

No. 1-13-0932

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 06 CR 10291
)	
LARRY WILLIAMSON,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

- ¶ 1 **Held:** Second stage dismissal of defendant's post-conviction petition affirmed over his contention that he made a substantial showing of ineffective assistance of trial counsel.
- ¶ 2 Defendant Larry Williamson appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) at the second stage of proceedings. Defendant

contends that he made a substantial showing that his trial counsel was ineffective for failing to investigate an eyewitness who would have corroborated his defense.

¶ 3 This court previously affirmed defendant's 2007 jury conviction for first degree murder and sentence of 48 years' imprisonment, and corrected the mittimus to reflect the correct conviction. *People v. Williamson*, No. 1-08-0238 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 On May 12, 2011, defendant filed a *pro se* post-conviction petition, alleging, in relevant part, that trial counsel was ineffective for failing to investigate and call Vincent Davidson, a "long-term neighborhood friend[]," who was at the scene during the shooting and listed as a potential witness by the State. Defendant maintained that if counsel had conducted a pretrial interview, he would have learned that Davidson provided a written statement to police, stating that he was "within feet" of defendant when the shots were fired, and did not see him with a gun in his hands when the victim was shot or after everyone had fled the scene of the shooting.

¶ 5 In support of his petition, defendant attached the "affidavit" of Vincent Davidson, which was neither signed nor notarized. In the affidavit, Davidson stated that he was present at the scene along with defendant and a group of other people, when gunshots erupted. Davidson averred that when the gunfire began, he was looking in the direction of defendant, and then fled along with everyone else. Davidson also averred that, when he was later interviewed by police, he told them that he had not seen defendant in possession of a gun and had not seen him shoot anyone, and that he was willing to testify to these facts at a hearing. He maintained that, at the time of the shooting, he was looking directly toward defendant, who was only six feet away, and he knew that defendant did not have a gun in his hands when the victim was shot, nor did he see

defendant obtain or possess a gun after they all fled from the scene. Davidson stated that he had never been interviewed by any attorney for defendant, and was not threatened, intimidated, coerced or promised anything in exchange for the statements made in his affidavit.

¶ 6 Defendant also attached his own "affidavit" which was signed, but not notarized. Therein, defendant stated that he was present during the incident, but was not the shooter and had not seen who was doing the shooting, and that he had fled from the scene like everyone else. He later learned that the "big guy" was the shooter. Although he discussed potential witnesses with his various appointed counsel, none of them made any effort to contact any of these witnesses, who, according to defendant, could have completely exonerated him.

¶ 7 After 90 days passed without an initial ruling on the petition, the court appointed a public defender to represent defendant for second-stage post-conviction proceedings. 725 ILCS 5/122-2.1(b) (West 2012). Counsel filed a certificate in compliance with Supreme Court Rule 651(c) (eff. Feb. 6, 2013), without amending defendant's *pro se* petition.

¶ 8 On August 15, 2012, the State filed a motion to dismiss, alleging that defendant is not entitled to an evidentiary hearing because he failed to provide supporting documentation, and his allegations are otherwise insufficient as a matter of law. The State asserted that the "affidavits" defendant attached to his petition are not signed and notarized, and, therefore, do not constitute affidavits under the Act, and that the failure to provide affidavits was a fatal defect. The State also alleged that defendant failed to demonstrate deficient performance by counsel or prejudice resulting therefrom.

¶ 9 At the proceeding on the motion to dismiss, the State noted that, in the time after it filed the motion, defendant had obtained a signed and notarized affidavit from Davidson. However,

the State asserted that Davidson's affidavit failed to present material evidence that would change the outcome of the trial. The State noted that three witnesses who originally told police and prosecutors that defendant shot the victim had recanted their statements at trial. Accordingly, the State asserted that there was nothing in Davidson's affidavit that would change the result of the trial.

¶ 10 Defendant argued that trial counsel was aware that Davidson was at the scene of the shooting and that he was listed in the State's discovery as an available witness. Defendant noted that Davidson stated that he did not see defendant with a gun, and was available to testify on defendant's behalf, but that no one ever contacted him. Defendant maintained that he had informed his counsel of potential witnesses available to testify on his behalf, but that counsel did not conduct any investigation into having someone testify for him. Defendant further maintained that, although the three witnesses who testified at trial had recanted their prior identifications of him as the shooter, it was unreasonable for counsel to rely solely upon these witnesses, especially where Davidson was willing to testify that defendant did not have a gun. Defendant thus maintained that he was prejudiced by counsel's failure to investigate and call Davidson.

