

No. 1-10-3020

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 28554
	)	
JOSEPH QUESADA,	)	Honorable
	)	Joseph M. Claps,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE CUNNINGHAM delivered the judgment of the court.  
Presiding Justice Quinn and Justice Harris concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Where the defendant's claims in post-conviction petition amended by counsel did not establish that his indictment was based on perjured testimony or that appellate counsel could have successfully challenged the sufficiency of the evidence, petition was correctly dismissed upon the State's motion; the dismissal of the defendant's post-conviction petition without an evidentiary hearing was affirmed.
- ¶ 2 Defendant Joseph Quesada appeals the circuit court's dismissal of his petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) without an evidentiary hearing. On appeal, the defendant contends his petition presented a substantial showing of a constitutional violation in that: (1) his indictment was based on the perjured testimony of a police detective; and (2) his counsel on direct appeal was ineffective for failing to attack the sufficiency of the State's evidence at trial. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 In 2005, the defendant and Enrique Cueto were tried simultaneously by separate juries for the 2002 shooting death of Oscar Ricardo. Carlos Villegas, who attended the same high school as the defendant, testified that on May 20, 2002, the defendant was riding in the back seat of a car driven by Cueto. The defendant and the victim exchanged gang signs several times as Cueto drove by. Villegas testified that as Cueto drove past the victim a third time, five or six shots were fired from inside the car. Villegas said he saw the defendant extend his hand in front of him and point away from his body; however, Villegas could not see anything in the defendant's hands. The morning after the shooting, Villegas identified the defendant in a police photo array.

¶ 4 Nicholas Galvez testified that he was a friend of the victim and was gathered with "Carlos" and several others near the scene prior to the shooting. Galvez observed a car containing members of a rival gang. Galvez heard shots being fired and said they came from the vehicle's back seat. Galvez identified Cueto in a photo array and a police lineup as the driver.

¶ 5 The State called Jorge Sotello as a witness, and Sotello acknowledged he gave a statement to investigators two days after the shooting that was memorialized. According to the statement, Sotello was riding in the car driven by Cueto, with the defendant alone in the back seat. During the ride, the defendant pulled out a weapon and showed it to them. Sotello saw the defendant display a gang sign and fire the gun from the back window three or four times. When Sotello was called as a witness at trial, he said he was physically abused by his interrogators. Sotello also disavowed his June 2002 grand jury testimony that was consistent with his written statement.

¶ 6 The defendant, who was 14 years old at the time of the offense but was tried as an adult, was convicted of first-degree murder and sentenced to 50 years in prison. On appeal, the defendant asserted that the 2005 amended version of the statute setting out criteria for transferring a juvenile from juvenile court to the criminal court should be retroactively applied in his case. This court rejected that argument and affirmed the defendant's conviction and sentence. *People v. Quesada*, No. 1-05-3113 (2007) (unpublished order under Supreme Court Rule 23).

¶ 7 On October 3, 2008, the defendant filed a *pro se* petition seeking post-conviction relief. Counsel was appointed to represent the defendant, and on November 10, 2009, counsel filed a supplemental post-conviction petition alleging the ineffectiveness of trial and appellate counsel. The State moved to dismiss the petition. On September 10, 2010, the circuit court granted the motion to dismiss, stating in a written order that the defendant's claims of errors by the trial judge and the ineffectiveness of trial counsel could have been raised on direct appeal and were therefore waived. The court also stated those claims and the defendant's assertions of appellate counsel's ineffectiveness and of the defendant's actual innocence were without merit.

¶ 8 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. At the second stage of a post-conviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006). If such a showing is made, the petition advances to the third stage, where the circuit court holds a hearing at which the defendant may present evidence in support of the petition. *Id.* The dismissal of a post-conviction petition at the second stage is warranted only when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381-82, 701 N.E.2d 1063, 1072 (1998). Review of the dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. *People v. Lacy*, 407 Ill. App. 3d 442, 456, 943 N.E.2d 303, 316 (2011), citing *People v. Edwards*, 195 Ill. 2d 142, 156, 745 N.E.2d 1212, 1220 (2001).

¶ 9 On appeal, the defendant first contends the petition, as supplemented by post-conviction counsel, set forth a viable claim that his right to due process was violated because his indictment was based on the allegedly perjured testimony of Chicago police detective Michael Mason. In addition, the defendant alleged in his petition that his trial and appellate counsel were ineffective in failing to challenge his indictment on that basis. In particular, the defendant asserted Detective Mason knew

at the time of his grand jury testimony that the defendant could not have shot the victim because his investigative partner, Detective Richard Milz, had been told by Galvez that the gunman was dark-skinned with a medium build, a description that did not match the defendant. The defendant argued that Detective Milz's knowledge could be imputed to Detective Mason and, therefore, Detective Mason's grand jury testimony that the defendant was the gunman was knowingly false.

