

No. 1-10-3498

**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. 03 CR 135    |
|                                      | ) |                  |
| GILBERTO GONZALEZ,                   | ) | Honorable        |
|                                      | ) | James B. Linn,   |
| Defendant-Appellant.                 | ) | Judge Presiding. |

---

JUSTICE McBride delivered the judgment of the court.  
Presiding Justice Epstein and Justice J. Gordon concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where the trial evidence against defendant was overwhelming, defendant was unable to show he was prejudiced by his trial and appellate counsel's alleged ineffective assistance.

¶ 2 Defendant Gilberto Gonzalez appeals from the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). On appeal, defendant contends that his petition sufficiently alleged claims of ineffective assistance of counsel based on trial counsel's failure to interview witnesses and object to a sleeping juror

remaining on the panel, and appellate counsel's failure to argue ineffective assistance of trial counsel on direct appeal. We affirm.

¶ 3 After a jury trial, defendant was convicted of first-degree murder. The evidence at trial established that around 7:25 p.m. on December 2, 2002, the victim, Jesse Sandoval, was fatally wounded in a drive-by shooting. Three eyewitnesses identified defendant as the shooter.

¶ 4 At trial, five witnesses to the shooting testified to substantially the same version of events, including Jorge Serrano, Manuel Rayo, Eduardo Negrete, Amanda Magdaleno, and Selena Carreto. Around 7:25 p.m. on December 2, 2002, all five witnesses were near the intersection of 21st Place and Washtenaw Avenue. Washtenaw is a one-way street going south. They saw a police car driving the wrong way on Washtenaw followed closely by a tan, four-door Oldsmobile. The car's windows were covered in snow except for the front windshield and the driver's window, which was rolled down. The car came around a second time and after it had passed, the victim crossed to the south side of 21st Place and hid between two vans. The driver of the car started shooting in the direction of the victim. After the shooting stopped, the victim was lying on the ground.

¶ 5 Jorge Serrano, Manuel Rayo, and Eduardo Negrete identified defendant as the shooter, and testified that he was the driver and sole occupant of the car. Neither Magdaleno nor Carreto saw who was in the car. After defendant drove away, Serrano chased the car down the street then flagged down a police car and told the officers his friend had been shot by the Oldsmobile driver. At the time of trial, both Serrano and Negrete had prior felony convictions and felony charges pending against them.

¶ 6 Officer David Williams testified that he was flagged down by Serrano, who pointed out the Oldsmobile and told Williams the driver had shot his friend. Williams and his partner activated their emergency lights and began following the car. Williams never lost sight of the car

and eventually followed it into an alley near 19th Street and California Avenue. The driver of the car, who Williams identified as defendant, jumped out of the car while it was still rolling.

Defendant was holding a handgun. Williams got out of his car, drew his gun, and ordered defendant to drop the gun. Defendant dropped the weapon then fled on foot. Williams chased after him and called for backup.

¶ 7 Officer Marcos Bocanegra testified that he reported to Williams's call for backup. After receiving a description of the suspect, Bocanegra and his partner followed fresh footsteps he observed in the snow into a storage area underneath a nearby building stairwell. By following the wet footsteps inside, he eventually found and apprehended defendant. After defendant was arrested, Williams identified defendant as the person he had been chasing on foot.

¶ 8 The forensic evidence showed that no latent fingerprints suitable for testing were found. However, a cartridge case recovered from the scene of the shooting was verified as having been shot from the gun defendant had dropped.

¶ 9 Defendant also received a gunshot residue test. From the results, the forensic specialist concluded that defendant may have discharged a firearm, may have contacted gunshot residue particles, or may have received particles from an environmental source. Ultimately, the specialist could not conclusively determine that defendant did discharge a firearm or that he may not have discharged a firearm.

¶ 10 The jury found defendant guilty of first-degree murder and of having personally discharged the firearm that proximately caused the victim's death.

¶ 11 After the trial, defense counsel filed a motion for new trial. Defendant filed a *pro se* motion for new trial, making several allegations of ineffective assistance of trial counsel including failure to interview witnesses. The trial court allowed defense counsel to withdraw and appointed a public defender to represent defendant. The trial court conducted a hearing on the

motion at which defendant's trial counsel and Salena Patitucci, an alleged witness, testified. Trial counsel testified that he spoke to Patitucci before the trial began. After hearing her potential testimony, counsel explained that if she was not telling the truth, she could do more harm than good. He asked whether she still wanted to testify and she said she did not. He testified that he thought she was lying at the time. Patitucci testified that she knew defendant from the neighborhood. On the night of December 2, 2002, she was in her bedroom when she heard a car skidding in the snow. She looked out her window and saw a tan, four-door, older car pull into the alley behind her house, followed by a police car. The driver got out of the vehicle and froze momentarily when an officer spoke to him. She was able to see the driver's profile and said it was not defendant.

