

NOTICE

Decision filed 11/03/15. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2015 IL App (5th) 140137-U

NO. 5-14-0137

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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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| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from the |
| |) | Circuit Court of |
| Plaintiff-Appellee, |) | Perry County. |
| |) | |
| v. |) | No. 09-CF-74 |
| |) | |
| CARL STURDIVANT, |) | Honorable |
| |) | James W. Campanella, |
| Defendant-Appellant. |) | Judge, presiding. |

JUSTICE MOORE delivered the judgment of the court.
Presiding Justice Cates and Justice Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court did not err in summarily dismissing the defendant's postconviction petition, and any argument to the contrary would lack merit, and therefore the defendant's appointed counsel on appeal is granted leave to withdraw, and the judgment of the circuit court is affirmed.

¶ 2 The defendant, Carl Sturdivant, filed *pro se* a petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). The circuit court summarily dismissed the petition. The defendant perfected an appeal. The defendant's appointed counsel on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit, and on that basis OSAD has filed a motion to withdraw as counsel and a supporting memorandum of law. See *Pennsylvania v. Finley*,

481 U.S. 551 (1987). The defendant has filed a response to OSAD's motion. This court has examined OSAD's motion, the defendant's response, and the entire record on appeal, and has concluded that OSAD's assessment of this appeal is correct. OSAD is granted leave to withdraw as counsel for the defendant, and the judgment of the circuit court is affirmed.

¶ 3

BACKGROUND

¶ 4 In July 2009, the defendant was charged with possessing contraband in a penal institution. See 720 ILCS 5/31A-1.1(b) (West 2008). The State alleged that the defendant, while imprisoned in the Pinckneyville Correctional Center, possessed a weapon, specifically "a homemade knife, dirk or dagger." The offense was a Class 1 felony. See 720 ILCS 5/31A-1.1(i) (West 2008).

¶ 5 In June 2010, the defendant waived his right to a trial by jury. In July 2010, the cause proceeded to a bench trial. In August 2010, the court entered a written verdict finding the defendant guilty as charged. In November 2010, the court sentenced the defendant to imprisonment for 10 years, with the sentence consecutive to the sentence he was serving at the time he committed the instant offense.

¶ 6 On direct appeal, this court affirmed the judgment of conviction. *People v. Sturdivant*, 2013 IL App (5th) 110107-U. The defendant had argued that (1) his conviction needed to be reversed because the homemade weapon found in his cell did not qualify as a knife, dirk, or dagger; (2) the State failed to present evidence sufficient to rebut his affirmative defense of necessity, and thus failed to prove his guilt beyond a reasonable doubt; (3) the circuit court was inherently prejudiced against his use of a

necessity defense; and (4) the circuit court failed to consider several applicable factors in mitigation and improperly considered, as a factor in aggravation, a factor implicit in the charged offense. This court disagreed with all four of the defendant's arguments. *Id.*

¶ 7 This court's order in the direct appeal included a detailed summary of the evidence adduced at the defendant's trial. Such a summary need not be reproduced here.

¶ 8 On February 26, 2014, the defendant filed *pro se* a petition for postconviction relief. See 725 ILCS 5/122-1 *et seq.* (West 2012). The defendant claimed, essentially, as follows: (I) the State deprived the defendant of due process when the trial prosecutor (i) expressed, during the State's closing argument, his personal opinion that the defendant was a liar and a manipulator, despite the trial transcript's establishing that the defendant testified truthfully; (ii) improperly assumed the role of expert witness when he stated, during closing argument, that "[t]here is not even such a thing as an S.O.S (smash on sight)"; and (iii) made "rude[] outburst[s]" during the defense's closing argument; (II) trial counsel provided ineffective assistance when he (i) failed to subpoena prison records showing which prison employees were present, and which prisoners were in which cells, at the time the weapon was discovered, rather than relying solely on a prison employee for that information, and (ii) failed to object to the prosecutor's "rude[] outburst[s]" during the defense's closing argument; and (III) direct-appeal counsel provided ineffective assistance when he failed to raise the issue of prosecutorial misconduct. The postconviction petition was accompanied by an affidavit wherein the defendant swore to the truth of the petition's allegations. No other affidavit or evidence accompanied the petition.

¶ 9 On March 11, 2014, the circuit court found the defendant's petition frivolous and patently without merit, and summarily dismissed it. The defendant now appeals from the dismissal order.

¶ 10 ANALYSIS

¶ 11 This appeal is from an order summarily dismissing a postconviction petition. The dismissal of a postconviction petition without an evidentiary hearing presents a legal question that is reviewed *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 378 (1998).

