

No. 1-12-3027

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County.
Plaintiff-Appellee,)	
)	
v.)	No. 05-CR-22969
)	
DENNIS TAYLOR,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court, which dismissed the defendant's postconviction petition at first-stage, was affirmed where the claims therein were frivolous and patently without merit.

¶ 2 This appeal relates to the first-stage dismissal of the *pro se* postconviction petition for relief of judgment, filed by the defendant, Dennis Taylor, pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). After a jury trial, the defendant was convicted of two counts of first-degree murder based on the commission of a forcible felony (720 ILCS 5/9-1(a)(3) (West 2004)), two counts of aggravated kidnapping (720 ILCS 5/10-

2(a)(6) (West 2004)), and one count each of attempted armed robbery (720 ILCS 5/8-4, 18-2(a)(1) (West 2004)) and aggravated unlawful restraint (720 ILCS 5/10-3.1(a) (West 2004)), for his participation in a grocery store robbery and the ensuing vehicle collision which killed two people. In his petition, the defendant alleged that he received ineffective assistance of trial counsel where: counsel's trial strategy was the functional equivalent of pleading guilty to felony murder; counsel compelled him to testify and failed to advise him that he had a right to choose not to testify; and counsel failed to inform that, regardless of a felony murder conviction, he faced a life sentence because of his prior convictions. The defendant also alleged that he received ineffective assistance of appellate counsel where counsel failed to raise these claims in his direct appeal. The trial court dismissed the petitions, finding that the defendant's claims were frivolous and patently without merit. For the reasons that follow, we affirm.

¶ 3 A detailed account of the facts adduced at the defendant's trial is contained in our Rule 23 order disposing of his direct appeal (see *People v. Taylor*, No. 1-08-0454 (2010), *modified upon denial of reh'g* (unpublished order under Supreme Court Rule 23)). Therefore, we will include only those facts necessary for the resolution of this appeal.

¶ 4 On September 6, 2005, the defendant and codefendant Anthony Brown¹ entered the Jewel grocery store on 144th Street in Dolton, Illinois, prior to the store's opening. Both men were armed with guns, and the defendant was wearing a false mustache and goatee and a wig. The defendant and Brown used plastic ties to bind the hands of two female employees, Janet Graniczny and Carlois Robinson, before locking them in a freezer. Brown also attempted to bind the hands of a third female employee, Elizabeth Stevenson. When Stevenson resisted, Brown

¹ Anthony Brown was tried separately from the defendant and is not a party to this appeal.

struck her in the right eye and on the back of the head with his gun. As Brown was struggling with Stevenson, the defendant led John Polk, a bakery sales representative, at gunpoint to the bakery area.

¶ 5 Thereafter, the defendant walked to the front of the store, where two other female employees, Angelica Abren and Lynn Steps, were working. After hearing a scream, Abren and Steps saw the defendant run toward them with a gun in his hand. Steps ran into the service office and shut the door, while Abren hid behind a register. Steps dialed 911 from the telephone in the office and watched on a store monitor as the defendant chased Abren. When Abren ran to the office and knocked on the door, Steps let her inside, and the two women remained there until the police arrived.

¶ 6 While the defendant was in the front of the store, Polk escaped to his truck, drove to an adjacent parking lot, and called 911. As he spoke to the 911 dispatcher, Polk noticed a silver Dodge pickup truck driving west on 144th Street, approximately 20 to 30 feet away from him. He recognized the defendant, who was seated in the front passenger seat, and he gave this information and a detailed description of the truck to the 911 dispatcher. He also told the dispatcher that the truck had turned and was traveling south on Indiana Street. During the 911 call, Polk heard loud police sirens approaching the Jewel.

¶ 7 South Holland police eventually located the pickup truck traveling east on Sibley Boulevard and followed the vehicle. As the pickup truck approached Woodlawn Avenue, the pickup truck, driven by Brown, accelerated suddenly, veered around two cars that were stopped at the traffic signal, and sped into the intersection against the red light. The truck collided with a black SUV that was traveling north on Woodlawn. Kathryn McMaster and Alen Kicic, the occupants of the black SUV, were killed instantly. After the collision, the defendant was

observed lying on the ground near the front wheel, less than a foot from a loaded black nine-millimeter semi-automatic handgun. Detective Giroux testified that the distance from the Jewel to the crash site is 2.4 miles and that approximately 4.5 minutes elapsed between the initial dispatch of the armed robbery and Detective Staples' message reporting the accident.

