

2013 IL App (2d) 120687-U
No. 2-12-0687
Order filed **March 29, 2013**

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Stephenson County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 07-CF-363
)	
ANTOINE T. CHEST,)	Honorable
)	Michael P. Bald,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

Held: Trial court's summary dismissal of defendant's postconviction petition is affirmed.

¶ 1 In April 2009, following a jury trial, defendant, Antoine T. Chest, was convicted of and sentenced on two counts of attempted first-degree murder (720 ILCS 5/8-4(a), 5/9-1(a)(1) (West 2006)) and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2006)). Specifically, the trial court sentenced defendant to 35 years' imprisonment on one count of attempted murder, to be served consecutively to concurrent terms of 26 years' imprisonment on the second count of attempted murder and 10 years' imprisonment for the aggravated-discharge-of-a-firearm

conviction. Each attempted murder sentence included an enhancement (25 years and 20 years, respectively) on the bases that defendant: (1) personally discharged the firearm that (2) caused great bodily harm. 720 ILCS 5/8-4(c)(1)(C),(D) (West 2006). The court denied defendant's posttrial motions.

¶ 2 On direct appeal, this court rejected defendant's arguments that the trial court erred where it allowed the State to present evidence of another crime (specifically, a shooting that had taken place the day prior to the offense at issue) and that the evidence was insufficient to establish beyond a reasonable doubt that defendant qualified for the mandatory statutory enhancements to his sentences on the murder convictions (specifically, that defendant was the shooter). *People v. Chest*, 2-09-1031 (2011) (unpublished order under Supreme Court Rule 23).

¶ 3 On March 28, 2012, defendant, through counsel, filed a postconviction petition pursuant to section 122-1 of the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)). On June 5, 2012, the trial court summarily dismissed defendant's petition. Defendant appeals. We affirm.

¶ 4 I. BACKGROUND

¶ 5 While more detailed facts regarding the trial evidence leading to defendant's conviction may be found in our 2011 Rule 23 order, we note for purposes of this appeal that the victims in this case were shot on December 21, 2007, after being approached by two males, allegedly defendant and co-defendant Gregory Shipp (whose trial was severed from defendant's). After the shooting, defendant and Shipp fled in a vehicle with two unidentified men; that vehicle ultimately crashed and, after a chase, defendant was apprehended.

¶ 6 Defendant argued at trial and on direct appeal that it was not proved beyond a reasonable doubt that he was the shooter, particularly where there remained unapprehended the two unidentified

men who had fled from the vehicle. However, at trial, evidence was received that gunshot residue lifts taken from the backs of defendant's hands two hours after his arrest led the state police crime lab to conclude that he: (1) had discharged a firearm; (2) was in the vicinity of a discharged firearm; or (3) came in contact with gunshot residue within six hours prior to taking the lifts. Lifts taken from co-defendant Shipp's hands did *not* test positive for the presence of gunshot residue. Further, a DNA expert testified that defendant also could not be excluded from having contributed to a mix of two human DNA profiles obtained from the gun. Co-defendant Shipp, however, was excluded. Finally, defendant could not be excluded from having contributed to a mix of DNA found on a sweatshirt and glove that were discovered in a garage near where, after the crime, defendant was seen.

¶ 7 In addition, evidence was received that, on December 20, 2007, *i.e.*, one day prior to the shooting that formed the basis of the trial charges, shots were fired from a black PT Cruiser's window at one of the same victims. Investigation of the scene recovered 9 millimeter and .45-caliber shell casings. It was later determined that the casings recovered at the scene of the December 20, 2007, shooting and the casings recovered at the scene of the December 21, 2007, shooting were fired from the same weapon; specifically, they were all fired from a Tech-9 Cobra 9 millimeter semi-automatic. The evidence reflected that a black PT Cruiser with bullet holes in its body and back window was parked at defendant's girlfriend's house; defendant's girlfriend's father testified that he assumed that defendant had parked it in the driveway. The PT Cruiser was searched, and a 9-millimeter shell casing was found on the front passenger seat. Defendant's cousin owned the PT Cruiser. As previously mentioned, on direct appeal this court held that there was no error in the admission of evidence regarding the December 20, 2007 shooting, and that the evidence was

sufficient to establish the sentencing enhancement factor that defendant personally fired the weapon that caused great bodily harm.

