

No. 1-11-3356

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. 07 CR 00041
)	
DAMIAN WILLIAMS,)	Honorable
)	Arthur F. Hill, Jr.,
Defendant-Appellant.)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition where defendant's claim that he was denied the effective assistance of appellate counsel when counsel failed to argue reasonable doubt, was patently meritless in light of the overwhelming evidence of guilt and defendant's claim was merely an inconsistent verdict claim that has been foreclosed by our supreme court's decision in *People v. Jones*, 207 Ill. 2d 122 (2003).
- ¶ 2 Defendant Damian Williams appeals from the order of the circuit court summarily dismissing his *pro se* petition for postconviction relief. On appeal, defendant contends that the petition was improperly dismissed because it adequately stated a claim of ineffective assistance

of appellate counsel based on failure to argue reasonable doubt on defendant's direct appeal. The State responds that the claim is meritless because there was ample evidence of defendant's guilt and his arguments on appeal are based on a theory of inconsistent verdicts rejected by our supreme court in *People v. Jones*, 207 Ill. 2d 122 (2003). We agree with the State and affirm the judgment of the circuit court.

¶ 3 According to the State's theory of the case, defendant and one or more unidentified accomplices committed an aggravated vehicular hijacking in Calumet City. The State alleged that defendant, who was driving the hijacked vehicle, attempted to murder Zachary Peters, an Illinois state police officer who was attempting to complete a traffic stop of the vehicle. The State alleged that defendant fired a handgun at Peters through the rear window of the vehicle. Defendant was also charged with aggravated discharge of a firearm based on the same conduct. In separate counts, defendant was also indicted for numerous offenses including attempted murder based on striking Peters with a car, aggravated battery, and unlawful use of a weapon. Before trial, the State nol-prossed all counts except the attempted murder based on firing a weapon in Peters' direction and the aggravated discharge of a firearm based on the same conduct. As relevant to this appeal, the State decided not to proceed on Count 1, which charged defendant with attempted murder based on striking Peters with a car. The jury found defendant guilty of attempted murder, but not guilty of aggravated discharge of a firearm. The trial court subsequently sentenced defendant to 21 years' imprisonment.

¶ 4 At trial, Zachary Peters testified that on November 21, 2006, he was an Illinois state police trooper assigned to patrol the interstates around Chicago. At approximately 10 p.m. he received a radio call alerting him to a car, a red Pontiac with Indiana license plates, wanted in connection with a vehicular hijacking. He subsequently observed the car, followed it, and requested assistance. The car exited the interstate and stopped at a red light at 59th and Wells.

The car stopped in the right lane, another car was stopped parallel to it in the left lane, and Peters stopped behind the car. Peters was driving a marked Ford Crown Victoria and dressed in a police uniform. After they stopped, a second officer, Master Sergeant Hoop arrived. Hoop was driving an unmarked Ford Crown Victoria. He passed the cars, entered the intersection, made a U-turn, and stopped nose to nose with the suspect's car. Hoop and Peters both activated their emergency lights, and Peters exited his vehicle.

¶ 5 Peters further testified that as he exited his vehicle, he drew his weapon and yelled "State Police, show me your hands." Peters was unable to see into the suspect's vehicle because the windows were fogged. As he approached the vehicle, he heard a gunshot and the rear window "exploded" outward toward him. Peters was then able to see into the vehicle and saw defendant sitting in the drivers seat. The vehicle backed up and struck both Peters' right leg and his patrol car. Peters fell against his car, righted himself, and returned fire, firing a total of 16 rounds toward the suspect's car.

¶ 6 The suspect's car began driving forward, striking the car next to it, and fled the scene. Peters and Hoop followed in separate cars. However, shortly thereafter Peters ended the pursuit because he had pain in his leg and was afraid he could no longer safely drive. Hoop stopped to assist Peters. An ambulance later transported Peters to a hospital. The following day, Peters identified defendant in a line up at the Chicago police department.

¶ 7 Master Sergeant Anthony Hoop testified consistently with Peters regarding the initial traffic stop. Hoop saw at least two African-American males in the car. As he was getting out of his vehicle, Hoop saw Peters approaching the car, and saw a muzzle flash from the driver's area of the car. Believing he was in the line of fire, Hoop took cover in his own vehicle. Hoop heard multiple shots as Peters returned fire. The suspect's car struck the car next to it, and took off at a

high rate of speed. Hoop pursued the car, but lost it in traffic. Hoop subsequently went to assist Peters. Hoop viewed a line up but was unable to identify anyone.

