2013 IL App (1st) 120924-U

FOURTH DIVISION
September 19, 2013

No. 1-12-0924

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 14759 (02)
	)	
MWENDA MURITHI,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Epstein concurred in the judgment.

ORDER

¶ 1 *HELD*: The trial court's summary dismissal of defendant's post-conviction petition, which included claims of ineffective assistance of trial and appellate counsel, is affirmed.

¶ 2 Defendant Mwenda Murithi was convicted of first-degree murder and sentenced to 55 years in prison. Following a direct appeal, which upheld his conviction and sentence, defendant filed

a post-conviction petition. The trial court summarily dismissed defendant's post-conviction petition and defendant appealed.

¶ 3 On appeal, defendant argues that the trial court erred in dismissing his post-conviction petition because: (1) the trial court failed to address his claim of ineffective assistance of counsel for trial counsel's failure to challenge unrecorded statements given by defendant after the victim had died, which was raised in his post-conviction petition, and (2) the trial court dismissed two non-frivolous constitutional claims made in his post-conviction petition, namely that trial counsel was ineffective for falsely promising that defendant would testify during his opening statement and that appellate counsel was ineffective in not raising the same issue on appeal. For the reasons that follow, we affirm the trial court's holding.

¶ 4 BACKGROUND

¶ 5 This is an appeal regarding the trial court's summary dismissal of defendant's post-conviction petition. Defendant was indicted along with Tony Serrano for the murder of 13-year-old Schanna Gayden, which occurred on June 25, 2007. Defendant and Serrano were tried concurrently by separate juries. Both were convicted of first-degree murder. Defendant was sentenced to 55 years in prison. Serrano was sentenced to 85 years in prison. Serrano is not involved in this appeal.

¶ 6 Prior to trial, defendant presented a motion to suppress statements he made to the police while in confinement. In the motion, defendant claimed that the statements he had made to the police were involuntary due to psychological and mental coercion.

¶ 7 Of importance to this appeal, at the evidentiary hearing on the motion to suppress,[1] Detective John Valkner testified that he arrived at the scene of the shooting at about 7:00 p.m. on June 25, 2007. Once at the scene, he learned that a young female had been shot in the head, but was still alive and had been rushed to Children's Memorial Hospital.

¶ 8 Valkner further testified that at 2:10 a.m., he and Detective Gilger interviewed defendant for approximately 20 minutes. This interview was not recorded. During the statement, after advising defendant of his rights, defendant admitted to the detectives that he wanted to fight the Cobras on the evening of the shooting, but denied that he ordered the gun be brought to the scene. Defendant also stated that he had told Officer Pagan earlier where he could find the gun that was used in the shooting and that he knew who was responsible for the shooting.

¶ 9 Valkner went on to testify that at 3:55 a.m., Investigator Kidd of the Cook County Medical Examiner's Office notified

[1] The trial court also heard evidence regarding defendant's motion to quash the arrest at this evidentiary hearing, which was denied.

Valkner that the victim had died. Valkner then contacted Children's Memorial Hospital to confirm the time of death, which he learned to be 12:10 a.m. The video recording equipment was turned on in the interview room where defendant was being held at 4:02 a.m., and remained on at all times, including for two additional interviews with the police.

¶ 10 After the evidentiary hearing, the trial court denied defendant's motion to suppress, finding that the statements given to the police during questioning were voluntary. Specifically, the trial court judge stated:

> "It is this Court's view that the statement was in every sense of the word voluntary, he was appropriately Mirandized, his behavior during the course of the arrest couched with my observations of him during the time he was in custody all point to that conclusion. I also wanted to indicate with regard to the last point raised by [the ASA] that I did not find in the conduct of the officer's point in which to turn on the video recording device or DVD recording device, the point in which they had learned the death of this young girl, their behavior in this aspect is also

> not a violation of the defendant's constitutional rights. Motion to quash and motion to suppress denied."

¶ 11 During opening statements, counsel for defendant advised the jurors that defendant was not required to prove his innocence or testify at trial on his own behalf. However, counsel made numerous statements indicating that defendant would testify during the trial. Specifically, counsel stated "But I fully anticipate you are going to hear from Mr. Murithi. I fully anticipate him sitting up there like every other witness and telling you what happened."

¶ 12 Counsel further made the following comments during his opening statement:

> "Mr. Murithi is going to sit up there, I believe. And when he does, he is going to tell you what happened out there, what he was doing out there. You are going to learn Mr. Murithi was born in Africa. You are going to learn the circumstances under how he came here. What he was doing. How his life was going. In the summer of 2007, yea, he is going to tell you that he was a member of the Imperial Gangster in that neighborhood.

