2019 IL App (1st) 16-1396-U

THIRD DIVISION
March 20, 2019

No. 1-16-1396

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	Appeal from the Circuit Court
Respondent-Appellee,	)	of Cook County, Illinois,
	)	Criminal Division.
v.	)	
	)	No. 02 C4 40765
ARDELL MOSLEY,	)	
	)	The Honorable
Petitioner-Appellant.	)	Geary W. Kull,
	)	Judge Presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court.

Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing the petitioner's second stage postconviction petition, where the petitioner failed to make a substantial showing of his ineffective assistance of counsel claims.

¶ 2 After a bench trial in the circuit court of Cook county, the petitioner, Ardell Mosely, was found guilty of two counts of aggravated battery with a firearm (720 ILCS 5/12.4.2(a)(1) (West 2002)) and two counts of aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2002)), but acquitted of attempted first degree murder (720 ILCS 5/8-4, 9-1 (West 2002)). The

petitioner was sentenced to two 15-year terms of imprisonment to be served concurrently with two seven-year terms. The petitioner now appeals from the second-stage dismissal of his successive petition for relief under the Post-Conviction Hearing Act. 725 ILCS 5/122-1 *et seq.* (West 2010). He contends that the circuit court erred in not permitting his petition to proceed to an evidentiary hearing because he made a substantial showing that his trial counsel, Raymond Prusak (Prusak), who has since been suspended from the practice of law by the Illinois Attorney Registration and Disciplinary Commission (ARDC) for neglecting other criminal cases, was ineffective for: (1) changing the theory of the case between trial and closing argument; (2) failing to interview and call exculpatory witnesses; (2) failing to move to suppress the suggestive and unreliable pretrial identifications of the petitioner; and (3) failing to move to suppress the gun that was recovered during the warrantless search of the petitioner's home. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Because the underlying facts of this case have already been adequately set forth in the orders involving the petitioner's direct appeal (see *People v. Mosely*, 1-05-3395 (2007) (unpublished order pursuant to Illinois Supreme Court Rule 23)), and the dismissal of his original *pro se* postconviction petition (see *People v. Mosely*, 1-08- 3569 (2010) (unpublished order pursuant to Illinois Supreme Court Rule 23)), we recite only those facts necessary to the disposition of this postconviction appeal.

¶ 5 The petitioner was charged with two counts each of attempted murder, aggravated battery with a firearm and discharge of a firearm for his involved in the non-fatal shooting of the two victims, Danny Striblien (Striblien), and Tyrone Stone (Tyrone), which occurred on June 13, 2002, near 2560 Rose Street, in Chicago. The petitioner's bench trial commenced on April 5,

2004. Following the testimony of two witnesses, the case was continued 10 times until trial resumed on October 13, 2004. That day, the State put forth three witnesses and the defense put forth its sole witness. The parties rested. The case was then continued seven times until arguments were held on February 22, 2005. The court found the petitioner guilty, and the case was then continued three times until the court granted the petitioner's motion to substitute defense counsel Prusak and appointed the public defender. The case was then continued four times until the court sentenced the petitioner.

¶ 6 A. Bench Trial

¶ 7 At trial, Striblien testified that on June 13, 2002, he was in the basement of his mother-in-law Penny Stone's (Penny) house with his brother Julius Clark (Julius), the second victim Tyrone, and Robert Stone (Robert), when Christopher Benson (Benson) knocked at the front door looking for him. Penny answered the door, and called to Striblien to tell him that Benson was asking for him. Striblien went to the door, unarmed, and Benson asked him what he had said to his mother. Julius came from behind and went outside to fight Benson. Striblien stepped outside, as well.

¶ 8 Striblien explained that 2560 Rose Street is part of a series of townhouses that face one another, with a sidewalk in between. Specifically, he said there are small porches consisting of three steps on the front of each townhouse, with about 10 to 20 feet separating the front of the residences. Tyrone's house was directly across the sidewalk from the petitioner's mother's house. It was in this sidewalk area that Julius and Benson fought, while Striblien, the petitioner, the petitioner's mother, sister, brother, Tyrone, Lisa Stone (Lisa), and another friend of the petitioner's, watched. Striblien identified the petitioner in court, and testified that the petitioner, who had long hair at the time of the shooting, was standing on his own porch directly across