¶ 10 A grand jury determines whether probable cause exists that an individual has committed a crime, thus warranting a trial. 725 ILCS 5/112-4 (West 2002); *People v. Shelton*, 401 Ill. App. 3d 564, 572, 929 N.E.2d 144, 154 (2010). A defendant's ability to challenge the adequacy and sufficiency of a grand jury indictment is limited; however, an indictment based on perjured testimony may be dismissed if the existence of false testimony is "established with certainty." *People v. Hart*, 338 Ill. App. 3d 983, 990, 789 N.E.2d 905, 911 (2003), quoting *People v. DeCesare*, 190 Ill. App. 3d 934, 944, 547 N.E.2d 650, 657 (1989). A witness's testimony contains perjury only if the witness knowingly makes a false statement. *Shelton*, 401 Ill. App. 3d at 572, 929 N.E.2d at 154; see also *Hart*, 338 Ill. App. 3d at 991, 789 N.E.2d at 911 (opining that, to constitute a due process violation, "there must be, at the very least, intent on the part of some State actor to materially mislead the grand jury").

¶ 11 In November 2002, Detective Mason testified before the grand jury that, in investigating the shooting, he had learned that the defendant shot the victim while Cueto drove the vehicle. Detective Milz testified at trial that on the afternoon of May 20, 2002, he and Detective Mason responded to a report of the shooting in question and spoke to Villegas and Galvez, who witnessed the shooting. Villegas identified a photo of Cueto as the driver of the car. The detectives had been told the nickname of another occupant of the car was "Fat Folks."

¶ 12 On May 21, 2002, the day after the shooting, Detectives Mason and Milz went to the high school attended by the defendant and Villegas, where Villegas was shown a photo array and identified the defendant as "Fat Folks." At 4 p.m. that day, the defendant was arrested; Cueto was

arrested later that evening. About six months later, in November 2002, Detective Mason testified before the grand jury that he had spoken to people who identified the defendant as the gunman.

¶ 13 The defendant attacks the veracity of Detective Mason's grand jury testimony by pointing to the fact that at one point during the investigation, Detective Milz was given a description of the shooter that did not match the defendant. However, the existence of various identifications and descriptions of suspects throughout the course of an investigation is not unusual. As set out above, the record contains trial testimony from Detective Milz that after he and Detective Mason interviewed witnesses at the scene of the shooting, both detectives were involved the following day in seeking the defendant based on the information received at the crime scene the previous night. Detective Mason's subsequent grand jury testimony that he spoke to people who identified the defendant as the gunman was not given falsely, when considering the time line of events preceding the defendant's arrest. Thus, the defendant has not made a substantial showing of a constitutional violation based on the substance of Detective Mason's grand jury testimony.

¶ 14 The defendant's second contention on appeal is that he stated a viable post-conviction claim that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence. The defendant asserted in the petition that the State's witnesses did not establish that he was the gunman.

¶ 15 Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362, 736 N.E.2d 1092, 1107 (2000). A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced the defendant. *People v. Rogers*, 197 Ill. 2d 216, 223, 756 N.E.2d 831, 835 (2001).

¶ 16 In weighing whether the defendant was prejudiced by appellate counsel's representation, it is necessary to determine whether a challenge to the sufficiency of the evidence would have

succeeded. See *Simms*, 192 Ill. 2d at 362, 736 N.E.2d at 1107. If the underlying issue is not meritorious, then the defendant has suffered no prejudice by counsel's failure to raise the issue. *People v. Enis*, 194 Ill. 2d 361, 377, 743 N.E.2d 1, 11 (2000).

¶ 17 In considering a challenge to the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Woods*, 214 Ill. 2d 455, 470, 828 N.E.2d 247, 257 (2005). Villegas testified that the defendant was in the back seat of Cueto's car, from which shots were fired; Galvez offered similar testimony that shots were fired from the back seat. Although at trial, Sotello recanted his grand jury testimony and written statement to the police in which he inculpated the defendant, the evidence, considered in the light most favorable to the State, was sufficient to support the defendant's conviction. Therefore, appellate counsel was not ineffective in failing to assert in the defendant's direct appeal that the evidence did not establish his guilt beyond a reasonable doubt.

¶ 18 Accordingly, for all of the reasons stated herein, the circuit court's dismissal of the defendant's post-conviction petition without an evidentiary hearing is affirmed.

¶ 19 Affirmed.