FIFTH DIVISION
JUNE 17, 2016

No. 1-14-1145

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. 02 CR 19509
	)	
ELLIOTT MONTES,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held*: The summary dismissal of defendant's postconviction petition is affirmed where defendant did not state an arguable claim that he was prejudiced by his trial counsel's decision not to question potential jurors about their gang biases.

¶ 2 Defendant Elliott Montes appeals the summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). Defendant contended in his petition that he presented an arguable constitutional claim of ineffective assistance of counsel in that his trial attorney should have submitted questions in *voir dire* asking potential jurors about gang bias.

¶ 3 Following a jury trial in 2004, defendant was convicted of the first degree murder of Freddy Parades and the attempted murder and aggravated battery with a firearm of Daniel Cueto. The following evidence presented at trial is relevant to this appeal.

¶ 4 Cueto and two of his brothers, Jose and Jesse, testified that Parades had belonged to the Satan Disciples street gang 8 or 10 years before. Daniel Cueto also had been a Satan Disciple. Defendant was accused of shooting Parades on July 10, 2002, after they argued about an automobile. The shooting occurred near a liquor store owned by the Cueto family. Jose, Jesse and Daniel Cueto all testified that Parades was unarmed. Daniel Cueto was standing next to Parades and was shot in the chest when defendant fired at Parades.

¶ 5 All three Cueto brothers further testified that after firing those shots, defendant walked a few steps away and then turned back, placed his gun to Parades' head and fired two or three more shots. Defendant then ran down the alley and took off and discarded his bloody blue jersey shirt.

¶ 6 Two other State witnesses testified that they observed defendant fire several shots that day. Richard Garcia testified he was with defendant on the morning of the shooting after dropping defendant off at a liquor store and he observed Parades and defendant arguing and defendant then firing one shot. Garcia heard additional shots as he ducked down behind his automobile. Tracy Farmer, a liquor salesman who was visiting the liquor store, testified he observed defendant fire two or three shots but did not observe the victim. Farmer heard additional shots shortly thereafter. The parties stipulated that a State witness would testify that the blood on defendant's shoes and jersey matched the DNA profile of Parades.

¶ 7 As the sole defense witness, defendant testified at trial that he and Parades had known each other since age 12 and that they were friends and members of the Satan Disciples gang.

Defendant testified he observed Parades fire a weapon on three occasions in 1993 and did not know Parades was no longer a gang member. Defendant claimed he shot Parades in self-defense because Parades was swearing and making gang signs similar to those that defendant had observed him make in 1993. Defendant testified that after shooting Parades, he still believed Parades could fire at him and he then fired two additional shots into the victim's head.

¶ 8 Defendant was sentenced to 75 years in the Illinois Department of Corrections for the murder of Parades. As to the charges involving Daniel Cueto, the court sentenced defendant to concurrent 30-year terms for attempted murder and aggravated battery with a firearm, to run consecutively to the 75-year sentence.

¶ 9 On appeal, this court vacated the aggravated battery with a firearm conviction based on the parties' agreement that defendant's conviction for that offense was based on the same physical act underlying the attempted murder conviction and thus violated the one-act, one-crime rule, and affirmed defendant's remaining convictions and sentences. *People v. Montes*, No. 1-05-0408, at 31-32 (2007) (unpublished order under Supreme Court Rule 23). This court described the evidence against defendant as "overwhelming" and rejected defendant's arguments that he was prejudiced by statements made by the prosecution or by his trial counsel's failure to limit the admission of evidence of defendant's prior crimes. *Montes*, No. 1-05-0408, at 25-31.

¶ 10 On November 25, 2013, defendant filed a *pro se* postconviction petition asserting seven claims. At issue in this appeal is defendant's claim that he was deprived of his sixth amendment right to the effective assistance of counsel because his trial counsel did not question potential jurors during *voir dire* about their feelings towards gangs or tattoos that can represent gang affiliation.

¶ 11 Defendant claimed in his petition that before jury selection, he asked counsel, "Do you think the jury is going to have a problem with me being in a gang and the tattoos on my face?" According to defendant, his attorney responded: "You have bigger things to worry about. I can't tell the judge what to ask them and there's nothing we can do to change it." Defendant argued that during his trial, prosecutors remarked on his gang affiliation during opening statement and closing argument and while questioning him and the State witnesses. He argues that those gang references "stirred the passions of the jury and their prejudice towards him."

¶ 12 On January 17, 2014, the circuit court summarily dismissed defendant's postconviction petition. As to the claim at issue in this appeal, the circuit court found that defense counsel's decision to question potential jurors on a particular topic was related to trial strategy and was thus immune from a claim of ineffective assistance of counsel. The circuit court also noted this court's finding in defendant's direct appeal that the evidence against defendant was "overwhelming."