¶ 8 Shameeka Cunningham testified that on November 21, 2006, she was stopped at a traffic light. She was lost and decided to ask the people in the car next to her for directions. She observed at least three to four people in the car, and identified defendant as the driver. As she was asking for directions two police cars arrived and blocked Cunningham and defendant's cars. When she heard gunshots, Cunningham ducked down in her car. Defendant's car backed up, struck a police car, pulled forward, struck Cunningham's car, and sped away. Cunningham later identified defendant in a photographic array and a subsequent line up.

¶ 9 Chicago police officer Mike Gremo testified that he received a radio call alerting him to look for a red Pontiac. Gremo subsequently located the car, it was still running and the radio was playing.

¶ 10 Chicago police sergeant Donna Strand testified that she received a radio dispatch alerting her to a police officer in need of assistance, and a subsequent dispatch telling her that a suspect was being pursued. Strand subsequently saw the suspect's car near 72nd and Normal; the car had bullet holes in it. Strand began looking for the suspect, and was flagged down by a citizen near 72nd and Harvard. After speaking with the citizen, she located defendant lying in the parkway. Defendant was attempting to prop himself up. Strand handcuffed defendant and rolled him over. When she did so, she discovered a firearm under his chest. An ambulance was called to transport defendant.

¶ 11 The State also presented the testimony of several evidence technicians and forensic scientists. The forensic evidence indicated that blood recovered from the driver's seat of the red Pontiac and the weapon found under defendant matched defendant's DNA profile. DNA recovered from other parts of the weapon showed a mixture of DNA profiles from which

defendant could not be excluded. A hooded sweatshirt recovered from the ambulance that transported defendant tested positive for gunshot residue on the right and left sleeves. Gunshot residue testing of defendant's hands revealed one particle of gunshot residue on his right hand and numerous particles of lead. These results were below the threshold for a positive test, but consistent with a person having fired a weapon then wiping the residue from his hands. The weapon recovered underneath defendant was a revolver that contained four live rounds and two empty chambers in the cylinder. A firearms expert demonstrated that it would take about five seconds to remove spent rounds from the weapon.

¶ 12 The jury ultimately found defendant guilty of attempted murder, but not guilty of aggravated discharge of a firearm. Defendant appealed, contending only that the trial court had miscalculated his credit for presentencing custody. This court affirmed defendant's conviction and sentence but ordered the mittimus corrected to reflect additional credit. *People v. Williams*, No. 1-10-0675 (2011) (unpublished summary order under Supreme Court Rule 23).

¶ 13 In 2011, defendant filed the pending *pro se* petition for postconviction relief. The petition raised numerous allegations of constitutional deprivation, including an allegation that "appellate counsel failed to preserve any issue as to the evidence and the inconsistency [*sic*] of the verdict." In an exhaustively detailed order, the trial court dismissed the petition as frivolous and patently without merit holding, *inter alia*, that Illinois law no longer allows a defendant to challenge a conviction on the basis that it is legally inconsistent with an acquittal on another charge. Defendant timely appealed and is now represented by private counsel.

¶ 14 On appeal, defendant raises only one issue: that he was denied the effective assistance of appellate counsel when that counsel failed to argue that the State failed to prove him guilty beyond a reasonable doubt on the direct appeal.

¶ 15 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a mechanism for persons in the penitentiary to challenge their convictions by identifying constitutional deficiencies in the proceedings leading to their conviction. See *People v. Hodges*, 234 Ill. 2d 1 (2009). However, issues that were raised and decided on direct appeal are barred by *res judicata* and issues that could have been raised, but were not, are forfeited. *People v. English*, 2013 IL 112890, ¶ 22. These doctrines are relaxed, however, when fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of counsel, or where the facts relating to the issue do not appear in the original appellate record. *Id.*

¶ 16 Here, defendant could have raised the issue of sufficiency of the evidence on direct appeal, and we would normally find that he has forfeited consideration of the issue. Defendant's contention, however, is not forfeited because it alleges that appellate counsel was ineffective. Claims of ineffective assistance of counsel are judged against the familiar standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984); see also *People v. Albanese*, 104 Ill. 2d 504, 526 (1984) (adopting the *Strickland* analysis). Under *Strickland* and *Albanese*, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) that but for the counsel's unprofessional errors, the results of the proceeding would have been different. *Albanese*, 104 Ill. 2d at 525. Because failure under either prong of *Strickland* is fatal to a defendant's claim, a reviewing court need not consider both prongs and may proceed directly to examine the prejudice prong. See *Strickland*, 466 U.S. at 697.

¶ 17 Claims of ineffective assistance of appellate counsel are judged under the same two-part standard. See *People v. White*, 322 Ill. App. 3d 982, 985 (2001). A defendant who alleges that appellate counsel was ineffective for failing to raise an issue must show that counsel's decision was objectively unreasonable and prejudiced defendant. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). "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." *Id.* Defendant's postconviction petition was dismissed at the first stage of the proceedings; accordingly, he was only required to show that it was arguable that counsel's performance was deficient and arguable that he was prejudiced. *Hodges*, 234 Ill. 2d at 17. We review the trial court's determination of this issue *de novo*. *Id.* at 9.

