

Nos. 1-10-3064 and 1-11-0222
(CONSOLIDATED)

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. 97 CR 11558
)	
DERRICK HARRIS,)	Honorable
)	James B. Linn,
Defendant-Appellant.)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

ORDER

¶ 1 *Held:* Where defendant failed to make a substantial showing that he was denied his right to testify at trial, we affirm the judgment of the circuit court.

¶ 2 Defendant Derrick Harris appeals from orders of the circuit court granting the State's motion to dismiss his successive petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2004)) (No. 1-10-3064), and denying his motion to reconsider (No. 1-11-0222). On appeal, defendant contends that he made a substantial showing that he was

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denied his right to testify at trial, and the denial of this right significantly undermines confidence in the trial court's finding of guilt. We affirm.

¶ 3 After simultaneous but severed bench trials, defendant and his codefendants Sammy Lowery and Erskine Deloach, who are not parties to this appeal, were each convicted of aggravated criminal sexual assault, home invasion, armed robbery, aggravated kidnaping, aggravated battery of a senior citizen, residential burglary, burglary, and possession of a stolen motor vehicle stemming from the abduction and assault of members of the Watson family in February 1997. Dante Handy, another codefendant in this case who is not a party to this appeal, opted for a simultaneous jury trial and was also convicted on all counts. Defendant was sentenced on three counts of aggravated criminal sexual assault and one count of home invasion, to four consecutive terms of 30 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Harris et al.*, 314 Ill. App. 3d 409 (2000).

¶ 4 On December 14, 2000, defendant filed a *pro se* post-conviction petition challenging the propriety of his sentences and alleging that his consecutive sentences were unconstitutional under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The State filed a motion to dismiss, which the circuit court granted thus denying defendant's petition without an evidentiary hearing. We affirmed that dismissal after granting appellate counsel leave to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987). *People v. Harris*, No. 1-05-2303 (2007) (unpublished order under Supreme Court Rule 23).

¶ 5 On December 22, 2005, defendant filed the successive *pro se* post-conviction petition at bar, alleging, in pertinent part, that he was denied effective assistance of counsel "where trial counsel advised [defendant] not to testify." In particular, defendant alleged that he told his trial attorney that he wanted to testify, but his trial attorney told him that he should not testify, that the trial court would not believe his testimony, and that his testimony would not be necessary.

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Defendant attached an affidavit to his petition in which he claimed that he made repeated requests of his attorney to testify, his attorney never told him that he had a fundamental right to testify, and his attorney told him that he would not be needed at trial.

¶ 6 The circuit court subsequently appointed counsel for defendant and docketed the petition for second stage review. The court then dismissed defendant's petition *sua sponte* before the State filed a motion to dismiss the petition. On appeal, this court reversed the circuit court's judgment and remanded the cause for a second stage hearing in accordance with the Act. *People v. Harris*, No. 1-08-0757 (2009) (unpublished order under Supreme Court Rule 23).

¶ 7 On August 19, 2010, the State filed a motion to dismiss defendant's petition, contending that defendant waived his claims of ineffective assistance of counsel, and that such claims were without merit. On September 30, 2010, counsel filed a certificate of compliance with Supreme Court Rule 651(c) (eff. Dec. 1, 1984). Counsel indicated therein that she did not make any amendments to defendant's petition for post-conviction relief because defendant's *pro se* petition adequately set forth his claims. On October 4, 2010, defendant filed a *pro se* response to the State's motion reiterating his ineffective assistance of counsel claims.

¶ 8 On October 7, 2010, the circuit court granted the State's motion to dismiss, finding that defendant's post-conviction petition and his response to the State's motion to dismiss had no merit, that his trial counsel did everything she could to explore different theories, the evidence at trial was overwhelming, and there was nothing to indicate that defendant did not get a fair trial. Defendant appealed from that order on October 7, 2010 (No. 1-10-3064). On November 5, 2010, defendant filed a *pro se* motion to reconsider the order granting the State's motion to dismiss, which the circuit court denied on December 1, 2010. Defendant appealed from that order on December 27, 2010 (No. 1-11-0222).