And you may not like that. You may not like him. He is going to tell you he was out there that night looking for a fight with the cobras. He had some troubles with them. He was looking for a fist fight. He is going to be very specific about that. He was throwing down gang signs. He was egging them on. He wanted to get in a fist fight with those guys.

He is going to tell you he likes to fight. He is going to tell you he made a phone call. The phone call wasn't to bring a gun to the scene. He is going to tell you that the phone call was to get more bodies out there because he saw he was getting outnumbered. He is going to tell you he saw Tony Serrano coming and he knew by the way that Tony Serrano was holding his waistband he had a good feeling that Tony Serrano brought a gun. He is going to tell you he didn't want a gun out there. Once he saw it he had to deal with it. Says all right. Things get out of hand. I know at least it's

> there. I don't want it here. He is going to tell you he doesn't want it. He didn't want it there because it was 6:00 o'clock in the evening and there were kids playing out there and that's just not smart to play with guns when there are that many people out there. He didn't want the gun out there. He didn't need it. He wanted to fist fight. He tried to get the gun away from Tony Serrano."

¶ 13 Following opening statements, the parties presented their evidence. The evidence adduced at trial established that at around 6:30 p.m. on June 25, 2007, Katie Wilson and her 13-year-old cousin, Schanna Gayden, went to Funston Park, which is located at the corner of McLean and Central Park Avenue, to buy watermelon from a vendor. Wilson testified she heard two groups of men arguing at each other from across the street. The group on Wilson's side of the street was yelling "Cobra killer." The argument got louder and then Wilson heard two gunshots. When Wilson turned around, she saw Gayden lying on the ground. Gayden subsequently died at the hospital of a gunshot wound.

¶ 14 Several witnesses testified regarding defendant's involvement in the shooting. Felix Jusino testified he, like defendant, was a member of the Imperial Gangsters street gang in

June 2007. About 20 minutes before the shooting, Jusino ran into defendant. Defendant told him there were some Cobras nearby and asked Jusino to come with him. When Jusino said he could not come because he was busy helping his mother, defendant left. While at the phone store, Jusino heard people yelling "Cobra killer" outside. Jusino went to see what was happening and saw defendant arguing with Cobras standing across the street. Defendant was yelling "Cobra killer" and hand signaling by "dropping the C" as a sign of disrespect. Jusino then noticed defendant was with Tony Serrano, who was also a member of the Imperial Gangsters. Defendant stood in front of Serrano yelling at the Cobras across the street while Serrano went behind a car. When Serrano stepped out from behind the car, he started shooting towards the Cobras and then ran. Jusino said he saw a pistol in Serrano's hand as Serrano ran past him.

¶ 15 Jacoby Jones testified he was walking with his sister near the park when he saw defendant. Defendant was yelling "Cobra killer" and flashing gang signs at several Spanish Cobra gang members standing across the street in the park. When Jones saw defendant raise his hand to his mouth and say "Bring the thumper," which Jones said he knew to be a slang term for a gun, Jones picked up his sister and ran to his house. A few seconds after going upstairs, Jones heard six to eight gunshots. Jones

identified defendant in a photo array and a lineup as the person who said "bring the thumper."

¶ 16 Roquelin Bustamante testified that on June 25, 2007, he saw three black males, including defendant, walking towards Central Park Avenue. All of the men were flashing gang signs and yelling at four Hispanic males standing on the other side of the street. Bustamante saw another Hispanic male come from behind a parked car, while hiding something in his shirt. Defendant was yelling at the men across the street to come closer. Bustamante said that when the Hispanic male who came from behind the car pulled a gun out from under his shirt, defendant waived at the gunman and told him to "wreck 'em." The gunman then started firing. Bustamante identified defendant in a lineup as the person who told the gunman to "wreck 'em."

¶ 17 Chicago police officer Edwin Page testified that he found defendant about a half block down from the park on McLean while canvassing the area after the shooting. Defendant was standing outside drinking an alcoholic beverage. After Officer Page placed him under arrest for drinking on a public way, defendant told the officer to give him a break because he had information for him. According to Officer Page, defendant said he knew where the "thumper" used in the shooting was. Defendant told the officer it was located in a partially abandoned building at

Dickens and St. Louis Avenue. After being advised of his *Miranda* rights, defendant told Officer Page he knew the shooter was an Imperial Gangster gang member named Tony.