¶ 8 The postconviction petition, prepared by counsel, asserts that defendant's constitutional rights were violated for four reasons. First, because he is actually innocent of the crimes for which he was convicted. Second, defendant claims that trial counsel provided ineffective assistance where he denied defendant the right to testify at trial, despite defendant's insistence that he could have offered a reasonable explanation for the presence of gunshot residue on his hands, which he claims was the State's main evidence against him. Specifically, defendant asserts that he was involved in the December 20, 2007, shooting, which explains the presence of residue and would have supported his claim of actual innocence of the following day's shooting. Third, defendant asserts that trial counsel was ineffective for failing to challenge ballistics evidence introduced at trial, noting that a National Academy of Science report dated February 18, 2009, establishes that markings on bullets and shell casings are not unique and, therefore, one cannot prove beyond a reasonable doubt that a bullet came from a particular gun. Fourth, defendant asserts that counsel was ineffective where he failed to consider defendant's request that a lesser-included offense instruction be tendered (such as aggravated battery with a firearm or aggravated battery on a public way).

¶ 9 The petition is signed by defense counsel. Attached to the petition are four exhibits and two affidavits. The exhibits consist of: (1) this court's 2011 Rule 23 order; (2) a supreme court docket sheet reflecting the court's denial of defendant's petition for leave to appeal; (3) defendant's Department of Corrections internet inmate profile; and (4) the February 2009 National Academy of Science report referenced in the petition.

¶ 10 As for the affidavits, the first is a notarized affidavit from co-defendant Gregory Shipp attesting, under penalty of perjury, that: (1) he pleaded guilty to the attempted murder offenses at issue; (2) he committed the offense in retaliation for a shooting incident that occurred the night before; (3) “at the time of the December 21 incident [he] was not in the company of [defendant] and [he] did not see [defendant] in the area at that time of the shooting on December 21, 2007;” and (4) no benefit was offered to him in exchange for the affidavit.

¶ 11 The second affidavit, from defendant, is also notarized. It reads that defendant, “under penalty of perjury,” attests, in relevant part, that:

“2. I informed my trial counsel that I wish[ed] to testify in my defense.

3. Trial counsel informed me that he would not call me as a I would be unable to explain the gunshot residue found on my hand to the jury’s satisfaction.

4. I informed trial counsel that I had been involved in a shooting the evening of December 20, 2007, in Freeport, Illinois, while driving my cousin[’]s Chrysler PT Cruiser and said incident would explain the gunshot residue test administered on me by the State. This explanation would refute and belie the State[’]s assertions at trial that I was involved in the December 21st offense.

5. I requested that my trial counsel request a lesser included offense instruction (aggravated battery with a firearm and aggravated battery on a public way) and my trial counsel without explanation refused that request and did not offer or request a lesser included offense instruction despite the evidence be [*sic*] more than sufficient to do so.

6. I did not shoot at either of the complaining witnesses in this cause on December 21, 2007, and I am innocent of the charges for which I now stand convicted.”

¶ 12 On June 5, 2012, the trial court summarily dismissed defendant's petition. The court rejected defendant's actual innocence claim on the bases that: (1) despite his whereabouts being known to the parties, Shipp was not called as a witness during defendant's trial; (2) Shipp's affidavit contradicted the trial evidence which showed gunshot residue on defendant's hands but *no* gunshot residue on Shipp; and (3) the argument is forfeited because defendant did not raise it on direct appeal.

¶ 13 The court rejected defendant's ineffective assistance claim that counsel denied defendant's request to testify on the bases that: (1) defendant did not allege that, *at trial* (as opposed to pretrial), he made a contemporaneous assertion of his right to testify and counsel refused the request; and (2) when the court asked defendant at trial whether it was his choice to waive his right to testify, defendant asserted that it was.

¶ 14 The court rejected defendant's ineffective assistance claim that counsel failed to challenge the ballistics evidence that allegedly connected defendant to the offense on the bases that: (1) defense counsel, through cross-examination, challenged the ballistics evidence at trial; and (2) the 2009 report does not specifically state, as defendant asserts, that "markings on bullets and shell casings are not unique, which means one cannot prove beyond a reasonable doubt that a bullet came from a particular gun."

¶ 15 The court rejected defendant's ineffective assistance claim that counsel failed to consider his request to tender a lesser-included instruction on the bases that: (1) a party may not raise on appeal the failure to give an instruction unless he or she tendered it at trial and, here, defendant did not tender any such instruction at trial; (2) it is often trial strategy to not seek lesser-included instructions, so the court "cannot fault the attorney for its failure" to do so here; and (3) objections

not raised in a posttrial motion are forfeited from appellate review. Therefore, the court concluded, the petition was frivolous and patently without merit, warranting dismissal.