from the porch on which Striblien was standing. According to Striblien, the petitioner was holding a gun. Striblien had just told the petitioner to "[c]ome downstairs and put the gun down" when another man ran from the petitioner's house with a garden tool that resembled a knife up his sleeve. This unidentified man went downstairs towards Striblien, who restrained him and continued to yell at the petitioner to put down the gun. From approximately four feet away, the petitioner shot the gun into the air and then aimed it at Striblien's face. Striblien testified that the petitioner then attempted to shoot again, but the gun jammed. He heard the gun click and saw the petitioner trying to fix the jam. Striblien released the unidentified man. At that moment, the petitioner started shooting at Striblien. Tyrone, who was standing near him, was shot in the shoulder. Striblien was shot, as well, but testified that he did not know he was shot at the time. Striblien ran onto Penny's porch, but had difficulty entering the house because Tyrone's sister was lying on the floor preventing the door from opening. Striblien testified that, as the petitioner shot at him four or five times, Striblien "bust [Penny's] door open," ran through the house, and fled out the back door. He further testified that throughout the shooting, the petitioner never pointed the gun at the ground, but instead was tracking Striblien with it. When the petitioner stopped shooting the gun, he tossed it to Benson, who then chased Striblien's brother down the street.

¶ 9 After the police arrived, Striblien was taken to the hospital where he was treated for a bullet wound to the right shoulder. Striblien testified that he was at the hospital for about six hours, after which he viewed a line-up at the police station in which he identified the petitioner as the shooter. When asked if there was anything different about the petitioner at the line-up than during the shooting, Striblien testified that the petitioner "didn't have any more hair."

Although he did not personally know the petitioner, he testified that he had seen him before in the neighborhood when visiting Penny's house.

¶ 10 On cross-examination, Striblien denied going to the petitioner's mother's house and holding her hostage. He further testified that the petitioner's mother was outside during the shooting, but admitted that he had previously testified at the preliminary hearing that she was not present.

¶ 11 Tyrone next testified consistently with Striblien. He stated that on June 13, 2002, he lived at his mother Penny's house. At around 1 p.m., he was in the basement playing video games when Penny told him that "[Benson] and them is at the door for you." According to Tyrone, Striblien went to the door, and Julius and he followed. When Benson asked what they had said about his mother, Julius denied having said anything, but Benson challenged him to a fight. Tyrone had an unobstructed view of the petitioner, with braided hair, holding a gun on his porch about 12 feet away. As Julius and Benson fought, an unidentified man exited the petitioner's house with an object in his sleeve. When Striblien restrained him, the petitioner, from his porch, shot his gun into the air. Julius and Benson continued to fight and Striblien told the petitioner to put his gun down. The petitioner then pointed the gun at Striblien, who was standing next to Tyrone. The gun initially jammed when the petitioner tried to shoot. A few seconds later, however, the petitioner was able to shoot at Striblien and Tyrone. Tyrone was shot in the right shoulder, and the petitioner continued shooting even after Tyrone had been hit. Tyrone testified that he, his brother Robert, and Striblien were "all on the porch like running side to side because we ain't got nowhere to go" because the petitioner was tracking them with the gun, moving towards them and shooting at them as they ran. Tyrone testified that the petitioner gave the gun to Benson when he stopped shooting, and then went into his house. As Tyrone fled to the parking lot, he saw Benson chasing Julius down the street with the petitioner's gun in his hand.

¶ 12 Tyrone also stated that he knew the petitioner before the shooting, through his cousin and because they were neighbors. Tyrone identified a gun in court as the one with which the petitioner shot him. Tyrone testified that he was unarmed, and that the petitioner and the unidentified man with an object in his hand were the only individuals on the scene with weapons. Tyrone identified the petitioner in court. After the shooting, Tyrone was transported to the hospital where he remained for four hours. That evening, he viewed a lineup at the police station in which he identified the petitioner as the shooter. At trial, Tyrone was shown a picture of the lineup, identified the petitioner, and noted that he "must have shaved his head" before the lineup occurred because he had "short hair" in the lineup, but had braids when he shot at Tyrone. Tyrone testified that he knew the petitioner's mother, who was standing near Benson and Julius during the shooting.

¶ 13 On cross-examination, Tyrone testified that he ran to Penny's porch when the petitioner shot at him, but did not enter the house "because the door handle broke." Tyrone further denied that he and Striblien restrained the petitioner's mother, saying that "[n]obody touched [her]."

¶ 14 The trial was continued numerous times after these two witnesses. On occasion, trial counsel did not appear as scheduled. Trial recommenced on October 13, 2004.

