2015 IL App (2d) 130627-U
No. 2-13-0627
Order filed March 16, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. RONALD ALVINE, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 92-CF-937 Honorable Daniel P. Guerin, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition where defendant failed to establish the materiality element of his *Brady*-violation claim; defendant failed to establish the prejudice prong of his ineffective assistance of counsel claim alleging that his trial counsel denied him the right to testify; and defendant failed to establish the prejudice prong of his ineffective assistance of appellate counsel claim alleging that appellate counsel did not challenge, on direct appeal, the trial court's determination that defendant was fit to stand trial; trial court affirmed.

¶ 2 Defendant, Ronald Alvine, appeals from the dismissal of his amended postconviction petition. On appeal, defendant argues that the trial court erred by dismissing his petition because

the petition made a substantial showing that defendant's constitutional rights were violated. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Following a jury trial, defendant was convicted of first-degree murder based on the knowing murder of a police officer in the course of his official duties (Ill. Rev. Stat. 1991, ch. 38, ¶ 9-1(b)(1)), felony murder (Ill. Rev. Stat. 1991, ch. 38, ¶ 9-1(b)(6)), burglary, and possession of a stolen motor vehicle. Defendant's conviction resulted from his attempt to steal a vehicle on April 20, 1992, when he struck and killed West Chicago police officer Michael Browning with the vehicle. The evidence adduced at trial is summarized in *People v. Alvine*, 173 Ill. 2d 273 (1996) (*Alvine I*). Defendant was sentenced to death and he appealed to the supreme court.

¶ 5 Before the supreme court's 1996 decision, defendant filed a *pro se* postconviction petition on December 18, 1995. In that petition, defendant claimed, *inter alia*, that: (1) his due process rights were violated when the State failed to produce documents regarding a pending police brutality complaint against the State's witness, West Chicago police officer Donald Reever that was relevant to defendant's self-defense claim; (2) he was improperly denied his right to testify; and (3) he was improperly declared fit to stand trial. While defendant's *pro se* postconviction petition was pending, the supreme court vacated defendant's knowing murder conviction based on confusing jury instructions related to the mental states required for knowing murder and felony murder. See *Alvine I*, 173 Ill. 2d at 290-91. The supreme court affirmed the felony murder conviction and remanded the case for sentencing. *Id*. On August 11, 1998, defendant was sentenced to death for the felony murder conviction.

¶ 6 Defendant appealed again to the supreme court, arguing that he was improperly denied a new sentencing hearing. While defendant's appeal to the supreme court was pending, he filed an "Amendment to Postconviction Petition" on July 27, 1999, including an attack on the State's

motion to impose the death penalty on the felony murder conviction. On August 10, 2000, the supreme court issued *People v. Alvine*, 192 Ill. 2d 537 (2000) (*Alvine II*), that vacated defendant's sentence and remanded the case for a new sentencing hearing. *Id*. at 538. On August 21, 2002, the trial court determined that defendant was unfit to be sentenced and the trial court ordered defendant to undergo psychiatric treatment. On January 10, 2003, Governor George Ryan commuted defendant's death sentence, determining that defendant would be eligible only for a natural life sentence. After determining that defendant was fit to be sentenced, the trial court conducted a new sentencing hearing and sentenced defendant to natural life without the possibility of parole. Defendant appealed his sentence and this court affirmed the judgment of the trial court. *People v. Alvine*, No. 2-06-1090 (2008) (*Alvine III*) (unpublished order under Supreme court Rule 23).

¶ 7 On July 13, 2009, defendant filed a form petition. On July 15, 2009, defendant filed a *pro se* "Post Conviction Petition." The trial court characterized defendant's last petition as a successive postconviction petition filed without leave of court. The trial court also determined that the petition was "frivolous and patently without merit," and dismissed the petition. Defendant appealed the trial court's dismissal of his petitions. This court reversed the trial court's judgment, reasoning that the initial petition was never ruled upon by the trial court and that defendant's July 2009 *pro se* petitions "were an attempt to restate his original claims and have them heard, rather than an attempt to file new claims following a denial or dismissal of a prior petition." *People v. Alvine*, No-09-0984, slip op. at 13-14 (May 26, 2011) (*Alvine IV*) (unpublished order under Supreme Court Rule 23). We remanded the case for consideration of the claims defendant filed in his initial postconviction petition. *Id*. at 14.

¶ 8 On September 7, 2012, defendant, through counsel, filed an amended postconviction petition claiming, *inter alia*, that he was deprived of: (1) due process by the State's failure to

produce documents concerning a civil rights complaint filed against prosecution witness Officer Donald Reever; (2) his right to testify and the effective assistance of trial counsel when he was not called as a witness at trial; and (3) the effective assistance of appellate counsel when appellate counsel failed to argue on direct appeal that defendant was denied due process when the trial court improperly found him fit to stand trial. On January 31, 2013, the State filed a motion to dismiss defendant's amended postconviction petition. On March 7, 2013, defendant filed a response to the State's motion. On April 22, 2013, the trial court granted the State's motion to dismiss, stating in its written order that defendant "failed to make a substantial showing of a constitutional violation." On May 23, 2013, defendant filed a *pro se* petition for leave to file a successive postconviction petition. On June 7, 2013, the trial court denied defendant's *pro se* motion stating in its written order that defendant "failed to demonstrate cause and prejudice."