¶ 18 Chicago police detective John Valkner testified that he questioned Defendant at 2:10 a.m. on June 26, 2007. After being advised of his *Miranda* rights, defendant told Detective Valkner that he was a member of the Imperial Gangster street gang. Defendant admitted that prior to the shooting, he was in an argument with some Cobras who were across the street from him on Central Park Avenue. Defendant denied, however, that he ordered the gun to be brought out. He told Valkner he just wanted to fight the Cobras, and ran as soon as Serrano started shooting. After Valkner learned the victim had died at 3:55 a.m., he turned on the video recording system in the interview room where defendant was being questioned for the remainder of the time defendant was there. The police conducted two additional interviews of defendant after 3:55 a.m., both of which were recorded.

¶ 19 The video containing defendant's recorded statements was the played to the jury. The jurors were also given a transcript of the video so that they could read along as the video played. In the video, defendant is first advised of his *Miranda* rights. When asked what happened on the evening of the shooting,

defendant stated "all I know is that Cobras came through, pointed a pistol, didn't do nothing, ran back, next thing I know I'm over there talking shit to them, someone just told me to go behind the fence." Defendant further explained that he just wanted to have a "boxing match real quick," that he likes fighting and that he thought there was going to be a fight. "Next thing I know I just heard hit the fence, hit the fence. *** I already know what the heck that means, boom, hit the gangway." Defendant stated that after the shots were fired he ran to the liquor store and bought Absolut vodka. He stated that he thought Tony was the one who had the gun because Tony had been somewhere behind him. On the video, defendant denied ever calling for the gun numerous times. In support of his statement that he did not call for a gun, defendant stated "I don't like bringing guns out at that hour there's too many kids outside. I always wait until midnight before I bring out guns." He then stated that he has not brought guns out in three years. He admitted that he refers to guns as "thumpers." He again stated that he just wanted to fight "'cause there was kids in the park that's the main reason I didn't want no gun out there. 'Cause I know I can aim, but I don't know about the other people man that's why I don't be lifting that shit at that time."

¶ 20 When defendant was asked why he wanted to fight the Cobras,

he stated "I just like fighting." Defendant admitted that he had been in two previous fights with the Cobras and he was trying to "even it up" and get the "upper hand" with this fight.

¶ 21 Defendant stated that when the police told him that a little girl had been shot, he already knew this information. As he had been walking down the street from the liquor store a girl told him about her friend being shot. Defendant stated that his response to this was: "I'm like, damn. Last thing I wanted to do." Defendant admitted to making calls to get more gang members there for a fight, but not for a shooting.

¶ 22 Defendant stated that three or four other Imperial Gangsters showed up for the fight. Defendant inquired of them "ya'll got thumper?" Tony responded that he had a gun. Defendant could also tell Tony had a gun by the way he was walking and holding his hand. When defendant realized that Tony had a gun "I was like, yes we got a gun here too. This evens everything's out." Defendant admitted he was happy there was a gun there "[i]n case dude starting lighting us up f*ck it we gonna light you back up."

¶ 23 Defendant stated that he knew one of the Cobras had a gun because he had pointed it at him early on in the confrontation. Defendant stated that he was going to "wait for him to shoot first" then "light him back." There was "gonna be a shootout. It ain't no fun shooting a n*gg*r without no gun. A shootout's

the best way 'cause in the hood that's just a homicide." Defendant denied telling Tony to shoot; rather, he just told Tony to "get 'em."

¶ 24 Defendant stated that when making calls to get more gang members to back him up, he told people that the Cobras were messing with him and one "dude even got a gun on his ass man." Defendant eventually stated that he did tell Tony to "bust them." Defendant stated he was trying to lure the Cobras closer thinking that Tony was "gonna get an easier target like that." He told Tony to "bust at these n*gg*rs *** as soon as we got closer to Central Park." Defendant then stated he asked Tony for the gun when Tony hesitated to shoot. Defendant stated "I was like f*ck it man let me get that I would've just run across myself." He stated he was "mad as hell" and tipsy at the time of the fight/shooting and if he had the gun, he would have shot at the Cobras just for crossing Central Park.

¶ 25 After playing the video, the State rested. When asked if defendant would testify on his own behalf, defense counsel informed the judge that he would not. The trial court judge then questioned defense counsel and defendant about this decision.

"COURT: Will you be calling your client, [defense counsel]?

COUNSEL: Judge, I will not. I have spoken to

him at great length about his absolute right to testify in his own behalf. While he has an absolute right, he is not required to testify on his own behalf. I have informed him that if he did decide to testify on his own behalf, we would ask for an instruction to be given to the jury that they would treat his testimony like that of anyone else.

I have also informed him that if he chose not to testify, that we would ask for an instruction to be given to the jury that they would not be able to hold the fact that he did not testify against him in any way in their deliberations.