¶ 15 The State then called several police officers involved in the investigation of the case. Franklin Park police officer Steven Ross testified that he was the first officer on the scene. Upon arrival, he noted that there were 20 to 30 people in the area, and observed two men "attempting to enter a black Ford Mustang." Officer Ross identified the petitioner in court as one of the men who was attempting to enter the passenger side of the vehicle, and noted that when he saw the petitioner entering the vehicle, the petitioner had "longer hair which appeared to be braided." Officer Ross testified that he drew his weapon and ordered the men to stay in the parking lot, but

that the petitioner nonetheless fled in the vehicle. Officer Ross called the license plate number and vehicle description in to the police station.

¶ 16 Officer Ross noted that, when the petitioner later participated in a lineup at the police station, his hair was "chopped off."

¶ 17 On cross-examination, Officer Ross testified that when he saw the two men entering the vehicle, he did not observe any weapons on either of them. Further, Officer Ross admitted that when he ordered the petitioner to stay in the parking lot, the petitioner did not acknowledge that he had heard him.

¶ 18 Franklin Park police officer Czernia next testified that, while responding to a dispatch for shots fired near 2560 Rose Street, he received another dispatch that the possible offenders had fled in a black Mustang. As Officer Czernia searched for the black Mustang, he saw two men running through a nearby yard. When he stopped his car, one man fled, and the other ran towards Officer Czernia, saying he had just been shot. Officer Czernia identified the petitioner in court as the man who ran towards him. Officer Czernia was unable to locate the man who fled. Officer Czernia then transported the petitioner to a location near the crime scene, where the petitioner stood outside of the car. Another patrol car pulled up, stayed a few seconds, and then pulled away. A sergeant informed Officer Czernia that a positive identification had been made, and Officer Czernia transported the petitioner to the police station. Officer Czernia noted that the petitioner had "no hair at all. It was cut off." Officer Czernia testified that approximately six minutes elapsed between the time he received the dispatch regarding the black Mustang and the time he saw the petitioner running through the yard. He denied seeing any "evidence of the fact that [the petitioner] had just cut his hair."

¶ 19 Franklin Park Police Chief Randy Peterson next testified that when he entered 2560 Rose

Street, he saw Benson exiting the bedroom in his t-shirt, underwear, and wet socks. Officer Ross arrested Benson and then searched the townhouse for the gun used in the shooting. The officer testified that the gun was found in the basement on top of a heating duct, and identified the gun in court.

¶ 20 The parties then stipulated that medical experts would testify that Striblien and Tyrone suffered one bullet wound each. The State rested. Defense counsel Prusak argued a motion for directed finding, which the court denied.

¶ 21 Thereafter, the petitioner's mother, Carolyn Mosley (Carolyn), testified that on June 13, 2002, Striblien, Tyrone, and Tyrone's brother stood on her porch using profanity directed towards the petitioner. Because the petitioner was not home at the time, the three men went to their own porch across the gangway and sat, yelling and swearing. Carolyn testified that she felt threatened by them and wanted to call the police. Therefore, about 10 to 20 minutes later, she tried to walk to her neighbor's house, but Striblien and Tyrone would not let her pass by. She yelled, and the petitioner, who was now home watching television with friends Benson, Jamal Davis (Jamal), and D-Dove, came outside. Striblien would not let the petitioner pass by, either. Carolyn stated that the petitioner then told the men to leave her alone and fired a "warning shot" into the air. According to Carolyn, Striblien then "charged" at the petitioner. The petitioner tried to shoot his gun into the air again, but the gun jammed. Carolyn testified that D-Dove, who was not arrested in this case, then pulled out a gun and shot four or five times at Tyrone. Carolyn saw both Striblien and Tyrone get shot. She testified that she did not know where D-Dove went after the shooting, but stated that she saw the petitioner run to the parking lot alone, looking for the police. Benson remained in her house until he was later arrested. She testified that the police

arrived 5 to 10 minutes after the shooting. Carolyn testified that Benson was driving a black Mustang. She also testified that the petitioner had a shaved head at the time of the shooting.

¶ 22 Carolyn admitted that she was not injured. She also acknowledged that the men were unarmed when they refused to let her pass by, but that after the petitioner shot once into the air, Tyrone picked up a two-by-four stick. Carolyn identified the gun with which the petitioner shot in the air. On cross-examination, she also admitted that she did not tell the police that D-Dove was the shooter.

¶ 23 The defense rested, and the court continued the case until 9:30 a.m. December 7, 2004 for closing arguments. When the case was called at 1:52 p.m. on December 7, defense counsel Prusak was not present in court. The petitioner informed the court that he did not know where counsel was and requested new counsel. The court responded that it understood, and recommended that the petitioner be patient. The court held the case until the following day. The petitioner again requested new counsel. The court assured the petitioner that it would not hold counsel's behavior against him.