¶ 18 In order to determine whether appellate counsel was ineffective for failing to raise a sufficiency of the evidence claim in defendant's direct appeal, we must first examine whether such a claim would have had any merit. When a defendant challenges the sufficiency of the evidence, the relevant question is whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. See *People v. Stewart*, 406 Ill. App. 3d 518, 525 (2010). Defendant argues that because the jury acquitted him of aggravated discharge of a firearm, we can only consider the act of striking Peters with a car, and that there is insufficient evidence of intent to infer an intent to kill from that act. We disagree.

¶ 19 Setting aside, momentarily, the issue of the jury's verdict of not guilty on aggravated discharge of a firearm, we find that the evidence of defendant's guilt was overwhelming. Sergeant Hoop testified that during the traffic stop he saw a muzzle flash in the area of the car's driver. Trooper Peters testified that after he heard a gunshot, the rear window of the car exploded in his direction. After the window broke, he had a clear view of the driver. Both Peters and Cunningham identified defendant in a line up. Peters returned fire, and defendant was found bleeding in a parkway. Forensic evidence revealed that defendant's blood was on the driver's seat of the car, and on a handgun recovered under his chest. Although additional DNA testing revealed a mixture of DNA types on other portions of the handgun, defendant could not be

excluded from that mixture of DNA. A sweatshirt recovered from the ambulance that transported defendant tested positive for gunshot residue and, although below the threshold for a positive test, particles consistent with gunshot residue were recovered from defendant's hand.

¶ 20 Admittedly, the case against defendant would have been stronger if Hoop could have identified defendant and testified that he had clearly seen him fire the weapon. Similarly, the case would have been stronger if the weapon recovered had contained spent shells. However, the reasonable doubt standard does not require the State to put on a perfect case; rather, a conviction will not be set aside on appeal unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of defendant's guilt. See *Stewart*, 406 Ill. App. 3d at 525. Here, despite the minor deficiencies we have identified, the evidence of defendant's guilt was overwhelming, and it was eminently reasonable for the jury to find defendant guilty of the attempted murder of Trooper Peters by firing at him with a handgun.

¶ 21 Defendant nonetheless contends that we should find reasonable doubt because the jury acquitted him of aggravated discharge of a firearm. Defendant reasons that the jury must, therefore, have based its attempted murder conviction on an act other than firing a handgun at the trooper. Defendant further reasons that the only remaining act that could support an attempted murder conviction is striking the trooper with a car, and concludes that it is at least arguable that this evidence failed to establish the requisite intent.

¶ 22 The State originally charged defendant with attempted murder based on striking Peters with a vehicle, in Count 1 of the indictment. However, as stated earlier, the State elected not to proceed on this count of the indictment and proceeded only on Count 2 which was attempted murder based on shooting at Peters and Count 5 which was aggravated discharge of a firearm based on firing in the direction of Peters. The jury instruction on attempted murder did not specify that it must be based on the act of shooting at Peters. However, defendant has raised no

claim related to the jury instructions, and the State, during closing argument, never argued any theory of the crime other than defendant fired a handgun in the direction of Trooper Peters. Thus, in all but name, defendant is contending that the jury's verdict on the aggravated discharge of a firearm charge (resulting in acquittal) was inconsistent with its verdict on the attempted murder of a peace officer with a firearm charge (resulting in a finding of guilt).

¶ 23 Under these circumstances, defendant's attempt to resurrect a theory of inconsistent verdicts has been rejected by our supreme court. Prior to our supreme court's decision in *Jones*, a defendant could challenge his conviction on the basis that two verdicts were legally inconsistent. See *People v. Klingenberg*, 172 Ill. 2d 270 (1996). However, in 2003, our supreme court broke from *stare decisis* and reversed itself, holding that *Klingenberg* was wrongly decided and adopting the view of the *Klingenberg* dissent. *Jones*, 207 Ill. 2d at 133. While defendant's conviction for attempted murder might arguably be legally inconsistent with his acquittal for aggravated discharge of a firearm, after *Jones*, legal inconsistency is an error without remedy. Defendant's remedy, if any, is to challenge the sufficiency of the evidence supporting the allegedly inconsistent conviction. See *id.* at 131. We have already examined the sufficiency of the evidence and have found it overwhelmingly in favor of the State. Accordingly, we find that, because defendant's inconsistent verdicts argument is based on an overruled theory of law, appellate counsel could not have been ineffective for failing to make such an argument.

¶ 24 For the reasons stated above, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition.

¶ 25 Affirmed.