¶ 16 Defendant appeals.

¶ 17 II. ANALYSIS

¶ 18 A. Standard of Review

¶ 19 The Act establishes a three-stage process for adjudicating postconviction petitions (725 ILCS 5/122-1 *et seq.* (West 2010)). *People v. Hommerson*, 2013 IL App (2d) 110805, ¶ 7. At the first stage (as here), the trial court considers, without input from the State, whether the petition is “frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2010). To do so, the court assesses whether the petition allegations, viewed liberally and taken as true, set forth a constitutional claim for relief. *Hommerson*, 2013 IL App (2d) 110805 at ¶ 7. To survive dismissal at the first stage, the petition must present only “the gist of a constitutional claim.” *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The “gist standard” presents “a low threshold;” the postconviction petition “need only present a limited amount of detail,” does not need to set forth the claim in its entirety, and does not need to include legal arguments or citations to legal authority. *Id.* Summary dismissal of a postconviction petition at the first stage is reviewed *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 20 B. Affidavit

¶ 21 We address first the State’s assertion that the petition was properly dismissed because defendant did not attach to it an affidavit as required by section 122-1(b) of the Act, which provides “the proceeding shall be commenced by filing with the clerk of the court . . . a petition . . . verified by affidavit.” 725 ILCS 5/122-1(b) (West 2010). The State asserts that the affidavits attached to

defendant's petition consist not of section 122-1(b) affidavits, but, instead, of evidentiary affidavits, which satisfy section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)). The State, citing *People v. Carr*, 407 Ill. App. 3d 513, 515-16 (2011) (failure to attach verified affidavit is a basis for first-stage dismissal), and *People v. Turner*, 2012 IL App (2d) 100819, ¶ 46 (the court noting, in a case involving a second-stage dismissal, that it was of the opinion that an unverified affidavit is not a basis for first-stage dismissal), correctly notes that this court is split on the issue whether the failure to attach a verified affidavit to the postconviction petition provides a basis for dismissing the petition at the first stage.

¶ 22 Here, however, we conclude that the verification requirement of section 122-1(b) is satisfied by defendant's notarized affidavit attached to the petition. Defendant's notarized affidavit, sworn to under penalty of perjury, suffices to provide this court with a basis for taking as true the allegations therein. Thus, unlike postconviction cases where the defendants attached no affidavits or only unsworn affidavits to their petitions, defendant's notarized affidavit here swears, "under penalty of perjury," to three of the four constitutional violations alleged in the petition (*i.e.*, actual innocence and ineffective assistance due to not allowing defendant to testify and not requesting a lesser-included instruction). As such, we conclude that the petition sufficiently verifies those three allegations as required by section 122-1(b) of the Act.

¶ 23 We note, however, that defendant's affidavit does *not* mention the claim concerning counsel's performance as to the ballistics evidence. Further, that claim was forfeited and properly dismissed.¹

¹ Specifically, the claim was properly dismissed because defendant could have challenged counsel's performance with respect to the ballistics evidence on direct appeal. *People v. English*,

¶ 24

C. Remaining Petition Allegations

¶ 25 The State argues that the trial court properly dismissed defendant's remaining allegations. For the following reasons, we agree.

¶ 26

1. Actual Innocence

¶ 27 First, in support of his claim of actual innocence, defendant attaches as newly-discovered evidence co-defendant Shipp's affidavit. Shipp's affidavit attests that he pleaded guilty to the December 21, 2007, shooting, that he committed the crime in retaliation for a shooting incident that occurred on December 20, 2007, and that defendant was not with him, nor did he see defendant in the area, at the time of the shooting.

¶ 28 To assert a claim of actual innocence based upon newly-discovered evidence, a defendant must show that the evidence was: (1) newly discovered; (2) material and not merely cumulative; and (3) of such a conclusive character that it would probably change the trial result. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). The parties agree that a co-defendant's affidavit may be considered newly-discovered evidence, even though the co-defendant and his or her location were known to the defendant at the time of trial. This is because "no amount of diligence could have forced the co[-

2013 IL 112890, ¶ 22. Even assuming the National Academy of Science report can be interpreted to conclude that a bullet cannot be found to match a specific gun, the February 2009 report existed at the time of defendant's April 2009 trial. Nevertheless, defendant raised no challenge on direct appeal to counsel's performance at trial regarding the ballistics evidence and, so, that argument is now forfeited. See *e.g.*, *People v. Blair*, 215 Ill. 2d 427, 446 (2005) (forfeited claims are frivolous and patently without merit).