We've discussed at great length strategic matters as to whether he should testify or not, along with his absolute constitutional rights. And I believe at this point, it is his desire not to testify on his own behalf.

COURT: Is that right Mr. Murithi?

DEFENDANT: Yes, it is.

COURT: Do you understand that - have you

talked about it extensively with [defense counsel]?

DEFENDANT: Yes.

COURT: Do you have any questions or anything regarding your decision not to testify at this time?

DEFENDANT: No, sir.

COURT: So you're confident and this is your own decision, no one has threatened you or promised you anything in order to make you choose not to testify?

DEFENDANT: No.

COURT: You're choosing not to testify of your own free will?

DEFENDANT: Yes, I am.

COURT: You understand that whether or not you testify or take the witness stand in this trial and testify on your own behalf is your decision and yours alone to make.

DEFENDANT: Yes.

COURT: And you have discussed it with, [defense counsel], your attorney in this case; is that right?

DEFENDANT: Yes, sir.

COURT: Has anyone promised you anything or threatened you in any way to make you choose not to testify?

DEFENDANT: No.

COURT: You're choosing not to testify is of your own free will; is that right?

DEFENDANT: Yes, sir.

COURT: And it is your decision not to testify here today, right?

DEFENDANT: Yes.

COURT: This court at this time is going to find the defendant's decision not to testify in this case is made under thoughtful discussion with his attorney and knowingly and voluntarily made of his own free will and such decision is not the product of promises, threats, duress or coercion of any kind.

Do you understand that, Mr. Murithi?

DEFENDANT: Yes."

¶ 26 After hearing all the evidence, the jury found defendant guilty of first degree murder. Following a joint sentencing hearing, defendant was sentenced to a 55-year prison term.

¶ 27 On direct appeal, defendant raised three issues: (1) improper *Zehr* instructions, (2) ineffective assistance of counsel for failure to question jurors about potential gang bias during *voir dire* and (3) excessive sentence. The appellate court affirmed defendant's sentence and conviction. Defendant's petitions for rehearing and for leave to appeal were denied.

¶ 28 On November 18, 2011, defendant filed a *pro se* post-conviction petition. Within his petition he claimed that his constitutional rights had been denied when: (1) trial counsel prevented him from testifying at trial, (2) trial counsel failed to object or challenge inconsistent statements he made to Officer Pagan, (3) trial counsel failed to challenge the admissibility of the unrecorded statements made to Detective Valkner, (4) trial counsel failed to make a timely objection to the use of the word "ordered" that had been used by Roquelin Bustamante, (5) trial counsel failed to include claims (2) and (3) in a post-trial motion and (6) appellate counsel failed to raise claims (1) and (2) on appeal. Defendant also claimed in his petition that but for the ineffective assistance of counsel, there was insufficient evidence to prove him guilty beyond a reasonable doubt.

¶ 29 Of note, in support of defendant's claim that trial counsel prevented him from testifying at trial, defendant's post-conviction petition claimed that he told trial counsel that he

wanted to testify about the conditions in the jail to show that his statements were not voluntary. Specifically, defendant stated that he asked trial counsel to testify in order to "object to the alleged statements [he] made to officer Pagan." He further advised counsel that he "intended to tell the jury about the mistreatment he suffered while in police custody before the first recorded statement," "about being denied access to the bathroom forcing him to urinate in the interrogation room" and to explain why he did not have a shirt on during the statements. Defendant's petition further claimed that his attorney informed him that "he had the case won and thus there was no need for [him] to testify. Even though [he] had some reservations about this decision he deferred to his counsel's opinion ***" and chose not to testify. Defendant went on to argue that the "jury was denied an opportunity to hear about the mistreatment [he] underwent at the hands of the police." Defendant stated that he would have testified that he did not know "who the shooter was for he was running for cover when the shooting started" and he would have explained that "he had altered his statements several times to avoid further coercion" at the hands of the police.

¶ 30 On February 15, 2012, the trial court dismissed defendant's post-conviction petition in a written order. The court found defendant's claim that he was not allowed to testify was without

merit because he had freely waived his right to testify on the record and that when trial counsel made promises during his opening statement, he did not specifically promise that said testimony would come directly from defendant. The trial court found that defendant's claim that trial counsel failed to challenge Officer Pagan's and Officer Valkner's testimony and failed to timely object to the use of the word "ordered" during Bustamante's testimony did not amount to ineffective assistance of counsel. The trial court further found that the claim of ineffective assistance for the failure to include the above issues in a post-trial motion or in an appeal was without merit given that the underlying actions were without merit. While it does not appear that the trial court addressed the issue regarding unrecorded statements, the trial court concluded his written order by stating: "Based upon the foregoing discussion, the court finds that the issues raised and presented by petitioner are waived or frivolous as patently without merit. Accordingly, the petition for post-conviction relief is hereby dismissed. Petitioner's request for leave to proceed *in forma pauperis* and for appointment of counsel is likewise denied."

