

No. 1-12-2847

**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).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 3987
	)	
WILLIE GLOVER,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Court erred in dismissing post-conviction petition claiming ineffective assistance of trial counsel for not investigating codefendants as witnesses, especially when State did not call codefendants as its witnesses.

¶ 2 Following a jury trial, defendant Willie Glover was convicted of delivery of a controlled substance and possession of a controlled substance with intent to deliver and sentenced to 18 years' imprisonment. We affirmed on direct appeal. *People v. Glover*, No. 1-06-0677 (2008) (unpublished order under Supreme Court Rule 23). Defendant now appeals from the dismissal

on State motion of his post-conviction petition, contending that the court erred in dismissing the petition when it stated a substantially meritorious claim that trial counsel rendered ineffective assistance by not investigating certain witnesses.

¶ 3 Defendant and codefendant Raymond Harris were charged with delivery of a controlled substance (less than one gram of heroin), possession of a controlled substance (less than one gram of heroin) with intent to deliver, defendant was charged with firearm offenses, and codefendant Raymond Hamilton was charged with possession of a controlled substance (less than 15 grams of heroin), all allegedly committed on or about January 22, 2005.

¶ 4 Defendant's counsel sought in pretrial discovery codefendants' guilty plea transcripts, in the express belief that the State would call codefendants as witnesses at defendant's trial.

¶ 5 The State's evidence at trial was that a police officer saw three separate transactions that were substantially identical: a man approached Harris, who spoke briefly with him and took money from him before directing him to defendant nearby, then defendant gave the man a small silvery object from his jacket. As the observing officer suspected he was witnessing narcotics sales, he directed other officers to approach during the third transaction; that is, when he saw Hamilton pay Harris and approach defendant. The officers arrested defendant, Harris, and Hamilton, and searches found that defendant had four small foil packets of white powder, Hamilton had one such packet of powder, and Harris had \$160. Later testing found the powder in all five packets contained heroin. When one of the officers questioned defendant after his arrest, he admitted to selling drugs and to having a gun hidden "underneath the car next door" and officers found a loaded pistol under an abandoned car on the vacant lot next to where

defendant was arrested. However, while the officer testified that he questioned defendant at the scene, his report stated he did so at the police station.

¶ 6 For the defense, defendant's life-long friend Carl Longstreet<sup>1</sup> and Carl's brother Kelly testified that defendant was at the Longstreet home on the day in question to assist Carl with household and personal tasks as he has multiple sclerosis. When defendant went outside to retrieve an object from a parked car for Carl, officers detained defendant along with two other men outside the Longstreet home. Carl saw that a search of defendant found no contraband and that four packets were found in the shoe of one of the other two men. Though Carl tried to explain to the officers that defendant had just gone outside on an errand, defendant was arrested because he argued with the officers. Carl admitted to prior felony convictions.

¶ 7 Codefendants did not testify for either the State or defense. The jury convicted defendant of the two controlled substance charges while finding him not guilty on the firearm charge. The court sentenced defendant in February 2006 to concurrent prison terms of 18 years.

¶ 8 On direct appeal, we affirmed against defendant's contention of improper closing argument.

¶ 9 In June 2009, defendant filed through counsel a post-conviction petition alleging in relevant part that codefendants would have testified that defendant did not sell heroin with Harris or to Hamilton on the day in question, so that trial counsel was ineffective for not investigating and calling codefendants as witnesses. The petition was supported in relevant part by Harris's November 2008 affidavit and Hamilton's March 2009 affidavit to similar effect: defendant was not involved in their heroin transaction or Harris's other transactions that day, Hamilton told

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<sup>1</sup> Carl referred to defendant as his nephew but then clarified that he is not literally defendant's uncle.

officers thus to no avail, they said in interviews by Assistant State's Attorneys after their guilty-plea convictions that defendant was not involved, and neither trial counsel nor his investigator interviewed them though they were willing to testify for defendant. Harris added that "[t]he facts in my plea deal didn't mean anything to me. I was just agreeing to it because I wanted the" plea deal. While Hamilton averred to not knowing defendant before that day, Harris referred to defendant by a nickname in his affidavit.