¶ 11 The circuit court noted that, following counsel's appointment and filing of the 651(c) certificate, Davidson filed an affidavit which was signed and notarized (Davidson affidavit). However, the court found that Davidson's statements therein did not establish material evidence that would change the outcome of defendant's trial. The court noted that the State presented three witnesses who originally told police and the prosecutors that defendant was the shooter, but then recanted their statements at trial. The court found that nothing in the Davidson affidavit would change the result on retrial, and dismissed defendant's petition for failure to set forth a substantial

showing of a violation of his constitutional rights.

¶ 12 Defendant challenges that ruling on appeal, contending that he made a substantial showing that his trial counsel was ineffective for failing to investigate and call Davidson, who would have corroborated his defense that he did not have a gun during the shooting. We initially observe that, by focusing on this single issue, defendant has forfeited the remaining allegations in his petition. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 13 Defendant initially contends that the standard used by the circuit court to review his petition was reminiscent of an actual innocence or total vindication standard, which is not the proper standard for evaluating a second-stage petition. We remind defendant, however, that we review the circuit court's decision itself, and not the reasons underlying it (*People v. Stoecker*, 384 Ill. App. 3d 289, 294 (2008)), and may affirm on any basis supported by the record (*People v. Rivera*, 2014 IL App (2d) 120884, ¶8).

¶ 14 At the second stage of post-conviction proceedings, defendant is required to make a substantial showing of a constitutional violation. *People v. Lofton*, 2011 IL App (1st) 100118, ¶¶27, 28, citing *Pendleton*, 223 Ill. 2d at 473. We review the circuit court's dismissal of a petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 15 In determining whether defendant presented a substantial showing of ineffective assistance of trial counsel to warrant further proceedings under the Act, we are guided by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Morris*, 335 Ill. App. 3d 70, 78 (2002). Under that standard, defendant must establish that counsel's performance fell below an objective standard of reasonableness, and but for the deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *Strickland*,

466 U.S. at 687, 694.

¶ 16 The record here shows that Davidson was listed as a potential witness by the State in its answer to discovery, and that the State tendered his written statement to the defense in open court. It is thus apparent that counsel was aware of this witness and chose not to call him, rather than failing to investigate him as a potential witness for the defense. *People v. Deloney*, 341 Ill. App. 3d 621, 635 (2003). Counsel's decision on which witnesses to call and what evidence to present is generally a matter of trial strategy which is immune from claims of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶79.

¶ 17 Following the shooting at issue, Davidson told police and the Assistant State's Attorney (ASA) that he knew the victim from the area and had known defendant for 10 years. At the time in question, Davidson saw the victim, who was unarmed, walk towards defendant; however, Davidson focused his attention on the victim at that point because he did not know what was going to happen. Davidson then heard a shot ring out from the area where defendant was standing, but did not see the gunfire because he was looking at the victim. Davidson then turned to run away, and as he fled, heard several more gunshots coming from the same area. Later that day, Davidson learned that defendant shot the victim, and believed that it was over a bag of marijuana. Davidson acknowledged that his statement was given freely and voluntarily and then signed each page of the statement.

¶ 18 This statement was contradicted, however, in the Davidson affidavit, wherein Davidson averred that he was looking directly at defendant when the shot went off. Davidson also stated that he had told police he never saw defendant shooting at anyone or in possession of a gun at the time of the incident, and that he was willing to testify to these facts at a hearing. The statements

given by Davidson were thus contradictory and would have subjected him to impeachment. Under these circumstances, counsel could reasonably have concluded that Davidson's testimony would be harmful to defendant, and thus decided, as a matter of sound trial strategy, not to present him as a witness at trial. *People v. Smado*, 322 Ill. App. 3d 329, 335 (2001). Defendant, therefore, failed to make a substantial showing that counsel's performance fell below an objective standard of reasonableness on this basis (*People v. Houston*, 226 Ill. 2d 135, 144-45 (2007); *Lofton*, 2011 IL App (1st) 100118, ¶¶27, 28), subjecting his petition to proper dismissal at the second stage of proceedings (*People v. Turner*, 2012 IL App (2d) 100819, ¶59).

¶ 20 Defendant also failed to show prejudice where three witnesses gave statements to the police and ASA that defendant was the shooter, and two of them also testified to the same before a grand jury. Although these witnesses recanted their statements and testimony at trial, their earlier statements, which they acknowledged were given freely and voluntarily, were found credible. Accordingly, we find that defendant cannot establish that he was prejudiced by counsel's failure to interview and call Davidson, who would have been severely impeached (*People v. Caffey*, 205 Ill. 2d 52, 107 (2001)), and no error by the court in dismissing his petition at the second-stage of proceedings.

¶ 21 In light of the foregoing, we affirm the order of the circuit court of Cook County.

¶ 22 Affirmed.