¶ 31 Defendant appealed the trial court's dismissal of his post-conviction petition claiming: (1) the trial court failed to address a non-frivolous issue raised in his post-conviction

petition, and (2) the trial court dismissed two non-frivolous constitutional claims made in his post-conviction petition, namely that trial counsel was ineffective for falsely promising that defendant would testify during his opening statement and that appellate counsel was ineffective in not raising the same issue on appeal. For the reasons below, we affirm the trial court's dismissal.

¶ 32 ANALYSIS

¶ 33 The Post Conviction Hearing Act (the Act) provides a remedy for defendants who have suffered a substantial violation of their constitutional rights. See 725 ILCS 5/122-1(a)(1) (West 2008). Under the Act, a post-conviction proceeding not involving the death penalty contains three stages. *People v. Gaultney,* 174 Ill. 2d 410, 418 (1996). At the first stage, the circuit court must independently review the post-conviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. *Id.*

¶ 34 A post-conviction petition is considered frivolous or patently without merit only if the allegations in the petition, taken as true and liberally construed, fail to present the "gist

of a constitutional claim." *Gaultney*, 174 Ill. 2d at 418 (*citing People v. Porter*, 122 Ill. 2d 64, 74 (1988)). Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit:

> "if the petition had no arguable basis in law or in fact. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *People v. Hodges*, 234 Ill. 2d 1, 16-17 (2009).

¶ 35 A post-conviction action is not an appeal from an underlying judgment; rather, it is a collateral attack on a prior conviction and sentence. *People v. Towns*, 182 Ill. 2d 491, 502 (1998). The purpose of the post-conviction proceeding is to allow inquiry into constitutional issues involved in the original conviction and sentence that have not been, and could not have been, adjudicated previously on direct appeal. *Id.* Issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. *Id.* at 502-03; see also *People v. Griffin*, 178 Ill. 2d 65, 73 (1997). Issues that could have been presented on direct appeal, but were not, are waived. *Id.*; *People v. Miller*, 203 Ill. 2d 433, 437 (2002) ("Rulings on issues that were

previously raised at trial or on direct appeal are *res judicata*, and issues that could have been raised, but were not, are waived.").

¶ 36 This court's review of the trial court's dismissal of a post-conviction petition without an evidentiary hearing is *de novo*. *People v. Edwards*, 197 Ill. 2d 239, 247 (2001). As the Illinois Supreme Court has explained, "[d]ue to the elimination of all factual issues at the dismissal stage of a post-conviction proceeding, the question is, essentially, a legal one, which requires the reviewing court to make its own independent assessment of the allegations. Thus, a court of review should be free to substitute its own judgment for that of the circuit court in order to formulate the legally correct answer." *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 37 Where a claim of ineffective assistance of counsel is made, a defendant must satisfy the *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, to prove ineffective assistance of counsel, a defendant must show: (1) counsel's performance was deficient or fell below an objective standard of reasonableness; and (2) the defendant suffered prejudice as a result of the deficient performance. *Strickland*, 466 U.S. at 687; *People v. Ford*, 368 Ill. App. 3d 562, 571 (2006).

¶ 38 With respect to the first prong, deficiency, the defendant must prove that counsel made errors so serious, and that counsel's performance was so deficient, that counsel was not functioning as "counsel" as is guaranteed by the sixth amendment. *Griffin*, 178 Ill. 2d 65 at 73-74; *People v. Simms*, 192 Ill. 2d 348, 361 (2000). Further, in establishing deficiency, the defendant must overcome the strong presumption that the challenged action or lack of action might have been the product of sound trial strategy. *Id.*

¶ 39 With respect to the second prong, prejudice, the defendant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Simms*, 192 Ill. 2d at 362. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* The prejudice prong of *Strickland* entails more than an "outcome-determinative" test. *Id.* The defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.*

¶ 40 A defendant must satisfy both prongs of the *Strickland* test. Therefore, "failure to establish either proposition will be fatal to the claim." *Id.; People v. Sanchez,* 169 Ill. 2d 472, 487 (1996); see also *People v. Hickey,* 204 Ill. 2d 585, 613 (2001)

(Petitioner must show that counsel's representation fell below an objective standard of reasonableness, and that, because of this deficiency, there is a reasonable probability that counsel's performance was prejudicial to the defense).

