

No. 1-13-0899

**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. 08 CR 1283
	)	
JORGE PENA,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE PIERCE delivered the judgment of the court.  
Justices Neville and Liu concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed over defendant's contention that he was denied his right to the effective assistance of trial counsel.

¶ 2 Defendant, Jorge Pena, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILSC 5/122-1 *et seq* (West 2010). He contends that trial counsel failed to provide him effective assistance by refusing to allow him to testify on his own behalf, and threatening to withdraw in the middle of trial if he elected to testify.

¶ 3 The record shows that defendant was tried before a jury and found guilty of the first degree murder of 15-year-old Khalid Mohammed while personally discharging a firearm, for which he was sentenced to 70 years' imprisonment. This court affirmed that judgment on direct appeal. *People v. Pena*, No. 1-09-2610 (2011) (unpublished order under Supreme Court Rule 23).

¶ 4 On October 22, 2012, defendant filed the *pro se* post-conviction petition at bar, contending, *inter alia*, that his trial counsel was ineffective for coercing him not to testify on his own behalf despite his desire to do so. Defendant maintains that his testimony would have established that the witnesses who testified against him at trial were gang members who were colluding to implicate him in the murders of Mark Evans and Mohammed.

¶ 5 Defendant claims that he would have testified that he had previously testified for the State in a murder trial for the leader of the Maniac Latin Disciples street gang, and that, in retaliation, members of that gang testified at his trial as State witnesses. Defendant contends that his testimony would have supported the defense theory that these witnesses were lying about defendant's involvement in the two murders, but that counsel coerced him not to testify by telling him that he would withdraw as counsel in the middle of the trial if defendant chose to testify.

¶ 6 On January 18, 2013, the circuit court entered a written order summarily dismissing defendant's petition, finding, in pertinent part, that defendant's ineffective assistance of counsel claim based on counsel's refusal to let him testify was "clearly rebutted by the record." Defendant now challenges that ruling on appeal. By solely addressing the ineffective assistance claim, defendant has waived review of the other claims set forth in his post-conviction petition. *People v. Bailey*, 91 Ill. App. 3d 910, 911 (1980).

¶ 7 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Proceedings are commenced by the filing of a petition where defendant must set forth the respects in which his constitutional rights were violated. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Defendant must also attach thereto affidavits, records, or other evidence supporting the allegations in his petition, or state why such evidence was not attached. 725 ILCS 5/122-2 (West 2010).

¶ 8 At the first stage of proceedings, defendant is only required to set forth the "gist" of a constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 16. We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 9 In this case, defendant contends that he was denied his right to the effective assistance of counsel where counsel coerced him not to testify after he expressed his desire to do so both before and during trial. The State disagrees, and asserts that summary dismissal was appropriate because his claim is rebutted by the record, which clearly shows that defendant voluntarily waived his right to testify.

¶ 10 Claims of ineffective assistance of counsel are examined under the two-prong test set forth in *Strickland v. Washington*, 446 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, defendant must show that his counsel's performance "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland*, 446 U.S. at 687-88). A petition alleging ineffective

assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214 ¶ 19, quoting *Hodges*, 234 Ill. 2d at 17.

¶ 11 The record here shows that at the close of the State's case, defense counsel informed the trial court that defendant had indicated that he elected not to testify. The trial court then spoke directly to defendant and admonished him of his constitutional right to testify, and that although his lawyer could give him advice, the ultimate decision belonged to him. Defendant stated that he understood his rights and that he elected not to testify. The trial court then asked defendant if anyone by use of force or threats had done anything to cause defendant not to testify, or if anyone made him any promises that would cause him not to do so. Defendant replied that no one had threatened him or made him any promises regarding his right to testify.

¶ 12 The trial court went on to verify that defendant's choice was his own, and that his decision was made freely and voluntarily. Defendant replied affirmatively. The trial court further admonished defendant that after the case is over, if he were to be found guilty, he cannot then say that he wanted to testify. Defendant stated that he understood that admonition, and after the trial court asked defendant if he had any questions regarding his right to remain silent and not testify or his constitutional right to testify, defendant stated that he did not. The court again asked defendant if it was his, and not his counsel's, free and voluntary decision not to testify, and defendant again stated that it was his decision. The court finally asked defendant if he had any questions at all, and asked him his age, and how far he went in school. Defendant replied that he had no questions, that he was 22 years old, and went to his sophomore year of high school.

¶ 13 This colloquy clearly reveals that defendant's underlying claim of being denied his right to testify is refuted by his own words. *People v. Greer*, 212 Ill. 2d 192, 211 (2004). The trial court admonished defendant at length regarding his right to testify, and specifically asked defendant if anyone had threatened him or otherwise coerced him not to testify. Defendant affirmatively stated that there had not been any such coercion or threats, and further that he understood that the decision to testify was his, and his alone. The record plainly shows that defendant had ample opportunity to inform the trial court that he wished to testify and did not do so (*People v. Brown*, 54 Ill. 2d 21, 24 (1973)) or advise the court that his counsel was preventing him from doing so. Under these circumstances, and as admonished by the court, defendant may not proceed in one manner and later contend on appeal that the course of action was erroneous. *People v. Harvey*, 211 Ill. 2d 368, 385 (2004). Thus, defendant's claim is contradicted by the record (*People v. Rogers*, 197 Ill. 2d 216, 222 (2001)), and he has provided nothing to support his claim therein. Defendant failed to set forth an arguable claim of ineffective assistance of trial counsel and his petition was subject to summary dismissal.

¶ 14 Defendant contends, nonetheless, that he feared that if his counsel withdrew from the case, he would not have a lawyer for the rest of the trial. This claim is also refuted by the record.

¶ 15 Before trial, the trial court told defendant that, although he was provided a very good lawyer, there might be a conflict in some way, and if that were the case, the court would "get [him] somebody else." In fact, on the very next court date, the public defender was forced to withdraw due to a conflict of interest, and the court appointed defendant other counsel. The trial court made it clear to defendant that other counsel was available should a conflict arise. Under these circumstances, we conclude that defendant failed to present an arguable claim of

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ineffective assistance of trial counsel (*People v. Torres*, 228 Ill. 2d 382, 397 (2008)), and we affirm the summary dismissal of his post-conviction petition by the circuit court of Cook County.

¶ 16 Affirmed.