¶ 8 The defendant testified on his own behalf and admitted that he intended to commit armed robbery when he went to the Jewel on September 6, 2005, with Brown. He further stated that he disguised his appearance by wearing a wig and a false mustache and goatee. The defendant acknowledged that, after their hands were bound, Robinson and Graniczny were placed in the freezer and that Stevenson resisted Brown's attempt to bind her hands. He stated that when he brought Polk to the bakery area, he saw that Stevenson was on the floor and was bleeding. Upon seeing that Stevenson had been injured, he decided to alert the other employees so they could get away. The defendant testified that he walked toward the front of the store with his gun visible so the two women working in that area would notice him. One of the women "ran to safety," and the other ran into the office. He then returned to the rear of the store and told Brown that they had to leave. The defendant stated that he knew there was a telephone in the office and that the women would call the police.

¶ 9 The defendant also testified that he was in the front passenger seat of the pickup truck as Brown drove south on Indiana Street. About a mile from the store, Brown pulled into a gas station at the intersection with Sibley Boulevard, exited the vehicle and retrieved a black duffle bag from the rear of the truck. The defendant testified that, while they were stopped at the gas station, he looked around but did not see any police and told Brown that they were not being followed. The defendant also testified that he "felt totally safe" at that time. After a minute or two, Brown began driving eastbound on Sibley Boulevard, obeying the speed limit and stopping

at the red traffic lights between Chicago Road and Greenwood Avenue. The defendant explained that he and Brown were traveling toward the expressway, hoping to get safely home without being apprehended.

¶ 10 The defendant further stated that, although he was not worried about being caught by the police, he reclined his seat because he was “on edge.” As they approached Woodlawn, Brown told him that the police were behind them. The defendant testified that he saw a police car, but told Brown not to speed because he did not believe that the police were yet aware of the attempted robbery at the Jewel store. However, Brown accelerated as they entered the intersection, and they crashed into a black SUV. The police arrived shortly thereafter, and he was taken into custody.

¶ 11 During closing (and opening) statements, counsel expounded the defense theory that, while the defendant acknowledged that he armed himself and participated in the Jewel store robbery, he was not responsible for the deaths of the victims because the collision was too far removed, in both time and distance, from the robbery. Defense counsel argued that, because the defendant had felt safe and was not fleeing arrest at the time of the collision, he could not be guilty of the murders under the felony murder theory. Rather, counsel contended that Brown, who had sole control of the vehicle and who decided to unlawfully drive through the intersection, was the only party responsible for the murders.

¶ 12 At the conclusion of the trial, the jury found the defendant guilty of two counts of first-degree murder, two counts of aggravated kidnapping, and one count each of attempted armed robbery and aggravated unlawful restraint. The defendant retained new counsel and filed a motion for a new trial, claiming, *inter alia*, that trial counsel had been ineffective for compelling the defendant to testify and admit to his guilt as to the robbery offenses. The trial court denied

the motion, finding that there was overwhelming evidence against the defendant on the attempted armed robbery and aggravated kidnapping charges and that trial counsel's strategy involved the defendant testifying to the fact that he was in a "safe haven" place after the robbery in order to avoid a felony murder conviction. The court explained that the defendant's testimony put him in a temporary safe place at the time of the collision, separate from the site of the robbery, which, if believed, the jury could have acquitted him of the murder charges. The court noted that the only person who could testify as to the defendant's place of safety to support his felony murder defense was the defendant himself. The trial court then sentenced the defendant to serve two natural-life terms, one for each of the felony murder convictions, as well as a prison term of 25 years for each of the aggravated kidnapping convictions, a 15-year term for attempted armed robbery, and a 5-year term for aggravated unlawful restraint.

¶ 13 On direct appeal, the defendant asserted that (1) the State failed to prove him guilty of felony murder beyond a reasonable doubt, (2) the trial court erred in instructing the jury regarding felony murder, (3) his trial counsel was ineffective in failing to tender proper jury instructions, (4) the trial court erred in denying his request for a post-trial evidentiary hearing to determine whether one of the jurors was prejudiced against him, and (5) the mittimus must be corrected. In July 2010, we rejected the defendant's first three arguments but retained jurisdiction and remanded the cause to the trial court with directions to conduct an evidentiary hearing on the issue of juror bias and to correct the mittimus. *People v. Taylor*, No. 1-08-0454 (2010), *modified upon denial of reh'g* (unpublished order under Supreme Court Rule 23) (mittimus corrected to vacate conviction for attempted armed robbery under one-act, one-crime principle and to accurately reflect conviction on count 15 was based on aggravated unlawful restraint, not aggravated kidnapping).

