

No. 1-10-1390

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. 04 CR 24919
)	
TERRELL DAVIS,)	The Honorable
)	Stanley J. Sack,
Defendant-Appellant.)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justices J. Gordon and Howse concurred in the judgment.

ORDER

¶ 1 **HELD:** Summary dismissal of *pro se* post-conviction petition affirmed over defendant's claim that partial dismissal entered where circuit court failed to mention, in its written dismissal order, one of the claims made in his petition; and where defendant failed to set forth an ineffective assistance of counsel claim that had an arguable basis in law and in fact.

¶ 2 Defendant Terrell Davis appeals from the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He

contends that we must reverse that order and remand the cause for second-stage proceedings because the circuit court's failure to mention his fifth amendment claim in its written order rendered its judgment a partial summary dismissal, which is prohibited under the Act. Defendant also contends that the circuit court erred in summarily dismissing his petition because he set forth an ineffective assistance of counsel claim that had an arguable basis in law and in fact.

¶ 3 Following a jury trial, defendant was found guilty of attempted first degree murder and aggravated battery with a firearm. The trial court merged the offenses and sentenced defendant to a single term of 15 years' imprisonment. This court affirmed that judgment on direct appeal (*People v. Davis*, No. 1-07-0689 (2008) (unpublished order under Supreme Court Rule 23)), and the dismissals of his subsequent petitions for post-judgment relief were also affirmed (*People v. Davis*, Nos. 1-07-1552, 1-07-2823 (2008) (unpublished orders under Supreme Court Rule 23)).

¶ 4 Defendant filed the subject post-conviction petition on February 5, 2010, alleging, in pertinent part, that his fifth amendment privilege not to testify as a witness in his own behalf was violated when trial counsel called him to testify, and that trial counsel was ineffective for failing to investigate or present an alibi witness. Defendant attached an affidavit from the alibi witness, Charlie Brooks, a barber who stated that defendant left his shop "a little after 3 p.m." on the date of the incident at bar.

¶ 5 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit on April 9, 2010. In its written order, the court did not specifically reference a number of claims, including the fifth amendment allegation, but the court concluded that "the issues raised and presented by [defendant] are frivolous and patently without merit," and "[a]ccordingly, the petition for post-conviction relief is hereby dismissed."

¶ 6 In this court, defendant first contends that we must reverse the dismissal of his petition and remand the cause for second-stage proceedings based on an application of *People v. Rivera*, 198 Ill. 2d 364 (2001), which held that partial summary dismissals are not permitted under the Act. Defendant asserts that the circuit court's failure to address his fifth amendment claim in its written order constitutes a partial summary dismissal. We disagree.

¶ 7 In *People v. Lee*, 344 Ill. App. 3d 851 (2003), this court considered and rejected the same argument presented by defendant here. Defendant argued that *Rivera* required reversal of the summary dismissal of his post-conviction petition because the circuit court failed to address one of his claims in its written order. *Lee*, 344 Ill. App. 3d at 855. This court declined to construe the order as a partial summary dismissal and noted that a judgment must generally be construed to give effect to the court's intention and to uphold its validity where supported by the wording of the judgment. *Lee*, 344 Ill. App. 3d at 855. We found that the wording of the order, to wit, "the issues raised and presented *** lack sufficient merit to withstand summary dismissal.

Accordingly, the instant petition for post-conviction relief shall be and is hereby dismissed," showed that the court plainly intended to dismiss the *entire* petition. *Lee*, 344 Ill. App. 3d at 852, 855.

¶ 8 Here, the circuit court similarly failed to specifically refer to defendant's fifth amendment claim in its written order, but concluded that the issues raised by defendant were frivolous and patently without merit and dismissed his petition. As in *Lee*, we construe the wording of the written order to reflect the obvious intent of the circuit court to dismiss defendant's *entire* petition. *Lee*, 344 Ill. App. 3d at 855. To do otherwise is inconsistent with the principle that we must construe a judgment to uphold its validity whenever possible. *Lee*, 344 Ill. App. 3d at 855.

¶ 9 Moreover, our *de novo* review discloses no error in the summary dismissal of defendant's petition as frivolous and patently without merit. *People v. Douglas*, 2011 IL App (1st) 093188, ¶¶ 1, 20. The fifth amendment provides that no person shall be compelled to in any criminal case to be a witness against himself. U.S. Const., amend. V. There is no constitutional privilege against mere self-incrimination; there is a privilege only against *compelled* self-incrimination. (Emphasis in original.) *People v. Hall*, 195 Ill. 2d 1, 25 (2000) (*quoting Ross v. State*, 552 A.2d 1345, 1347 (1989)). Absent compulsion, "the gears of the Fifth Amendment privilege are not engaged." *Hall*, 195 Ill. 2d at 25 (*quoting Hunter v. State*, 676 A.2d 968, 978 (1996)). In other words, the fifth amendment "does not preclude a witness from testifying voluntarily in matters which may incriminate him. If, therefore, he desires the protection of the privilege, he must claim it or he will not be considered to have been '*compelled*' within the meaning of the [a]mendment." (Emphasis added.) *People v. Snow*, 403 Ill. App. 3d 734, 738 (2010) (*quoting United States v. Monia*, 317 U.S. 424, 427 (1943)).

