 385, 860 N.E.2d 323, 327 (2006). More specifically, the defendant must demonstrate (1) that counsel's performance was objectively unreasonable under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *People v. Harris*, 225 Ill. 2d 1, 20, 866 N.E.2d 162, 173 (2007). A reasonable probability that the result of the proceeding would have been different is a probability sufficient to undermine confidence in the outcome of the proceeding. *People v. Colon*, 225 Ill. 2d 125, 135, 866 N.E.2d 207, 213 (2007). Because a defendant's ineffective-assistance-of-counsel claim will fail if either prong of the *Strickland* test is not met, a reviewing court need not determine whether counsel's performance was deficient before determining whether he was prejudiced. *People v. Perry*, 224 Ill. 2d 312, 342, 864 N.E.2d 196, 214 (2007). There is a strong presumption that counsel's action or inaction was a matter of trial strategy (*People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163 (1999)), and matters of trial strategy will not support a claim of ineffective assistance of counsel unless counsel's strategy is so unsound that he entirely fails to conduct any meaningful adversarial testing of the State's case. *People v. Patterson*, 217 Ill. 2d 407, 441, 841 N.E.2d 889, 909 (2005).

We have already determined that Artis was not denied his right to a speedy trial and that the State did not commit a *Brady* violation or allow perjured testimony into evidence. Thus, we need not address Artis's claims that trial counsel was ineffective for having failed to seek a discharge based on the violation of Artis's speedy trial rights, failed to object to the *Brady* violation and to the State's use of perjured testimony, or failed to seek a mistrial when Hunter's alleged perjury was "disclosed."

With respect to Artis's claims that trial counsel was ineffective for having failed to "properly" challenge Hunter's statement and testimony, failed to investigate his self-defense theory, failed to examine police and lab reports, and failed to object to the prosecutor acting as both a witness and a prosecutor, we find that these claims consist of nothing more than conclusory allegations, devoid of any specific factual allegations from which the circuit court could have found a valid claim of a constitutional deprivation of the right to the effective assistance of counsel. Broad, conclusory allegations are insufficient to make a substantial showing of a constitutional violation. *People v. Delton*, 227 Ill. 2d 247, 258, 882 N.E.2d 516, 522 (2008).

Artis also alleged that trial counsel provided ineffective assistance by failing to challenge the stipulated testimony of Mary Wong because it resulted in an admission that he had fired a weapon. The parties stipulated that Wong, a forensic scientist, would testify that she tested the jacket Artis allegedly wore for gunshot residue and found none. They further stipulated that Wong would testify that gunshot residue testing has a limited window of opportunity and that testing more than five days after a shooting substantially decreases the probability of detecting gunshot residue on articles of clothing. This hardly constitutes an admission that Artis fired a weapon. At most, it rebuts the inference that Artis did not fire a weapon. Even if we could find that counsel was deficient for having stipulated to this portion of Wong's testimony, there is no reasonable probability that, but for this error, the

result of the proceeding would have been different.

Artis's final claim of ineffective assistance of trial counsel is that trial counsel failed to object to forensic scientist James Hall's testimony that two guns were used. At Artis's trial, Hall testified that his examination of the cartridges and projectiles revealed that two guns were used. On cross-examination, Hall testified that he did not know who had fired the guns and could not connect any of the cartridges or projectiles to Artis. In his postconviction petition, Artis did not explain why trial counsel should have objected to this testimony or upon what basis the objection should have been made. Again, even if we could find that counsel was deficient for having failed to object to this testimony, there is no reasonable probability that, but for this error, the result of the proceeding would have been different.

D. Ineffective Assistance of Appellate Counsel

Finally, Artis alleged that he was denied the effective assistance of counsel on direct appeal where counsel on appeal (1) failed to argue in his petition for leave to appeal to the supreme court that this court erred in affirming the trial court's refusal to give the accomplice-witness instruction, (2) failed to challenge the substitution of two appellate justices, and (3) failed to raise his postconviction claims on direct appeal.

Claims of the ineffective assistance of appellate counsel are evaluated under the same two-prong test set forth in *Strickland* for evaluating claims of ineffective assistance of trial counsel. *People v. Jones*, 219 Ill. 2d 1, 23, 845 N.E.2d 598, 610 (2006). To prevail on a claim of the ineffective assistance of appellate counsel based on appellate counsel's failure to argue an issue, the defendant must show that the failure to raise the issue was objectively unreasonable and that there is a reasonable probability that, but for this failure, the defendant's conviction or sentence would have been reversed. *People v. Williams*, 209 Ill. 2d 227, 243, 807 N.E.2d 448, 458 (2004). Appellate counsel is not obligated to argue every

conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues that, in counsel's professional judgment, are meritless, unless counsel's assessment of the merits is patently wrong. *People v. Harris*, 206 Ill. 2d 1, 34, 794 N.E.2d 314, 335 (2002). Moreover, experienced appellate advocates will often screen out weaker arguments in order to focus on the most important issues. *People v. Richardson*, 189 Ill. 2d 401, 413, 727 N.E.2d 362, 370 (2000).

As noted above, on direct appeal this court rejected Artis's argument that the trial court should have given the accomplice-witness instruction (Illinois Pattern Jury Instructions, Criminal, No. 3.17 (4th ed. 2000)), holding that there was no evidence that Hunter was an accomplice to the murder. *Artis*, No. 5-05-0027, order at 7. In his postconviction petition, Artis argued that appellate counsel was ineffective for having failed to include this issue in his petition for leave to appeal to the supreme court. Artis's postconviction petition did not set forth any evidence which would indicate that Hunter was an accomplice or any argument describing why this court's ruling was otherwise erroneous. Also, Artis did not attach a copy of his petition for leave to appeal to his postconviction petition. Consequently, there was no basis upon which the circuit court could have concluded that Artis had made a substantial showing that he was denied his constitutional right to the effective assistance of appellate counsel.

Artis also alleged that he was denied the effective assistance of appellate counsel where counsel failed to challenge the substitution of two justices. Oral argument was held before Justices Chapman, Hopkins, and McGlynn. *Artis*, No. 5-05-0027, order at 11. While the cause was under advisement, Justice Hopkins died and Justice McGlynn was not reelected to his position. Justice Stewart was substituted for Justice McGlynn and Justice Wexstten was substituted for Justice Hopkins. *Id.* Artis argued in his postconviction petition that appellate counsel should have challenged these substitutions, but he did not

explain the basis upon which the substitutions could have been challenged or how those substitutions prejudiced him. Consequently, this claim of ineffective assistance of counsel must fail.

Artis's final allegation of ineffective assistance of appellate counsel was that appellate counsel was ineffective for failing to raise on direct appeal the issues that Artis was raising in his postconviction petition. Having already determined that these issues are meritless, we need not address this claim.

III. CONCLUSION

For the foregoing reasons, the motion of the State Appellate Defender to withdraw as counsel is granted, and the judgment of the circuit court of St. Clair County is affirmed.

Motion granted; judgment affirmed.