¶ 12 The trial court denied defendant's motion, finding that trial counsel had explained himself and that defendant was not convicted due to counsel's actions but was convicted because of the evidence presented at trial. The court further found that trial counsel was "a very experienced, conscientious lawyer. He carefully thought out his strategy in this case. He did what he could with what he had to work with." The trial court sentenced defendant to 48 years in prison.

¶ 13 This court affirmed defendant's conviction and sentence on direct appeal rejecting, *inter alia*, his argument that he was denied a fair trial because the trial court failed to take action when it knew a juror may have fallen asleep during proceedings. *People v. Gonzalez*, 388 Ill. App. 3d 566 (2008).

¶ 14 On October 13, 2010, defendant, through counsel, filed the instant postconviction petition. In his petition, defendant alleged ineffective assistance of trial and appellate counsel. Specifically, defendant alleged he received ineffective assistance because his trial counsel failed to interview Salena Patitucci and failed to move to remove a juror who had been sleeping during trial, thereby failing to preserve the issue for appeal. Defendant also alleged that he received

ineffective assistance of appellate counsel based on the failure to raise these arguments on direct appeal.

¶ 15 In support of his petition, defendant attached the affidavit of Salena Patitucci. In her affidavit, Patitucci averred that she knew defendant from around the neighborhood and that she was not interviewed by defendant's trial counsel before trial. She also averred that on December 2, 2002, she was in her bedroom when she looked out her window and saw the police chasing a four-door, tan car into the alley behind her house near 19th and California. The driver exited the car and froze when an officer pointed a gun at him. She looked at his face for 10-15 seconds and knew the driver was not defendant. Patitucci further stated that "on a break from trial at some point, [trial counsel] came and talked to me to, apparently, decide if I should testify for him."

¶ 16 Defendant also attached a copy of the disciplinary report which shows his trial counsel was suspended from the practice of law for three years on November 18, 2008. In the report, the Attorney Registration and Disciplinary Commission (Commission) found that counsel "committed serious misconduct in nine criminal cases, demonstrating a pattern" between May 2002 and June 2006. Defendant's case is not listed in any of the instances of detailed misconduct.

¶ 17 On October 29, 2010, the trial court summarily dismissed defendant's petition.

¶ 18 On appeal, defendant contends that his petition should not have been summarily dismissed because it adequately presented the gist of a claim of ineffective assistance of trial and appellate counsel.

¶ 19 Initially, the State contends that defendant's claims of ineffective assistance of trial counsel are barred by principles of forfeiture and *res judicata* because defendant failed to raise them on direct appeal. It is generally true that claims that could have been but were not raised on direct appeal are waived. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). However, when the

alleged waiver stems from the incompetence of appellate counsel such procedural bars are relaxed. *People v. Harris*, 206 Ill. 2d 1, 33 (2002). Here, defendant alleges that both his trial and appellate counsel were ineffective so we will consider the claims. *Harris*, 206 Ill. 2d at 33-34.

¶ 20 The summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Accordingly, we may affirm based on any reason supported by the record because we review the judgment, not the trial court's reasoning. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010). Summary dismissal is proper if the allegations in the petition are positively rebutted by the record. *People v. Rogers*, 197 Ill. 2d 216, 222 (2001).

¶ 21 Neither party articulates the applicable standard. To withstand summary dismissal, defendant maintains that the petition need only allege the "gist of a constitutional claim," which has been a phrase used in cases involving petitions filed by a defendant *pro se*. The State claims that a higher threshold should apply because the petition was prepared by an attorney but admits that this position was not accepted in *People v. Usher*, 397 Ill. App. 3d 276, 282-83 (2009). As acknowledged in *Usher*, "the Act dictates only one standard for first-stage postconviction petitions, that being whether the petition is frivolous or patently without merit." *Usher*, 397 Ill. App. 3d at 282-83, citing 725 ILCS 5/122-2.1(a)(2) (West 2006); see also *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 22 A petition is considered frivolous or without merit only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. Petitions based on meritless legal theory or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16.

¶ 23 A first stage petition claiming ineffective assistance of counsel must show that it is arguable that: (1) counsel's performance fell below an objective standard of reasonableness and; (2) the defendant was prejudiced by counsel's performance. *Hodges*, 234 Ill. 2d at 17.