¶ 14 After conducting an evidentiary hearing, the trial court determined that there was no evidence of juror bias. On October 5, 2011, we ordered the defendant to file a report by October 26, 2011, indicating whether he intended to challenge the trial court's finding. We further ordered that, if the defendant elected to appeal that finding, he was required to file a supplemental record, consisting of the proceedings on remand, and a brief. On October 25, 2011, the defendant's attorney sent a status report to the Clerk of the Appellate Court, but that report did not indicate whether the defendant intended to challenge the trial court's finding that there was no juror bias. On November 21, 2011, this court issued an order finding that the defendant had forfeited any challenge of the trial court's decision with regard to juror bias issue. The defendant thereafter filed a petition for rehearing, asserting that the order of November 21 must be vacated because it was based on a factual inaccuracy: that the defendant had failed to file a timely status report. On December 27, 2011, this court denied the defendant's petition for rehearing for two reasons: (1) the October 25 status report did not indicate whether he intended to challenge the finding of no juror bias; and (2) defense counsel conceded in the petition for rehearing that she reviewed the complete transcript of the evidentiary hearing on the issue of juror bias and found no issue of arguable merit. See *People v. Taylor*, 2011 IL App (1st) 080454-U (*modified upon denial of reh'g*).

¶ 15 On May 31, 2012, the defendant mailed to the circuit court a *pro se* postconviction petition, alleging, in relevant part, that his trial counsel was ineffective for pursuing a trial strategy that equated to a concession of his guilt, compelling him to testify, and failing to inform him that, regardless of a felony murder conviction, the robbery conviction subjected him to a mandatory life sentence. The defendant also alleged that his appellate counsel was ineffective for failing to raise these claims in his direct appeal. Specifically, the defendant claimed that trial

counsel "compelled [him] to testify against himself, in a close case prosecution," "never admonished [him] of his constitutional right to, not testify, or take a jury trial," and "never informed [him] of the consequence of" his testimony, "or if found guilty, he would receive natural life." Instead, the defendant stated that counsel told him that he would argue the "temporary place of safety" defense within the felony murder doctrine. The defendant attached his affidavit in support of these allegations.

¶ 16 The trial court dismissed the defendant's petition on August 31, 2012, finding the claims therein to be frivolous and without merit. The record indicates that notice of the court's dismissal was sent to the defendant on September 20, and he then timely filed his notice of appeal on October 1, 2012.

¶ 17 On appeal, the defendant contends that the trial court erred in dismissing his petition at the first stage where his ineffective assistance of counsel claims had an arguable basis in fact and law. He argues that: (1) trial counsel's chosen strategy was unsound because the concession of guilt to the underlying felony amounted to a concession of guilt to the felony murder counts; (2) counsel compelled him to testify and admit to his guilt to the robbery offense; and (3) counsel failed to inform him, that even had he been acquitted of the felony murder charges, he was nevertheless subject to a mandatory life sentence as a habitual criminal. The State counters that dismissal was proper where the defendant failed to satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) for ineffective assistance of counsel claims. The State asserts that (1) counsel's performance was not deficient; rather, he pursued a trial strategy to avoid convictions for the most serious offenses in light of overwhelming evidence of the defendant's guilt; and (2) the defendant was not prejudiced by the trial strategy as there was overwhelming evidence of his guilt. We agree with the State.

¶ 18 The Act provides a mechanism by which criminal defendants can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 (West 2012); *People v. Miller*, 393 Ill. App. 3d 629, 632-33, 913 N.E.2d 659 (2009). There are three procedural stages for petitions filed under the Act, and at the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit.” See 725 ILCS 5/122–2.1 (West 2012); *People v. Jones*, 399 Ill. App. 3d 341, 356, 927 N.E.2d 710, 723 (2010). If the court determines that the petition is either frivolous or patently without merit, it shall dismiss the petition by written order. 725 ILCS 5/122–2.1 (West 2012); *Jones*, 399 Ill. App. 3d at 356. The petition is “frivolous or patently without merit” only if the petition has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204, 1212 (2009). “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.” *Id.* For example, a claim may lack merit where it is completely contradicted by the record, and facts may be deemed fanciful factual allegations if they are fantastic or delusional. *Id.* Our review of a trial court’s first-stage dismissal of a postconviction petition is *de novo*. *Jones*, 399 Ill. App. 3d at 359.

¶ 19 Turning to the defendant’s claims of ineffective assistance of counsel, we find his claims fail under *Strickland*’s two-prong test. To succeed on an ineffective assistance of counsel claim, a defendant must show that (1) counsel’s performance was deficient, and (2) he suffered prejudice as a result of counsel’s substandard performance. *Strickland*, 466 U.S. at 687-8. To establish deficiency in counsel’s performance, the defendant must demonstrate that it fell below an objective standard of reasonableness. *Miller*, 393 Ill. App. 3d at 632. To establish prejudice,

he must demonstrate that it was reasonably probable that, but for counsel's deficient performance, the outcome of his proceeding would have been different. *Id.* The *Strickland* standard applies equally to claims of ineffective assistance of appellate counsel as a defendant must show both that appellate counsel's performance was deficient and, that but for counsel's errors, there is a reasonable probability that the appeal would have succeeded. *People v. Petrenko*, 237 Ill. 2d 490, 497, 931 N.E.2d 1198 (2010). At the first stage of a postconviction proceeding, "a petition alleging ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Id.* If the defendant fails to satisfy one of the two *Strickland* prongs, we need not address the other prong and his claim of ineffective assistance of counsel must fail. *People v. Foster*, 168 Ill. 2d 465, 475 (1995).