]defendants to violate their fifth amendment right to avoid self-incrimination.” *People v. Molstad*, 101 Ill. 2d 128, 135 (1984); see also *People v. Edwards*, 2012 IL 111711, ¶ 38.

¶29 However, actual innocence claims must be supported “‘with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.’ *** ‘Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful.’ ” *Edwards*, 2012 IL 111711, ¶ 32 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The actual innocence claim and supporting documentation “must set forth a colorable claim of actual innocence, *i.e.*, they must raise the probability that it is more likely than not that no reasonable juror would have convicted [the defendant] in the light of the new evidence.” *Id.* at ¶ 33.

¶30 Here, we disagree with defendant’s assertion that, if believed, co-defendant Shipp’s affidavit is completely exculpatory, particularly given the lack of eyewitness testimony or any admissions by defendant at trial that he was the shooter. As to who acted as the shooter, Shipp’s affidavit states only that he pleaded guilty to attempted murder charges; it does not explicitly state that *he* personally shot the victims. See *People v. Lofton*, 2011 IL App (1st) 100118, ¶¶ 38-40 (affidavit sufficient only because it claimed both that the affiant was the shooter *and* that the defendant was not present). We further note that this distinction is not a mere technicality, for Shipp did *not* test positive for the presence of gunshot residue and his DNA profile *was* excluded from the two profiles found on the gun. Where the hallmark of an actual innocence claim is “total vindication” (*id.* at ¶ 40), and where Shipp’s affidavit does not provide an alternative version of the events surrounding the shooting or specifically identify the shooter, it does not conclusively prove defendant’s actual innocence.

¶ 31 Further, in its specific references to defendant, Shipp’s affidavit states only that defendant was not with him and that he did not see defendant in the area at the time of the shooting. See *id.* at ¶¶ 39-40 (co-defendant’s affidavit averring that the defendant had nothing to do with the shooting and took no part in the crime was insufficient to sustain actual innocence claim). However, the evidence at trial belies any assertion that defendant was not present. Specifically, the evidence reflects that both men who approached the victims were armed and wearing black, hooded coats or sweatshirts. The men fled past a bank building and then a black car pulled out; the car drove at a high rate of speed until it lost control and ran into a snow bank. The four occupants, wearing dark, hooded sweatshirts, fled; one officer drove in the direction of where two passengers fled and saw defendant, wearing a black t-shirt (again, it was winter), emerge from a driveway near Beaver and Avon Streets, and run away. After being chased, defendant eventually surrendered. In the garage on Beaver and Avon Streets, police found a bundle of clothes, including a black, hooded sweatshirt, from which defendant’s DNA could not be excluded.

¶ 32 Accordingly, in light of the trial evidence, Shipp’s affidavit’s claim that defendant was not present, coupled with its failure to identify the shooter, is not of such a conclusive nature that it would probably change the result on retrial. Shipp’s affidavit might be viewed as a basis from which to assert a “reasonable doubt argument, but that is not the standard; the standard is *actual innocence*.” (Emphasis in original.) *People v. Green*, 2012 IL App (4th) 101034, ¶ 36. Shipp’s affidavit does not raise the probability that, in the light of this new evidence, it is more likely than not that no reasonable juror would have convicted defendant. Accordingly, we affirm the dismissal of defendant’s actual innocence claim.

¶ 33 2. Ineffective Assistance - Failure to Testify

¶ 34 Defendant argues next that the court erred in dismissing his claim that trial counsel was ineffective for failing to allow him to testify. In his affidavit, defendant attests that he told his counsel he wished to testify on his own behalf and that counsel informed him that he would not call him.

¶ 35 The right to testify or to waive that right ultimately belongs to a defendant. *People v. Thompkins*, 161 Ill. 2d 148, 177 (1994). However, it is not sufficient in a postconviction petition to claim that, at some point, the defendant indicated he wished to testify, without some allegation or evidence showing that the defendant later reaffirmed that intention. *Id.* In *Thompkins*, the court summarily dismissed a postconviction claim that trial counsel was ineffective where he did not permit the defendant to testify, where the defendant claimed only that, at some point before trial, he told counsel he wished to testify, but nothing in the record indicated that the defendant later reaffirmed that intention. Further, the defendant was silent at trial when defense counsel, without calling the defendant to the stand, rested his case. *Id.* Based on such a record, the court concluded, it appeared that the defendant had acquiesced in his counsel's advice that he not testify. *Id.* Further, the court noted:

“ ‘By hypothesis, in every case in which the issue is raised, the lawyer's advice will in retrospect appear to the defendant to have been bad advice, and he will stand to gain if he can succeed in establishing that he did not testify because his lawyer refused to permit him to do so.