¶ 9 On appeal from those orders, defendant contends that he made a substantial showing that

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he was denied his right to testify. Moreover, he asserts that the denial of his right to testify significantly undermines confidence in the trial court's finding of guilt.

¶ 10 We review the court's dismissal of a post-conviction petition without an evidentiary hearing *de novo*. *People v. Suarez*, 224 Ill. 2d 37, 42 (2007). At the second stage of proceedings on a successive post-conviction petition, the relevant inquiry is whether the petitioner has made a substantial showing of the alleged constitutional violation such that an evidentiary hearing is warranted. *People v. Lofton*, 2011 IL App (1st) 100118, ¶34. The constitutional violation alleged in the successive petition is ineffective assistance of trial counsel based on counsel's advice that defendant should not testify and counsel's failure to tell defendant of his right to testify.

¶ 11 A defendant who argues ineffective assistance of counsel must demonstrate that his counsel's representation fell below an objective standard of reasonableness and that he was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Lacy*, 407 Ill. App. 3d 442, 456-57 (2011). The failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Enis*, 194 Ill. 2d 361, 377 (2000), citing *Strickland*, 466 U.S. at 697. As a general rule, a defendant has a fundamental right to testify and the decision to testify can only be made by the defendant, regardless of counsel's advice. *People v. Clemons*, 277 Ill. App. 3d 911, 922 (1996).

¶ 12 Here, although defendant's petition alleges that he indicated his desire to testify to his counsel, there is no evidence that he reaffirmed his intention when it was time for the defense to present its case, or that he objected when counsel rested its case without calling him to testify. Absent "a contemporaneous assertion by the defendant of his right to testify, the trial judge properly denied an evidentiary hearing." *People v. Thompkins*, 161 Ill. 2d 148, 178 (1994), quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

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¶ 13 Moreover, defendant is unable to establish prejudice under the *Strickland* test, as evidence of his guilt was overwhelming. See *Harris*, 314 Ill. App. 3d at 418-19. The two victims, *i.e.*, Louise and Monica, identified defendant as an intruder, and Monica testified to being raped by defendant. Defendant also made an inculpatory statement to police, which he signed, and a DNA sample taken from Monica matched defendant. Thus, defendant fails to make a substantial showing that his constitutional rights were violated, and therefore dismissal of this claim was proper.

¶ 14 In reaching this conclusion, we find *People v. Lester*, 261 Ill. App. 3d 1075 (2d Dist. 1994) and *People v. Nix*, 150 Ill. App. 3d 48 (3d Dist. 1986), relied on by defendant, unpersuasive. As defendant observes, these cases, without reaching the prejudice prong, remanded the causes for evidentiary hearings on the issue of whether counsel provided erroneous advice regarding the right to testify. *Lester*, 261 Ill. App. 3d at 1079-80; *Nix*, 150 Ill. App. 3d at 51. However, the Second District expressly disavowed this position in *People v. Buchanan*, 403 Ill. App. 3d 600 (2d Dist. 2010). In *Buchanan*, 403 Ill. App. 3d at 608, this court declined to follow *Lester*, in part, because it completely failed to address the prejudice prong of the ineffective assistance of counsel test. Notably, the First District follows the position that the prejudice prong should be considered. *People v. Hernandez*, 351 Ill. App. 3d 28, 39-40 (1st Dist. 2004) (affirming the dismissal of defendant's post-conviction petition when he could not show he was prejudiced by trial counsel's alleged violation of his right to choose whether or not to testify); see also *People v. Madej*, 177 Ill. 2d 116, 146-47 (1997), overruled on other grounds by *People v. Coleman*, 183 Ill. 2d 366 (1998) (affirming the second-stage dismissal of the defendant's post-conviction petition when defendant could not show that the violation of his right to testify created a reasonable probability that the trial outcome would have differed because evidence of his guilt was overwhelming).

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¶ 15 We therefore affirm the order of the circuit court dismissing defendant's successive petition at the second-stage of proceedings.

¶ 16 Affirmed.