¶ 20 The defendant first argues that counsel's trial strategy was the functional equivalent of pleading guilty to felony murder because counsel conceded his guilt to the underlying robbery during opening and closing arguments and compelled him to testify to the same. The choice of defense theory is ordinarily a matter of trial strategy, and counsel has the ultimate authority to decide this trial strategy. *People v. Guest*, 166 Ill. 2d 381, 394 (1995). We "will generally not review a claim of ineffectiveness of counsel based on inadequate trial strategy," except where counsel has entirely failed to conduct any meaningful adversarial testing. *Id.* "[C]ounsel's concession of guilt does not constitute 'per se' ineffectiveness whenever the defense attorney concedes his client's guilt to the offenses in which there is overwhelming evidence of that guilt," "as counsel would lose credibility by contesting all the charges. *Id.* at 395 (quoting *People v. Johnson*, 128 Ill. 2d 253, 269 (1989)).

¶ 21 In this case, as the trial court noted, defense counsel did conduct meaningful adversarial testing of the State's case against the defendant, despite the overwhelming evidence of his guilt, by attempting to prove a break in the chain of events between the robbery and the collision. Several victims of the Jewel store robbery identified the defendant as one of the offenders, and counsel would have lost credibility by contesting the charges related to that offense. However, defense counsel presented a theory in which the defendant was not guilty of the most serious charged offense, felony murder, arguing that he had reached a place of temporary safety from the robbery offense by the time the vehicle collision occurred. See *People v. Moore*, 375 Ill. App. 3d 234, 240-41 (2007) (stating that, where there is a break in the chain of events between the felony and the murder, the felony-murder rule does not apply, and one factor in determining whether there has been a break in the chain is whether the defendant has reached a place of temporary safety). Counsel's theory forced the State to prove its case, beyond a reasonable doubt, that there was no break in the chain of events between the robbery and the vehicle collision. Given the facts, we agree with the trial court's conclusion that the defendant's claim failed to demonstrate that counsel's performance was deficient. Thus, the defendant's ineffective assistance of counsel claim regarding counsel's trial strategy was properly dismissed because it had no arguable basis in law or fact.

¶ 22 Regarding the defendant's claim that counsel was ineffective when he compelled him to testify and failed to advise him of his constitutional right to choose not to testify, we find that the trial court properly dismissed the claim because the defendant failed to meet the prejudice prong of *Strickland*. As the trial court noted, the only manner in which to prove the defense's "temporary safety" theory was the defendant's testimony, if he chose to testify. See *People v. Frieberg*, 305 Ill. App. 3d 840, 851 (1999) ("A defendant's right to testify at trial is a

fundamental constitutional right, as is his right to choose not to testify"). The defendant claims that counsel compelled him to testify and did not advise him of his right to choose not to testify.² However, the defendant fails to explain how his testimony prejudiced him. Based on the record, even without the defendant's testimony, the outcome of his trial would likely have been the same given the remaining overwhelming evidence of his guilt. Likewise, the defendant failed to articulate how he was prejudiced when counsel allegedly failed to advise him that, even if he was acquitted of felony murder, the aggravated kidnapping conviction, along with his prior convictions, would have guaranteed him a life sentence. See 720 ILCS 5/33B-1 (West 2004) (mandating life sentence for habitual criminals, *i.e.*, any felon convicted of their third class X offense, which includes aggravated kidnapping). Accordingly, the defendant's claims alleging that trial counsel failed to advise him that he had a right to not testify or to advise him of his potential sentences were properly dismissed for lacking an arguable basis in law or fact. For the same reasons, the defendant's claims regarding appellate counsel's ineffectiveness also fail. See *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011) (stating that appellate counsel is not required to raise every conceivable issue on appeal, and unless the underlying issue has merit, there is no prejudice from appellate counsel's failure to raise an issue on appeal).

¶ 23 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County which dismissed the defendant's postconviction petition at the first stage of proceedings.

² The record does not contain evidence that the trial court admonished the defendant before he testified. However, "[o]ur supreme court has determined that a trial court is neither required to admonish a defendant regarding his constitutional right to testify nor to set of record defendant's decision on that matter." *People v. Peden*, 377 Ill. App. 3d 463, 470 (2007) (citing *People v. Smith*, 176 Ill.2d 217, 234–35 (1997)).

¶ 24 Affirmed.