¶ 13 On appeal, defendant contends his petition presented an arguable claim of the ineffectiveness of his trial counsel so as to warrant further proceedings under the Act. The Act provides a method by which a defendant may challenge his conviction or sentence based on a substantial denial of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq*. (West 2012); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 14 At the outset, we address the State's contentions that defendant failed to verify his petition with his own sworn affidavit and that defendant further failed to attach evidence or affidavits to the petition to corroborate his claims. We do not find either of those arguments to preclude our consideration of the petition. As to the State's first argument, a postconviction

petition should not be dismissed at the first stage of proceedings for lack of a verification affidavit. *People v. Hommerson*, 2014 IL 115638, ¶ 11. Moreover, our supreme court has held that the Act's requirement that a postconviction petition must be accompanied by "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached" is excused where a defendant has raised a claim of ineffective assistance of his trial counsel and where, as here, the only affidavit the defendant could furnish to support his claims is that of his attorney. *People v. Hall*, 217 Ill. 2d 324, 333 (2005); see also 725 ILCS 5/122-2 (West 2012).

¶ 15 At the first stage of review, the circuit court must examine the petition within 90 days of its filing and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a), (a)(2) (West 2012). At this initial stage, the defendant need only present the gist of a constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). That standard requires the defendant to plead sufficient facts to assert an arguably constitutional claim. *Brown*, 236 Ill. 2d at 184 (citing *People v. Jones*, 211 Ill. 2d 140, 144 (2004) (noting the "gist" standard represents a "low threshold")). When presenting a claim of the ineffective assistance of trial counsel in a postconviction petition, the defendant must show it is arguable both that: (1) his counsel's performance was deficient, and (2) counsel's deficient performance resulted in prejudice to the outcome of the defendant's trial. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 16 If the court does not dismiss the petition as frivolous or patently without merit within 90 days of its filing, the petition advances to the second stage, where counsel may be appointed for defendant and the State is allowed to respond to the petition, and the circuit court considers the petition's legal sufficiency. 725 ILCS 5/122-4, 122-5 (West 2012); *People v. Domagala*, 2013 IL

113688, ¶ 35. A circuit court's order summarily dismissing a postconviction petition is reviewed *de novo*. *People v. Cathey*, 2012 IL 111746, ¶ 17.

¶ 17 The trial court has the primary responsibility of conducting *voir dire* examination, and the "extent and scope of the examination rests within its discretion." *People v. Strain*, 194 Ill. 2d 467, 475 (2000). The purpose of *voir dire* is to ascertain sufficient information about the beliefs and opinions of prospective jurors so as to allow the removal of those venire members whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath. *People v. Cloutier*, 156 Ill. 2d 483, 495-96 (1993).

¶ 18 The trial court has no duty to question potential jurors *sua sponte* about any gang bias. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 29. Under Illinois Supreme Court Rule 431, the trial court shall ask prospective jurors "questions it thinks appropriate, touching upon their qualifications to serve as jurors in the case at trial." Ill. S. Ct. R. 431 (eff. May 1, 1997). In addition, Rule 431 provides that the court "may permit the parties to submit additional questions to it for further inquiry if it thinks they are appropriate and shall permit the parties to supplement the examination by such direct inquiry as the court deems proper[.]" Ill. S. Ct. R. 431 (eff. May 1, 1997).

¶ 19 Defendant asserted in his petition that his trial counsel was ineffective for failing to question potential jurors during *voir dire* about their feelings towards gangs or tattoos that can represent gang affiliation. On appeal, defendant continues to argue that underlying claim of counsel's ineffectiveness but now frames it as an issue of his attorney's misapprehension of the law. See, *e.g.*, *People v. Garmon*, 394 Ill. App. 3d 977, 987 (2009) (counsel's choice of an

appropriate defense is a matter of trial strategy or tactics that is not reviewable under *Strickland*, unless that choice is based upon a misapprehension of the law).

¶ 20 The record rebuts defendant's claim that his counsel mistakenly believed he could not submit questions to be asked in *voir dire* because the report of jury selection proceedings reveals that counsel presented a *voir dire* question to the trial court. The record indicates that the trial court stated that defense counsel "gave me a question." The subject of that question is not clear from the record; however, the record indicates that the court stated the question was on the court's list of questions to be asked and the question had already been asked. Because the record rebuts defendant's claim that his counsel misapprehended the law on that topic, that claim represents an indisputably meritless legal theory. See *Hodges*, 234 Ill. 2d at 16; *People v. Daniels*, 230 Ill. App. 3d 527, 533-34 (1992) (defendant's contention that his counsel did not provide effective legal assistance must fail where counsel was aware of the applicable law).

¶ 21 As to the claim raised in defendant's petition itself, a petition that alleges the ineffective assistance of counsel may not be summarily dismissed if: (1) it is arguable that counsel's performance fell below an objective standard of reasonableness; and (2) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. As to the first requirement, we find that defendant's petition raises an arguable claim that his counsel provided deficient representation. Our conclusion is supported by the State's contention that counsel's decision to forgo gang-related questioning of potential jurors was based in trial strategy.

¶ 22 When testimony regarding gang membership and gang activity is "an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias."