¶ 24 Defense counsel Prusak appeared in court on December 8, apologized, and explained that he had had a family emergency the previous day. Counsel then incorrectly stated that the parties had argued on the last day of trial. The court continued the case until January 11, 2005, for transcripts and closing arguments. Prusak did not appear in court on January 11, and the petitioner said he did not think counsel would come to court because the petitioner owed him money. The court informed the petitioner that its only option was to continue the case. The petitioner asked if he could be assigned a public defender, and the court stated that Prusak would have to withdraw before that. The court continued the case until January 18, saying it would not proceed on anything substantive, but just wanted to "get the lawyer in."

¶ 25 Defense counsel Prusak did not appear on January 18, and the court continued the case until January 25. On January 25, he appeared but again erroneously informed the court that the parties had previously presented their closing arguments. Apparently realizing his error, Prusak then requested a continuance until February 2, on which day "we will be able to close." The petitioner then asked if he could fire his attorney, and the court asked the petitioner if he had spoken to Prusak at all. When Prusak responded that he would speak to the petitioner now, the court instructed the petitioner to speak with his counsel and stated that "if [the petitioner still] want[ed] to fire [his] lawyer," it would "consider that" issue on the next court date.

¶ 26 On February 2, defense counsel Prusak appeared in court, but the court continued the case for argument to February 10. On February 10, defense counsel's representative, who was late to court, explained that Prusak was unable to appear because he was in a jury trial in another courthouse. Before counsel's representative arrived, the petitioner informed the court that he had "no idea" where counsel was, and that he "[had not] talked to [counsel] since I've been incarcerated." The court continued the case to 9:30 a.m. on Tuesday, February 15. At 12 p.m. on February 15, the court called the petitioner's case and announced that it would take a lunch break before argument. Defense counsel Prusak explained that he was unable to return after lunch, and the court continued the case to February 22.

¶ 27 Arguments were heard on February 22. Prusak argued that the petitioner had acted in defense of his mother, saying: "I think when you examine the evidence that you heard in this courtroom, your Honor, you'll see that [the petitioner] shot first in the air, and then only then, after they refused to let his mother go, did he shoot at these people. [] He defended [his mother], and we're asking your Honor to acknowledge the affirmative defense of self-defense of others in these circumstances."

¶ 28 In its rebuttal, the State noted that counsel had presented an "inconsistent argument" by arguing both that: (1) the petitioner was defending his mother when he shot the victims; and (2) the petitioner was not the shooter.

¶ 29 The court found the petitioner guilty of two counts of aggravated battery with a firearm and two counts of aggravated discharge of a firearm, but not guilty of attempted first-degree murder. In doing so, the court stated that it had "reviewed [its] notes from the proceedings" on April 5, 2004 and October 13, 2004, "including the exhibits, stipulations of the parties and the arguments of the lawyers." The court further noted that Carolyn had testified that the petitioner fired the gun four or five times. The court found that:

> "[T]he issue is who fired that handgun which resulted in the injuries to [the victims]. [Striblien] testified that he knew the petitioner from the neighborhood, and he also observed the petitioner as he fired the handgun at him. In addition, [Striblien] identified the petitioner in a lineup. [Tyrone] testified that he observed the petitioner as he fired the gun at [Striblien] and as the petitioner fired a gun at him. Further, he testified that the petitioner wore braids at the time of the shooting. Finally, [Tyrone] identified the petitioner in a lineup. Also, he testified that the petitioner stood a few feet from him when the petitioner fired the handgun at him. The Court finds that the evidence establishes beyond a reasonable doubt that the petitioner was the person who fired the handgun at both [Striblien] and [Tyrone] who suffered shoulder injuries."

¶ 30 The trial court subsequently sentenced the petitioner to two 15-year terms of imprisonment on the aggravated battery with a firearm convictions to be served concurrently with two seven-year terms of imprisonment for the aggravated discharge of a firearm convictions.

¶ 31 B. Direct Appeal

¶ 32 The petitioner appealed his convictions and sentences, arguing that: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) he was denied his right to counsel of choice where the trial court did not allow him to substitute private counsel with a public defender; (3) trial counsel was ineffective where he pursued a different theory of the case in closing argument than at trial; and (4) the aggravated discharge of a firearm convictions should be vacated. We affirmed the petitioner's convictions and sentences for aggravated battery with a firearm and vacated the petitioner's convictions and sentences for aggravated discharge of a firearm. *People v. Mosley*, 1053395 (2007) (unpublished order pursuant to Illinois Supreme Court Rule 23). In doing so, with respect to the petitioner's ineffective assistance of counsel claim, we held that even if defense counsel's representation of the petitioner had been deficient, the petitioner had failed to establish any prejudice resulting from that deficient performance, since the evidence presented against him had been overwhelming. *Id*.