¶ 9 On July 2, 2013, defendant filed *pro se* a notice of appeal from the trial court's June 7 order. Defendant was appointed appellate counsel. On December 13, 2013, this court granted defendant's motion to file a late notice of appeal. On December 17, 2013, defendant filed a notice of appeal from the trial court's April 22 dismissal of his amended postconviction petition.

¶ 10 II. ANALYSIS

¶ 11 Defendant contends that the trial court erred by dismissing his amended postconviction petition without granting an evidentiary hearing because his petition made a substantial showing that his constitutional rights were violated.[1] The Post-Conviction Hearing Act (Act) (725 ILCS

[1] The State urges us to dismiss this appeal contending that defendant did not want to appeal the dismissal of his amended postconviction petition. We deny the State's request because a notice of appeal was, in fact, filed.

5/122-1 to 122-7 (West 2012)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). In cases not involving the death penalty, the Act establishes a three-stage process for adjudicating a postconviction petition. *Id*. at 471-72.

¶ 12 When a petition proceeds to the second stage, the Act provides that counsel may be appointed for defendant if defendant is indigent. See 725 ILCS 5/122-4 (West 2012); *Pendleton*, 223 Ill. 2d at 472. After defense counsel has made any necessary amendments to the petition, the State may file a motion to dismiss the petition or file an answer to the petition. *Id*. at 472. If the State files a motion to dismiss the trial court may hold a second-stage dismissal hearing. *People v. Harper*, 2013 IL App (1st) 102181, ¶ 33.

¶ 13 At the second-stage dismissal hearing, "the defendant bears the burden of making a substantial showing of a constitutional violation." *Pendleton*, 223 Ill. 2d at 473. At this stage the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). "To accomplish this, the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *Id*. If no substantial showing of a constitutional violation is made, the petition is dismissed. *People v. Tate*, 2012 IL 112214, ¶ 10. The trial court must accept as true "all well-pleaded facts that are not positively rebutted by the trial record." *Pendleton*, 223 Ill. 2d at 473. If a substantial showing of a constitutional violation is set forth, the petition advances to the third stage for an evidentiary hearing. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). We review *de novo* the trial court's dismissal of a postconviction petition at the second stage of the proceedings. *Coleman*, 183 Ill. 2d at 378.

¶ 14 A. *Brady* Claim

¶ 15 Defendant argues that his right to due process was violated because the State failed to disclose exculpatory and impeaching evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963), prior to defendant's jury trial. In particular, defendant contends that the State improperly failed to disclose a civil rights complaint alleging that prosecution witness police officer Donald Reever physically injured and emotionally harassed a civilian.

¶ 16 To establish a *Brady* violation, a defendant must show that: (1) the State failed to disclose exculpatory or impeaching evidence to the defendant; and (2) the defendant was prejudiced because the evidence was material to guilt or punishment. *People v. Beaman*, 229 Ill. 2d 56, 74 (2008). Evidence is material " 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' " *People v. Barrow*, 195 Ill. 2d 506, 534 (2001) (quoting *People v. Coleman*, 183 Ill. 2d 366, 393 (1998), quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)). A reasonable probability is "a 'probability sufficient to undermine confidence in the outcome.' " *People v. Hobley*, 182 Ill. 2d 404, 433 (1998) (quoting *Bagley*, 473 U.S. at 682 (1985)).

¶ 17 Defendant argues that the undisclosed evidence of Reever's civil rights complaint was material because it could have been used to impeach Reever's credibility. Reever testified that he did not shoot at defendant. Defendant argues that the undisclosed impeachment evidence would have supported defendant's claim of self-defense to first-degree murder.

¶ 18 However, the supreme court vacated defendant's conviction of first-degree murder in *Alvine I*, 173 Ill. 2d at 290-91. Further, a claim of self defense was unavailable to defendant for his felony murder charge. See *People v. Moore*, 95 Ill. 2d 404, 411 (1983); *People v. Walker*, 392 Ill. App. 3d 277, 287-88 (2009). Therefore, defendant cannot establish that the undisclosed evidence is relevant or material. In addition, as defendant notes, Reever was impeached by the ballistics evidence on Reever's gun, defendant's bullet wound, and Charles Pierce's testimony

that Reever affected a firing stance directly upon confronting defendant. *Alvine I*, 173 Ill. 2d at 278, 280. In light of Reever's impeachment, we cannot say that the alleged undisclosed evidence was material or non-cumulative. We do not condone the State's failure to disclose; however, defendant suffered no prejudice. See *People v. Rincon*, 387 Ill. App. 3d 708, 730 (2008). Accordingly, defendant has failed to establish that the evidence was improperly excluded or disclosed and, therefore, has failed to establish a *Brady* violation.