¶ 10 Defendant alleged in his post-conviction petition that trial counsel called him as a witness despite being informed otherwise. However, our review of the record discloses that defendant was never compelled to testify within the meaning of the fifth amendment. *Snow*, 403 Ill. App. 3d at 741. Defendant voluntarily took the stand when called by trial counsel and denied any involvement in the incident at bar or any knowledge of the victim and his companion, both of whom positively identified defendant in court as the shooter. He also testified that he did not recall telling a detective that he was at Charlie Brook's barbershop from about 1 p.m. to 3 p.m. on the date of the incident. Defendant volunteered these statements without asserting his fifth amendment privilege, leaving him "in no position to complain now that he was compelled to give

testimony against himself." *Snow*, 403 Ill. App. 3d at 741 (*quoting United States v. Kordel*, 397 U.S. 1, 10 (1970)).

¶ 11 In addition, defendant did not support his fifth amendment claim with affidavits or other evidence (725 ILCS 5/122-2 (West 2010)). Defendant's "verification" affidavit, unlike a section 122-2 affidavit, "does not show that [his] allegations can be corroborated and is not considered when determining whether a defendant has a factual basis for his claims." *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 34. Thus, defendant's unsupported fifth amendment claim has no arguable basis in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)), and would not preclude summary dismissal of his petition.

¶ 12 Defendant next contends that trial counsel was ineffective for failing to investigate his alibi witness, Charlie Brooks. He claims that had trial counsel contacted Brooks, "he would have arguably established [defendant's] alibi for the time of the shooting [at approximately 3:19 p.m.]" He argues that Brooks' affidavit "could show that [defendant] was at the barbershop at the time of the shooting, or had left the barbershop [a little after 3 p.m.] too late to have been at the scene."

¶ 13 The State responds that defendant's claim of ineffective assistance of trial counsel is barred by the doctrine of waiver because the record on direct appeal was sufficient to allow for consideration of such claim and defendant did not raise it. The State also maintains that the circuit court did not err in summarily dismissing defendant's petition because this claim has no arguable basis in law or in fact. We find that the State's positions are well taken.

¶ 14 In a post-conviction proceeding, all issues which could have been presented on direct appeal, but were not, are deemed forfeited. *People v. Jarrett*, 399 Ill. App. 3d 715, 725-26 (2010). Defendant asserts that his argument regarding trial counsel's representation is based on

matters outside of the record because Brooks did not testify at trial and, thus, the substance of his affidavit, that defendant left the barbershop "a little after 3 p.m.," was not before the trial court for purposes of direct appeal. However, in his own reply brief, defendant notes that "Brooks' averment that [defendant] was at the barbershop at the date and around the time of the shooting is corroborated by the State's rebuttal witness, Detective Wiggins, who testified that [defendant] told him during questioning that he went to the barbershop around 1 p.m. and left around 3 p.m." Conversely, defendant testified that he did not recall telling a detective that he was at Brooks' barbershop during those times. Because defendant was not represented by the same attorney on direct appeal and his claim of ineffective assistance of trial counsel is based on the above-stated matters of record, the issue could have been raised on direct appeal, and as it was not, it is waived. *People v. Dobrino*, 227 Ill. App. 3d 920, 933-34 (1992).

¶ 15 Aside, defendant's ineffectiveness claim has no arguable basis in law or in fact because there was no alibi defense for Brooks to corroborate in light of defendant's testimony that he did not recall telling a detective that he was at Brooks' barbershop during the relevant time frame. *People v. Jones*, 399 Ill. App. 3d 341, 370 (2010) (citing *People v. Barr*, 200 Ill. App. 3d 1077, 1081 (1990)). We also note the State's observation that Brooks' affidavit does not account for the time of the shooting, at approximately 3:19 p.m., and, in fact, places him in the area of the shooting at that time. Trial counsel's decisions on what evidence to present and what witnesses to call are generally matters of trial strategy immune from claims of ineffectiveness. *Jones*, 399 Ill. App. 3d at 370. Had Brooks testified as proposed in his affidavit, such testimony could only have served to contradict and impeach defendant's own testimony. *Barr*, 200 Ill. App. 3d at 1081. Under these circumstances, it can hardly be said that trial counsel was ineffective for

1-10-1390

failing to investigate or present defendant's alleged alibi witness (*Barr*, 200 Ill. App. 3d at 1081), and defendant's ineffectiveness claim fails for lack of prejudice (*Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We thus conclude that the circuit court did not err in summarily dismissing his post-conviction petition (*People v. Taylor*, 405 Ill. App. 3d 421, 424 (2010)), and we affirm the order of the circuit court of Cook County to that effect.

¶ 16 Affirmed.