¶ 10 The petition was twice amended by counsel, adding an express allegation that Harris falsely implicated defendant in his plea proceedings. Post-conviction counsel filed a certification pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013) that she consulted with defendant, reviewed the record, and filed all pleadings necessary to adequately present his claims.

¶ 11 The State moved to dismiss the petition, arguing that the petition was untimely, the ineffectiveness claims were waived by not raising them on direct appeal, codefendants' affidavits were merely cumulative of trial testimony and thus not exonerative, and it was proper trial strategy to not call codefendants as witnesses when they were impeachable by the sworn factual bases for their guilty pleas and by Harris's familiarity with defendant.

¶ 12 Defendant (through counsel) responded to the motion to dismiss, arguing that the petition was timely in relation to the supreme court's denial of leave to appeal in his direct appeal, the ineffectiveness claim regarding codefendants could not have been raised on direct appeal because their affidavits were not in the trial record, codefendants' accounts were not merely cumulative of the Longstreets' testimony, and failure to investigate a potential witness is not a matter of trial strategy. Defendant noted that he was not raising an actual innocence claim so that the affidavits did not have to constitute newly-discovered evidence of actual innocence.

¶ 13 On September 13, 2012, the circuit court granted the motion to dismiss after argument thereon, during which post-conviction counsel reiterated that defendant was not raising an actual innocence claim. The court found in relevant part that codefendants "were known to the defendant at the time of the incident" so that their affidavits were "not newly discovered evidence in any sense of the word," and moreover that the court did not see any ineffectiveness by trial counsel. This appeal timely followed.

¶ 14 On appeal, defendant contends that the circuit court erred in dismissing his post-conviction petition when it stated a substantially meritorious claim that trial counsel rendered ineffective assistance by not investigating his codefendants as witnesses.

¶ 15 A post-conviction proceeding is a collateral attack on the trial court proceedings, allowing a defendant to challenge substantial deprivations of constitutional rights that were not, and could not have been, adjudicated previously. *People v. English*, 2013 IL 112890, ¶¶ 21-22. While issues decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal but were not are forfeited, an issue is not barred where fundamental fairness requires, forfeiture arose from ineffective assistance by appellate counsel, or the facts relating to the issue do not appear on the face of the direct appeal record. *Id.*

¶ 16 There are three stages in post-conviction proceedings. *Id.*, ¶ 23. A petition may be summarily dismissed within 90 days if frivolous or patently without merit; that is, if it has no arguable basis in law or fact. *People v. Domagala*, 2013 IL 113688, ¶ 32. A petition not summarily dismissed proceeds to the second stage, where the State may move to dismiss it. *Id.*,

¶ 33. On such a motion, the circuit court must determine whether the petition makes a substantial showing of a constitutional violation. *Id.* If the defendant succeeds in bearing the

burden of making that showing, the petition proceeds to the third stage, an evidentiary hearing. *Id.*, ¶ 34. While the court in a third-stage evidentiary hearing serves as a fact-finder, determining witness credibility and weighing the evidence, evidentiary questions are not resolved at the first or second stages but only the legal sufficiency of the petition. *Id.*, ¶¶ 34-35. All well-pleaded facts not positively rebutted by the trial record are to be taken as true. *Id.*, ¶ 35. Unless an evidentiary hearing was held involving fact-finding and credibility determinations, our review of the disposition of a post-conviction petition is *de novo*. *English*, 2013 IL 112890, ¶ 23; *People v. Brown*, 2013 IL App (1st) 091009, ¶ 52.

¶ 17 A criminal defendant has a constitutional right to the effective assistance of counsel, and a claim of ineffective assistance is subject to a two-prong test whereby the defendant must demonstrate that counsel's performance was deficient -- that is, objectively unreasonable under prevailing professional norms -- and that the deficient performance prejudiced the defendant in that there is a reasonable probability that the result of the proceeding would be different absent counsel's unprofessional errors. *Domagala*, 2013 IL 113688, ¶ 36.