¶ 41 The *Strickland* analysis is also used to test the adequacy of appellate counsel. *Simms*, 192 Ill. 2d at 362. A defendant who contends that appellate counsel rendered ineffective assistance, *e.g.*, by failing to argue a particular issue, must show that appellate counsel's failure to raise the issue was objectively unreasonable and prejudiced the defendant. *People v. West,* 187 Ill. 2d 418, 435 (1999). 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. Easley,* 192 Ill. 2d 307, 329 (2000); *West,* 187 Ill. 2d at 435. Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, *People v. Mack,* 167 Ill. 2d 525, 534 (1995), for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Easley,* 192 Ill. 2d at 329; *Simms*, 192 Ill. 2d at 362. Normally, appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *People v.* Rogers,

197 Ill. 2d 216, 223 (2001); *Mack*, 167 Ill. 2d at 532-33.

¶ 42 I. Trial Court's Failure to Address an Issue Contained in Defendant's Post-Conviction petition.

¶ 43 Defendant claims that the trial court failed to address his claim of ineffective assistance of counsel for trial counsel's failure to challenge unrecorded statements given by defendant after the victim had died, which was raised in his post-conviction petition. As a result, he claims that we must consider the trial court's order a partial dismissal, which would require defendant's petition to be remanded for second-stage review. Defendant claims that under *People v. Rivera*, partial summary dismissal of a petition is forbidden under the Act. See *People v. Rivera*, 198 Ill. 2d 364, 371-72 (2001). While we agree that the Act does not allow for partial summary dismissal of a post-conviction petition, we do not find that the trial court intended a partial summary dismissal here and, accordingly, find this case to be distinguishable from *Rivera*.

¶ 44 In *Rivera*, the court very clearly intended to dismiss some claims and remand others for second-stage review. *Rivera*, 198 Ill. 2d at 365-66 (trial court specifically found four claims as being frivolous or patently without merit, but found two claims had stated the gist of a meritorious claim and advanced those claims for second-stage review). Here, the trial court very clearly intended to dismiss all claims. In its order, the trial

court concluded:

> "Based upon the foregoing discussion, the court finds that the issues raised and presented by petitioner are waived or frivolous and patently without merit. Accordingly, the petition for post-conviction relief is hereby dismissed. Petitioner's request for leave to proceed *in forma pauperis* and for appointment of counsel is likewise denied."

¶ 45 In *People v. Lee*, the defendant argued that because the trial court gave no reasons for dismissing one of his claims, the appellate court was required to construe the post-conviction petition order as a partial dismissal and remand the case for second-stage review. *People v. Lee*, 344 Ill. App. 3d 851, 855 (2003). The court disagreed. *Id.* There, the court stated that "[w]hen we construe a trial court's order we seek to determine the trial court's intention. We will construe the order to uphold its validity, if the wording of the order can support such a construction." (Internal citations omitted) *Id.* at 855. The court noted that the trial court "plainly intended to dismiss the entire petition, and the parties understood the order as a complete dismissal subject to immediate appellate review." *Id.*

at 855. Here, like in *Lee*, based on the trial court's order, it is clear that the trial court intended to dismiss defendant's petition in its entirety and allow for the appeal that followed.

¶ 46 Although the trial court's reasons for dismissing a post-conviction petition may provide assistance to this court (see *People v. Porter,* 122 Ill. 2d 64, 82 (1988)), we review the trial court's judgment and not the reasons given for the judgment. *Lee*, 344 Ill. App. 3d at 853; *Makowski v. City of Naperville,* 249 Ill. App. 3d 110, 115 (1993). We will affirm the trial court on any basis supported by the record even if the trial court reasoned incorrectly. *Id.*; *Pryweller v. Cohen,* 282 Ill. App. 3d 899, 907 (1996). Errors in the trial court's assessment of the evidence or conclusions of law do not require reversal if the judgment is correct. *Id.*; See *Woodward v. Pratt, Bradford & Tobin, P.C.,* 291 Ill. App. 3d 807, 816 (1997). "Thus, we will reverse summary dismissal of a postconviction petition if the petition states sufficient facts to show the gist of a constitutional claim, and we will affirm summary dismissal of the petition, regardless of the trial court's reasons for the dismissal, if the petition patently lacks merit." *Id.* Therefore, in this case, so long as the record supports it, we may affirm the trial court's summary dismissal even if the court failed to address one of defendant's claims.