¶ 19 B. Ineffective Assistance of Counsel

¶ 20 Defendant argues that he was denied effective assistance of counsel when his trial counsel prevented him from testifying in his own defense.

¶ 21 In reviewing a claim of ineffective assistance of counsel, we apply the two-part test established by the United States Supreme Court in the case of *Strickland v. Washington*, 466 U.S. 668 (1984). See also *People v. Curry*, 178 Ill. 2d 509, 518 (1997). "To prevail under *Strickland*, a defendant must show that his attorney's assistance was both deficient and prejudicial." *Curry*, 178 Ill. 2d at 519. "More precisely, a defendant must show (1) that his attorney's assistance was objectively unreasonable under prevailing professional norms, and (2) that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Curry*, 178 Ill. 2d at 519 (quoting *Strickland*, 466 U.S. at 687). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *People v. Edwards*, 195 Ill. 2d 142, 164 (2001) (quoting *Strickland*, 466 U.S. at 694).

¶ 22 The failure of a defendant to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76. A defendant must "show prejudice from the denial of his right to testify in order to make out a claim of ineffective assistance of counsel." *People v. Youngblood*, 389 Ill. App. 3d 209, 218 (2009).

¶ 23 In this case, defendant does not indicate what testimony he would have offered had he been called to testify. Therefore defendant fails to establish that due to his testimony the result of the trial would have been different. Accordingly, defendant cannot satisfy the prejudice prong of the *Strickland* test and his ineffective assistance claim regarding this issue fails. See *People v. Barkes*, 399 Ill. App. 3d 980, 989-90 (2010).

¶ 24 Next, defendant argues that his appellate counsel was ineffective and he was denied his right to due process because he was unfit at trial. Defendant contends that his "claims are not affirmatively rebutted by the record." However, defendant failed to fully brief this argument, cite to relevant authority, and cite to the record. Therefore, the issue is forfeited on appeal. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013). See also *People v. Cunningham*, 2012 IL App. (3d) 100013, ¶ 18.

¶ 25 Forfeiture notwithstanding, defendant contended in his amended postconviction petition that the trial court erred by finding that defendant was fit to stand trial because the trial court: (1) improperly discounted the lay witness testimony of his former attorney; and (2) accorded undue weight to the testimony of the State's experts.

¶ 26 The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced the defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues that, in his judgment, are without merit, unless counsel's judgment is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to prejudice requires the reviewing court to examine the merits of the underlying issue or claim, because a defendant suffers no prejudice from appellate counsel's

failure to raise a nonmeritorious claim on appeal. See *Simms*, 192 Ill. 2d at 362. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 27 Where, as here, a *bona fide* doubt exists as to a defendant's fitness to stand trial he is entitled to a fitness hearing. See *People v. McCallister*, 193 Ill. 2d 63, 110 (2000). At the time of defendant's fitness hearing in this case, defendant would be considered unfit only if, because of defendant's mental or physical condition, defendant was unable to understand the nature and purpose of the proceedings against him, or was unable to assist in his defense. See *People v. Griffin*, 178 Ill. 2d 65, 79 (1997). A defendant can be fit to stand trial even where his mind is otherwise unsound. *People v. Coleman*, 168 Ill. 2d 509, 534 (1995). Once the fitness question is raised, the burden falls on the State to establish a defendant's fitness by a preponderance of the evidence. *McCallister*, 193 Ill. 2d 110. We will not disturb a trial court's decision regarding fitness absent an abuse of discretion. *People v. Cook*, 2014 IL App (2d) 130545, ¶ 13. In addition, the record must show an affirmative exercise of judicial discretion. *Id*.

¶ 28 Nonexperts who have had opportunity to observe defendant may give their opinions of mental condition or capacity based on their observations. Further, such lay opinions may overcome expert opinions in the trial court's determination of a defendant's fitness for trial. *Coleman*, 168 Ill. 2d at 526. Moreover, in assessing a defendant's fitness the trial court may properly consider the defendant's conduct at trial. *Id*. "[T]he ultimate issue of fitness is for the trial court, not the experts, to decide." *Id*. at 525.

¶ 29 In this case, the record reveals that, after a lengthy and comprehensive fitness hearing, the trial court considered all of the testimony, including that of four mental health experts and defendant's former attorney. Although the record indicates that defendant suffered from a "mental condition," the manifest weight of the evidence supports the trial court's determination

that defendant was fit to stand trial. The record also shows an affirmative exercise of discretion by the trial court. Therefore, defendant cannot establish that he was prejudiced by appellate counsel's failure to challenge the trial court's fitness determination on direct review and, thus, defendant cannot establish that appellate counsel was ineffective.

¶ 30 III. CONCLUSION

¶ 31 Accordingly, we affirm trial court's dismissal of defendant's amended postconviction petition. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4–2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 32 Affirmed.