¶ 18 The role of trial counsel -- making the adversarial testing process work in a defendant's particular case -- imposes a professional duty to conduct reasonable investigations or make a reasonable decision that makes particular investigations unnecessary. *Id.*, ¶ 38. This duty includes the obligation to independently investigate any possible defenses, and where the record establishes that counsel had objective reason to know that a possible defense was available, failure to investigate fully may constitute ineffective assistance of counsel. *Id.* A lack of investigation is judged against a standard of reasonableness given all of the circumstances, while applying considerable deference to counsel's judgment. *Id.*

¶ 19 Generally, a defendant waives his right to refuse to answer potentially incriminating questions when he enters a guilty plea. *People v. Ousley*, 235 Ill. 2d 299, 306-07 (2009).

However, the right exists until the guilty-plea conviction becomes final; that is, when the time for withdrawing the plea and for appealing a denial of withdrawal has passed. *Id.*

¶ 20 Here, we note initially that the court erred in finding that codefendants' affidavits did not constitute newly-discovered evidence of actual innocence when defendant made no such claim in his petition as amended and post-conviction counsel reminded the court twice. However, as our review is *de novo*, the issue before us regardless of that error is whether the petition as amended made a substantial showing of a claim of ineffectiveness by trial counsel for not investigating or calling codefendants as witnesses.

¶ 21 We conclude that it did. Trial counsel was aware of, and presented at trial, defendant's claim that he was not involved in the heroin sales at issue but was merely caught up in the arrests of codefendants near the Longstreet home. While the transcripts of codefendants' guilty pleas presumably did not support this defense (as indicated in Harris's affidavit), it behooved trial counsel to go "behind" and beyond those transcripts by seeking to interview codefendants, particularly after the State did not call either codefendant as a trial witness despite trial counsel's belief that it would. Codefendants clearly aver that trial counsel did not interview them, personally or through an investigator, and that they would have provided exculpatory evidence had counsel done so. We note in this regard that, while the State cites *Ousley*, the power to compel testimony is tangential at best to the question of whether counsel could *interview* codefendants; they could refuse to answer the out-of-court questions of trial counsel or his investigator before or after the time that waiver of self-incrimination takes effect under *Ousley*.

¶ 22 As to prejudice, we conclude that defendant has made a substantial showing of a reasonable probability that the outcome of trial would have been different had counsel investigated and called codefendants as witnesses. Their accounts would not have been merely cumulative of the Longstreets' trial testimony. While the Longstreets did not witness the heroin sales, codefendants indisputably did. Moreover, the testimony of codefendants – Hamilton in particular, as he was buying heroin rather than selling it, and he averred that he did not know defendant before that day – would not necessarily be given the same weight by a finder of fact as the testimony of the Longstreets who knew defendant for many years. Taking the averments of codefendants' affidavits as true, as we must at this stage, we find that defendant made a substantial showing of a meritorious ineffectiveness claim against trial counsel regarding his failure to investigate or call codefendants as witnesses.

¶ 23 Defendant asks us to reassign this case to a different judge of the circuit court upon remand. However, a criminal defendant seeking reassignment or substitution bears the burden of show the judge's prejudice -- that is, bore animosity, hostility, ill-will, or distrust towards the defendant -- rather than the mere possibility of prejudice. *People v. Jones*, 219 Ill. 2d 1, 18 (2006). Erroneous findings and rulings are, without more, an insufficient basis for believing that the judge is prejudiced against the defendant. *People v. Covington*, 395 Ill. App. 3d 996, 1009 (2009). We decline defendant's invitation to direct reassignment on remand.

¶ 24 Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further proceedings on the claim of ineffective assistance by trial counsel for not investigating or calling codefendants as witnesses.

¶ 25 Vacated and remanded.