¶ 47 Here, defendant contends that the trial court failed to address his claim of ineffective assistance of counsel for trial counsel's failure to challenge unrecorded statements given by defendant after the victim had died. Specifically, defendant argues that "[e]ffective counsel would have argued in a pre-trial motion that Valkner should have known that Gayden had died, and that Valkner's purposeful ignorance was a direct violation of statute 725 ILCS 5/103-2.1." Defendant contends that such an argument during pre-trial motions would have stood a reasonable chance of success because the first interrogation of defendant was conducted at 2:10 a.m., after the victim had died, and was not videotaped, resulting in a violation of section 103-2.1(b) of the Code. 725 ILCS 5/103-2.1(b) (West 2008).

¶ 48 Section 103-2.1(b) of the Code, which addresses statements taken in connection with murder/homicide charges, provides:

> "An oral, written, or sign language statement of an accused made as a result of a custodial interrogation at a police station or other place of detention shall be presumed inadmissible as evidence against the accused in any criminal proceeding brought under Section 9-1 *** unless:
>
> (1) an electronic recording is made of

> the custodial interrogation; and
>
> (2) the recording is substantially accurate and not intentionally altered."
>
> 725 ILCS 5/103-2.1(b) (West 2008).

¶ 49 Section 103-2.1(b) is subject to numerous exceptions set out in subsection (e) that preclude a finding of a violation for failure to electronically record a statement. *People v. Armstrong*, 395 Ill. App. 3d 606, 621 (2009) (*citing* 725 ILCS 5/103-2.1(e) (West 2008)). The exception applicable here provides: "Nothing in this Section precludes the admission *** of a statement given at a time when the interrogators are unaware that a death has in fact occurred." 725 ILCS 5/103-2.1(e)(viii) (West 2008). Accordingly, "[t]he plain and clear language of exception (viii) requires two factual determinations before the exception is triggered: (1) a death has occurred; and (2) the interrogators are aware of the death." *Armstrong*, 395 Ill. App. 3d at 621.

¶ 50 Here, it is clear from the record that Detective Valkner did not learn of the victim's death until Investigator Kidd contacted him at 3:55 a.m. Almost immediately upon learning this, defendant's video recording device was turned on at 4:02 a.m. Further, when Valkner arrived at the scene of the shooting the evening before, he was told that the victim had been shot in the

head, but was still alive and was being rushed to Children's Hospital. There is nothing in the record to indicate or even suggest that the detectives questioning defendant knew of the victim's death at any time prior to 3:55 a.m. While defendant tries to argue that the detectives were "purposefully ignorant" of the victim's death, there is no evidence in the record to support this allegation either. Simply because Valkner was an experienced lead detective and was told that the victim had been shot in the head, does not mean that he knew that the victim had died prior to him being told so at 3:55 a.m.

¶ 51 Further, pursuant to section 5/103-2.1(f), "[t]he presumption of inadmissibility of a statement made by a suspect at a custodial interrogation at a police station or other place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances." 725 ILCS 5/103-2.1(f) (West 2008). Here, the trial court already found that defendant's statements were voluntary following the evidentiary hearing on defendant's motion to suppress, and we agree with that finding. As such, because the unrecorded statements would have been admissible under two exceptions within section 5/103-2.1, making any challenge to the unrecorded statements' admissibility futile, defendant's claim that trial counsel was ineffective for

not filing a motion to suppress such statements is without merit. 725 ILCS 5/103-2.1(f) (West 2008).

¶ 52 Additionally, because appellate counsel has no duty to raise non-meritorious issues on appeal, *see Easley*, 192 Ill. 2d at 329, defendant's claim that appellate counsel was ineffective because he did not raise this issue on appeal also lacks merit. Because any attempt by trial counsel or appellate counsel to challenge the admissibility of the unrecorded statements would have failed due to the exceptions laid out in section 5/103-2.1, we affirm the trial court's ruling summarily dismissing defendant's post-conviction petition. 725 ILCS 5/103-2.1(f) (West 2008).

¶ 53 II. Trial Court's Dismissal of Two Claims Within the Post-Conviction Petition.

¶ 54 Defendant argues that the trial court erred in dismissing two of his post-conviction claims: (1) that trial counsel was ineffective by telling the jurors during opening statements that defendant would be testifying when defendant never took the stand, and (2) appellate counsel was ineffective by failing to raise the same issue on appeal.

¶ 55 First, while we recognize the claim regarding comments made during opening statements could have been raised on direct appeal, was not, and should be considered waived, See *People v. Miller*, 203 Ill. 2d at 437, defendant also alleges that appellate counsel was ineffective by not raising this issue on appeal.