Strain, 194 Ill. 2d at 477. Under *Strain*, if defense counsel elects to submit questions to the trial court as to gang prejudice or bias or if counsel wants to ask such questions of the venire members directly, the trial court cannot prevent such questioning. Still, this court has held since *Strain* that counsel who represents a defendant with a gang history does not provide deficient representation if counsel chooses not to question prospective jurors about gang bias. *People v. Macias*, 371 Ill. App. 3d 632, 641 (2007); *People v. Benford*, 349 Ill. App. 3d 721, 733 (2004); *People v. Furdge*, 332 Ill. App. 3d 1019, 1026 (2002). In *Furdge*, for example, this court stated that it was reasonable for the defendants' counsel to avoid questioning the jury pool about gang bias where both the defendant and the victim had ties to gangs and where such questioning would "unduly emphasize" the topic. *Furdge*, 332 Ill. App. 3d at 1026.

¶ 23 *Macias*, *Benford* and *Furdge* reflect that defense counsel's decision to not submit gang-related *voir dire* questions can be based on trial strategy, as the State contends in this appeal. Defendant responds, and we agree, that under *People v. Tate*, 2012 IL 112214, ¶ 22, the State cannot prevail on a strategy-based argument at this initial stage of postconviction review.

¶ 24 In *Tate*, the defendant asserted in a postconviction petition that his trial counsel was ineffective for failing to call four witnesses, including two individuals whom Tate said could provide an alibi. *Tate*, 2012 IL 112214, ¶ 4. The circuit court summarily dismissed the petition. *Tate*, 2012 IL 112214, ¶ 6. On appeal, the defendant asserted that he raised an arguable claim of ineffective assistance of counsel, and the State responded that the defendant's claims had no arguable basis in law or fact because counsel had a "sound strategic reason" for not calling those witnesses. *Tate*, 2012 IL 112214, ¶¶ 16-21.

¶ 25 Holding that the defendant's petition must proceed to the second stage of postconviction review, the supreme court found the "State's strategy argument is inappropriate for the first stage, where the test is whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that the defendant was prejudiced." *Tate*, 2012 IL 112214, ¶ 22. The supreme court held that such an argument was "more appropriate to the second stage of post-conviction proceedings," where both parties are represented by counsel and the defendant is required to make a substantial showing of a constitutional violation. *Tate*, 2012 IL 112214, ¶ 22.

¶ 26 Under *Tate*, defendant's claim that his counsel was ineffective for failing to submit gang-related questions in *voir dire* cannot be defeated at the initial stage of postconviction review by an argument involving the strategic decisions of counsel. See also *People v. Wright*, 2013 IL App (4th) 110822, ¶ 22 (discussing *Tate* and noting the first-stage review of a *Strickland* claim in a postconviction case is a "more lenient formulation" and that the "arguable" language is "crucial" but does not mean the defendant's position ultimately will be deemed correct).

¶ 27 However, defendant still must demonstrate that it is arguable his counsel's failure to submit gang-related questions to the venire resulted in prejudice to the outcome of his trial, *i.e.*, that the result of his proceeding would have been different had potential jurors been questioned about gang bias. See *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Even under the liberal standard that *Hodges* has set for first-stage review of post-conviction claims, we cannot conclude that defendant was arguably prejudiced by his counsel's decision not to question potential jurors about their gang biases.

¶ 28 Defendant acknowledges that this court on direct appeal found the evidence against him to be "overwhelming" but argues that the sufficiency of the evidence is not determinative of whether he was prejudiced by counsel's decision. Defendant relies on *People v. Moore*, 279 Ill. App. 3d 152, 160-62 (1996), which distinguishes those two standards and describes the prejudice prong of *Strickland* as centering on whether the result of defendant's trial, with counsel's challenged decisions, was "a fair trial, understood as a trial resulting in a verdict worthy of confidence."

¶ 29 Here, defendant cannot show it is plausible that the result of his trial would have been different had his counsel questioned the venire as to possible gang prejudices. As the State points out, defendant and both victims were previously members of the same gang. Defendant's self-defense theory relied upon his knowledge of Parades' behavior and gun use in prior gang-related situations and his belief that Parades was still a gang member. Therefore, any biases that jury members theoretically would have harbored against gang members would have been held against the victims as well as defendant. Moreover, the State witnesses testified that Parades was unarmed, and the evidence established that defendant shot Parades, walked several steps away and then returned to Parades and shot him again in the head. There is no reasonable probability that the gang references affected the jury's view of events or compromised the fundamental fairness of the trial. See *People v. McCarter*, 385 Ill. App. 3d 919, 936-37 (2008). In conclusion, defendant cannot show that it is arguable that the result of his trial was affected by counsel's decision.

¶ 30 For all of the reasons stated above, defendant has not stated an arguable claim of the ineffectiveness of his trial counsel. Accordingly, the summary dismissal of his postconviction petition is affirmed.

¶ 31 Affirmed.