¶ 24 Regarding the first prong, the linchpin of defendant's position is that the subsequent suspension of his trial counsel is sufficient to overcome the first stage dismissal of his petition. However, the conduct of trial counsel here was already the subject of an evidentiary hearing where the trial court found that counsel explained his actions and that defendant was convicted based on the evidence presented at trial, not his trial counsel's actions. Furthermore, the Commission suspended trial counsel for his misconduct in representing nine named clients, none of whom was defendant. No doubt the misconduct was material to the nine named clients, but not as to the instant defendant. Moreover, defendant's attempt to rely on statutes regarding the admissibility of evidence at trial (725 ILCS 5/115-7.3 (West 2010); 725 ILCS 115-7.4 (West 2010); 725 ILCS 5/115-20 (West 2010)), are not pertinent in considering the sufficiency of allegations in a postconviction petition.

¶ 25 Even assuming that the petition could be considered to have shown that it is arguable that counsel's performance fell below an objective standard of reasonableness based on trial counsel's subsequent suspension, defendant has not shown that he arguably was prejudiced by counsel's performance.

¶ 26 To establish prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *People v. Manning*, 241 Ill. 2d 319, 327 (2011).

¶ 27 Defendant first alleges his trial counsel was ineffective for failing to interview Salena Patitucci. He argues that Patitucci could have provided exonerating testimony because, according to her affidavit, she saw the police chasing an tan, four-door car, but averred that defendant was not the driver of the car.

¶ 28 The record positively rebuts defendant's allegations. At the posttrial hearing, trial counsel testified that he did speak with Patitucci but believed she was lying. After explaining to her that

if she was lying her testimony could hurt defendant more than help him, she declined to testify. Furthermore, Patitucci's affidavit does not contradict the record, but in fact supports it as she stated that she spoke with defendant's trial counsel.

¶ 29 Moreover, even if we were to take defendant's allegations as true, he is unable to show that but for counsel's failure to interview Patitucci, there is a reasonable probability that the outcome of the trial would have been different. At trial, Serrano, Rayo, and Negrete identified defendant as the shooter. Each testified to seeing defendant's face during one of the two times he drove by, to defendant being the only person in the car, and to either hearing or seeing gunfire coming from defendant's car. Furthermore, Magdaleno and Carreto generally corroborated their version of events. The trial testimony also showed that Officers Williams started following defendant's car within minutes of the shooting, never lost sight of the car, identified defendant as the driver, and saw defendant drop a gun in the snow, which was later recovered by the police. Officer Bocanegra testified that he followed fresh, wet footprints right to defendant. Moreover, the physical evidence did not eliminate the possibility that defendant was the shooter and, in fact, forensic evidence established that the cartridge case recovered from the scene of the shooting was fired from the gun that was dropped by defendant. As Patitucci did not witness the shooting and the evidence presented against defendant at trial was overwhelming, we cannot say that had defendant's counsel interviewed and called Patitucci as a witness, there is a reasonable probability that the trial result would have been different. Defendant is unable to show he was arguably prejudiced by counsel's actions, and therefore did not sufficiently allege ineffective assistance of counsel.

¶ 30 Defendant next alleges his counsel was ineffective for not preserving the issue of the sleeping juror by failing to request removal of the juror or raising the issue in a posttrial motion. On direct appeal, we found that the trial court's actions in response to the sleeping juror did not

deny defendant a fair trial because it brought the matter to the parties' attention immediately and that it would consider any motion made by the parties. *Gonzalez*, 388 Ill. App. 3d at 576-77. No motions were made. *Gonzalez*, 388 Ill. App. 3d at 577. Notably, we also observed that defendant was unable to show the juror in question was sleeping "for a substantial portion of the trial or that the juror failed to follow an essential part of the proceedings." *Id.* In addition to providing no further evidence in his petition that the juror missed a substantial or essential part of the trial, defendant is still unable to show he was prejudiced by counsel's failures. As previously noted, the evidence presented against defendant at trial was overwhelming and even if trial counsel had properly preserved the issue of the sleeping juror for appeal, we cannot say that there is an arguably reasonable probability that his motion to remove the juror would have succeeded or that the result at trial would have been different. See *People v. Escobedo*, 377 Ill. App. 3d 82, 90 (2007) (finding that a defendant failed to show ineffective assistance of counsel based on failure to bring a sleeping juror to the trial court's attention because the trial evidence against him was overwhelming).

¶ 31 Finally, defendant alleges his appellate counsel was ineffective for failing to raise these claims on direct appeal. However, as we have found his underlying claims to be without merit, defendant cannot show he was prejudiced by appellate counsel's failure to present the ineffective assistance counsel claims on direct appeal. *People v. Johnson*, 183 Ill. 2d 176, 187 (1998).

Therefore, the trial court did not error in dismissing defendant's petition.

¶ 32 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 33 Affirmed.