Neither in the post-conviction petition in this case, with its reference to conversations which took place between the defendant and his attorney well in advance of the beginning of the trial, nor in the supporting affidavit, is there any statement that the defendant, *when the*

time came for him to testify, told his lawyer that he wanted to do so despite advice to the contrary. In the absence of a *contemporaneous assertion* by the defendant of his right to testify, the trial judge properly denied an evidentiary hearing.’ ” (emphases added.) *Id.* at 178 (quoting *People v. Brown*, 54 Ill. 2d 21, 24 (1973) (dismissing postconviction claim that the defendant’s counsel ignored his request to testify)).

¶ 36 Here, defendant states only that he told his counsel that he wished to testify, but he fails to aver when those conversations took place and, in any event, the record belies his claim. Like in *Thompkins* and *Brown*, nothing in the record reflects that, when the time came to testify, defendant wished to do so but his counsel ignored that stated request. Further, when defense counsel informed the court that defendant did not wish to testify, defendant was silent and when, in its admonishments, the court asked defendant whether he wished to testify, defendant replied, “no.” Finally, when the court asked defendant if his decision not to testify was a “conscious decision” on defendant’s part, defendant replied, “right.” We agree with the State that to ignore defendant’s responses to the admonishments would run counter to the general principle that “the admonishments of the court cannot be considered a meaningless ritual.” *People v. Artale*, 244 Ill. App. 3d 469, 476 (1993). Defendant’s postconviction claim regarding counsel’s refusal to allow him to testify was properly dismissed.

¶ 37 3. Ineffective Assistance - Failure to Request Lesser-Included Instruction

¶ 38 Finally, defendant asserts that his counsel was ineffective where he refused defendant’s request for a lesser-included instruction. On appeal, defendant does not specify which lesser-included instructions he wanted or that he was entitled to such instructions. In his affidavit, however,

defendant suggested as examples the lesser-included instructions of aggravated battery with a firearm and aggravated battery on a public way.

¶ 39 The right to request an instruction on a lesser offense belongs to the defendant. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). However, for the postconviction petition to state the gist of a constitutional claim of ineffective assistance of counsel, it must allege facts to show that counsel's performance was objectively unreasonable (*i.e.*, deficient performance) *and* that it is reasonably probable that, but for counsel's deficient performance, the result of the proceeding would have been different (*i.e.*, prejudice). *People v. DuPree*, 397 Ill. App. 3d 719, 735 (2010); see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). An attorney's performance is deficient where he or she violates the defendant's right to decide ultimately whether to tender a lesser-included offense instruction. *DuPree*, 397 Ill. App. 3d at 737. However, again, to establish prejudice, the petition must allege facts to show that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007). Here, defendant's claim fails because the petition does not state facts to establish either deficient performance or prejudice.

¶ 40 First, as the State correctly notes, the jury *was* instructed on the offense of aggravated battery with a firearm.² Indeed, it convicted defendant of that charge; however, defendant was sentenced only

²This runs counter to the trial court's ruling on the postconviction petition, where it noted that defendant failed to tender any lesser-included instructions at trial. Nevertheless, this court confirmed that the jury instructions and verdict forms contained instructions and a conviction for aggravated battery with a firearm. It was apparently determined, however, that defendant was eligible for sentencing only on the attempted murder and aggravated discharge of a firearm convictions.

on the attempted murder and aggravated-discharge-of-a-firearm convictions. Thus, because that instruction was tendered, defendant cannot establish any deficient performance or prejudice for counsel's alleged failure to tender any such instruction.

¶ 41 Further, assuming that defendant would have been entitled to an instruction of aggravated battery on a public way, such that trial counsel's failure to tender that instruction at defendant's request equates to deficient performance, there is simply no *reasonable* probability, in light of the trial evidence, that, had that instruction been tendered, defendant would have been acquitted of the greater charges (*i.e.*, attempted murder) and convicted instead only of aggravated battery on a public way. As the petition does not allege facts establishing that the result of trial would have been different, he cannot establish prejudice and his ineffective assistance claim fails. Accordingly, defendant's claim that counsel was ineffective for denying his request for lesser-included instructions was properly dismissed.

¶ 42

III. CONCLUSION

¶ 43 Accordingly, the judgment of the circuit court of Stephenson County is affirmed.

¶ 44 Affirmed.