Accordingly, we must address the comments made during opening statements in order to assess defendant's claim that appellate counsel was ineffective for failing to raise the issue on appeal. See *People v. Coleman,* 168 Ill. 2d 509, 522-23 (1995) ("This court has held that the doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of counsel on appeal.").

¶ 56 As stated earlier, in order to prove that counsel was ineffective, defendant must show both (1) counsel's performance was deficient or fell below an objective standard of reasonableness and (2) the defendant suffered prejudice as a result of the deficient performance. *Strickland*, 466 U.S. at 687; *People v. Ford*, 368 Ill. App. 3d 562, 571 (2006). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. *People v. Penrod*, 316 Ill. App. 3d 713, 723 (2000).

¶ 57 Here, it is clear that trial counsel advised the jurors during his opening statement that defendant would testify and that defendant did not testify. However, even if we were to find that trial counsel's statements during opening statements were objectively unreasonable,[2] we cannot say that his statements

[2] Because trial counsel stated in open court that he had discussed with defendant the strategic aspect of his decision to testify or not to testify, and defendant agreed with counsel that

caused sufficient prejudice to defendant's case such that the outcome of his conviction would likely have been different absent those statements. *People v. Schlager,* 247 Ill. App. 3d 921, 932 (1993) ("the test is not whether defense counsel fulfilled all the promises he made during his opening remarks but, rather, whether defense counsel's errors were so serious that, absent those errors, the result of the proceeding would likely have been different.").

¶ 58 Here, defendant claims that trial counsel's remarks in his

---

this discussion occurred, it is likely that the decision not to have defendant testify was one of strategy. See *People v. Griffin,* 178 Ill. 2d 65, 73-74 (1997); *People v. Simms*, 192 Ill. 2d 348, 361 (2000) (noting that in order to establish deficiency, the defendant must overcome the strong presumption that the challenged action or lack of action might have been the product of sound trial strategy).

Further, the record shows that defendant made conflicting statements about the events leading up to the shooting on numerous occasions. The record also shows that defendant had a desire to take the stand to testify regarding issues that the court had ruled were inadmissible, such as the conditions of his confinement. These facts, in the absence of an explanation from trial counsel, shed some light into the possible strategic decision not to have defendant testify at trial.

Moreover, in *People v. Manning,* like here, contrary to counsel's promise during opening statements, the defendant informed the trial court that he did not want to testify. *People v. Manning*, 334 Ill. App. 3d 882, 892 (2002). The appellate court in *Manning* held that because it could not determine from the record whether counsel's decision not to have defendant testify was based upon the defendant's choice not to testify, sound trial strategy, or incompetence, the court presumed it was the result of trial strategy and rejected the defendant's ineffective-assistance-of-counsel claim. *Manning,* 334 Ill. App. 3d at 893. Here, there is also a lack of evidence to show why defendant did not end up testifying.

opening statement were damaging because defendant did not testify and it was the defense's theory that defendant had nothing to do with the gun be brought out and nothing to do with the gun being fired. However, in defendant's statement that was played before the jury, defendant concedes that he asked Serrano and the Imperial Gangsters if they brought a "thumper" to the fight. He admitted that he knew Serrano had a "thumper" before he shot it and admitted that he told Serrano to "bust them." He further admitted that he was trying to get the Cobras closer so that Tony would have an easier target to shoot at. He stated that when Serrano hesitated in shooting, he asked Serrano for the gun, but that Serrano refused at which point he continued to tell Serrano to "bust them." Thus, defendant had already admitted to his involvement in the shooting, stating that he wanted the gun at the scene, he knew Serrano had a gun, he attempted to lure the Cobras closer to Serrano so that he would have better aim and he told Serrano to "bust 'em, bust 'em." As such, defendant's own statements are sufficient to support the jury's conviction.

¶ 59 Moreover, besides defendant's own admissions, numerous other witnesses testified that defendant ordered the gun and ordered that the gun be fired. Jacoby Jones testified that he saw defendant raise his hand to his mouth and say "Bring the thumper," which Jones said he knew to be a slang term for a gun.

At that point, Jones picked up his sister and ran to his house. Roquelin Bustamante testified that defendant waived at the gunman and told the gunman to "wreck 'em." The gunman then started firing. Bustamante later identified defendant in a lineup as the person who told the gunman to "wreck 'em."

¶ 60 Given the overwhelming evidence presented by the State showing that defendant ordered the gun be fired, we cannot say that counsel's comments made during opening statements were so serious that there likely would have been a different outcome in defendant's case or that the outcome in this case was not a just result.

¶ 61 For the foregoing reasons, we affirm the trial court's findings.

¶ 62 Affirmed