¶ 12 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-stage process whereby a defendant may seek redress for any substantial constitutional deprivation that occurred in the proceedings that resulted in his conviction. 725 ILCS 5/122-1(a) (West 2012); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). A postconviction proceeding is a collateral proceeding that allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). A defendant initiates a postconviction proceeding by filing a petition in the circuit court. 725 ILCS 5/122-1(b) (West 2012). He bears the burden of establishing the claimed constitutional deprivation. *People v. Harper*, 2013 IL App (1st) 102181, ¶ 33.

¶ 13 At the first stage of postconviction proceedings, the circuit court independently examines the petition and takes as true the petition's factual allegations. If the court finds that the petition's claims are frivolous or patently without merit, it must summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition is frivolous or patently without merit "only if the petition has

no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. If the court finds that the claims are not frivolous or patently without merit, the proceedings advance to the second stage, where the court appoints counsel for an indigent defendant. 725 ILCS 5/122-4 (West 2014).

¶ 14 In his postconviction petition, the defendant claimed that the trial prosecutor, by various remarks he made during closing arguments, engaged in three different instances of misconduct, and each of these three deprived the defendant of due process. For the sake of deciding this appeal, this court has assumed that the complained-of remarks were improper. (This court has not determined that they were improper.) Harmless-error analysis applies to a constitutional due process error. *People v. Davis*, 233 Ill. 2d 244, 270 (2009); *People v. Rivera*, 227 Ill. 2d 1, 30 (2007). Here, the record does not reveal, and the defendant has not suggested, any particular prejudice suffered by the defendant as a result of the prosecutor's remarks. It is presumed that the judge at a bench trial disregards all improper remarks. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). It also is presumed that the judge at a bench trial considers only admissible evidence. *People v. Jaynes*, 2014 IL App (5th) 120048, ¶ 55. Nothing in the record overcomes either of these two presumptions. Nothing suggests that the complained-of remarks affected the verdict. Therefore, any due-process violation stemming from the prosecutor's remarks was, without doubt, entirely harmless.

¶ 15 The defendant also claimed that trial counsel provided ineffective assistance by committing two errors of omission. First, the defendant claimed that trial counsel erred in failing to subpoena prison records regarding prison personnel and prison inmates and

their whereabouts at the time the homemade knife was discovered. The clear implication of this claim is that if trial counsel had subpoenaed prison records, he would have been able to identify some witness who could have provided testimony or information favorable to the defendant. However, the defendant did not attach to his postconviction petition any affidavit from any witness whom his trial counsel supposedly would have been able to find, and the defendant did not explain the absence of such documentation. (Indeed, the defendant did not even name a proposed witness or suggest any piece of evidence that might have been garnered through subpoenaing prison records.) In light of the absence of a witness affidavit, this court cannot determine whether subpoenaing prison records would have yielded anything favorable to the defendant, and therefore further review of this claim is unnecessary. See, *e.g.*, *People v. Enis*, 194 Ill. 2d 361, 380 (2000) (postconviction claim that trial counsel failed to call a witness must be supported by affidavit from proposed witness, and absence of such affidavit eliminates need for further review of claim).

¶ 16 In his second claim of ineffective assistance by trial counsel, the defendant faulted counsel for failing to object to the trial prosecutor's "rude[] outburst[s]" during the defense's closing argument. (This claim is related to a claim of prosecutorial misconduct, discussed *supra*.) On four occasions during the defense's closing argument, the prosecutor interjected brief counterarguments. This arguably rude and objectionable behavior, however, did not prevent defense counsel from making a cogent and comprehensive closing argument. Assuming, without deciding, that trial counsel erred by not objecting to the interruptions, there is no indication that the defendant was prejudiced

by the lack of objections. The defendant has not suggested, and the record does not disclose, how the defendant may have been harmed by counsel's failure to object. Without prejudice, there can be no claim of ineffective assistance. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (two-pronged test for ineffective assistance requires establishing both error and prejudice resulting from the error).

¶ 17 Finally, the defendant claimed in his postconviction petition that direct-appeal counsel provided ineffective assistance when he failed to raise the issue of prosecutorial misconduct. As explained *supra*, the prosecutor's conduct, even assuming it was improper, had no discernible impact at trial. Therefore, a prosecutorial-misconduct argument would have lacked merit and would not have altered the outcome of the direct appeal, and counsel cannot be deemed ineffective for not making the argument. See, *e.g.*, *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010) (direct-appeal counsel cannot be deemed ineffective for failing to raise an issue that has no arguable merit).

¶ 18 The circuit court did not err in finding that the defendant's petition was frivolous and patently without merit. No sound argument to the contrary can be made. Accordingly, OSAD is granted leave to withdraw as the defendant's counsel on appeal, and the judgment of the circuit court of Perry County is affirmed.

¶ 19 Motion granted; judgment affirmed.