¶ 33 C. Original postconviction petition

¶ 34 On November 7, 2008, the petitioner filed his first *pro se* postconviction petition alleging, *inter alia*, that trial counsel provided ineffective assistance for: (1) failing to interview and call witnesses identified by the petitioner; (2) failing to suppress a suggestive lineup; (3) failing to move to suppress a gun found during the search of the petitioner's house; (4) failing to attend court on various occasions; and (5) for arguing a different theory of the case during closing arguments than at trial. The petition also alleged that, to the extent the above claims should have been raised on direct appeal and were not, appellate counsel was ineffective.

¶ 35 In support of his claims, the petitioner attached his own affidavit as well as those of three

family members: (1) his brother Wendell Mosley (Wendell); (2) his sister, Shanta Lewis (Shanta); and (3) his mother, Carlyon.

¶ 36 In his affidavit, the petitioner's brother Wendell attested that the petitioner was with his friends Benson, Davis, Eric Lensey (Lensey) and Lamonica Swain (Swain) at the time of the shooting. Wendell averred that the petitioner told Tyrone and Striblien to leave his mother alone. Wendell heard a single gunshot, ran inside, and through a window saw the petitioner holding a gun in the air. He then heard two gunshots from "somewhere else." Wendell attested that "[the petitioner] couldn't have shot those guys because I was looking at him and while he had the gun in the air shots were fired[,] then he ran." Wendell attested that he believed Lensey was the shooter.

¶ 37 In her affidavit, Carolyn attested to a factual scenario similar to that to which she testified to at trial. She stated that, on June 13, 2002, she and her daughter were surrounded by four men who refused to let them pass by. She yelled, and one of the men grabbed her arm. Then, the petitioner and Benson approached and told the men to let them pass by. Two of the men attacked Benson and two attempted to attack the petitioner. The petitioner drew a gun and fired a "warning shot" into the air. Carolyn attested that she knew the petitioner was not the shooter because his gun jammed after firing the first shot into the air. Carolyn stated that she saw Lensey fire a gun and then people fled.

¶ 38 In her affidavit, the petitioner's sister, Shanta, attested that she and her mother were walking near their house when Tyrone, Robert, and two others blocked their way. They felt threatened, her mother yelled, and the men grabbed her mother's arm. The petitioner, Benson, and Jamaal responded by coming out of their house. Two men "jumped" Benson, so the petitioner fired his gun into the air as a "warning shot," but then his gun jammed. Shanta attested that Lensey then

ran by. Shanta also stated that Prusak "told [her] that he was going to call [her] back so that [she] could testify, but he never did."

¶ 39 In his affidavit, the petitioner attested that, *inter alia*, counsel Prusak was consistently late for court, failed to appear, or left in the middle of a hearing without prior warning. The petitioner further stated that he provided Prusak with the names and addresses of exculpatory witnesses who were not called at trial, including Wendell, Shanta, Benson, and Swain. The petitioner also stated that Prusak failed to call a witness identified by the State, Rudy Rhodes (Rhodes), who told the petitioner that he saw somebody else shoot the victims. The petitioner also attested that he asked Prusak to move to suppress certain evidence, but that counsel failed to do so.

¶ 40 The petitioner also attested that, after the close of evidence, Prusak repeatedly failed to appear in court. When he finally appeared, Prusak mistakenly believed he had already presented his closing argument. Moreover, he conceded without consulting the petitioner that the petitioner shot one of the victims.

¶ 41 After filing his *pro se* postconviction petition, the petitioner also filed an amended postconviction petition and a supplemental postconviction petition. Neither the original *pro se* postconviction petition, the amendment, nor the supplemental petition included any reference to the ARDC, nor were any ARDC documents attached.

¶ 42 On November 21, 2008, the trial court dismissed the petition as frivolous and patently without merit. The petitioner appealed. In doing so, for the first time ever, he attached the ARDC documents to his brief, claiming that they served to "bolster" his claim of ineffective assistance of trial counsel.

¶ 43 On November 5, 2010, we affirmed the dismissal of the petition. See *People v. Mosley*, 1-

08-3569 (2010) (unpublished order pursuant to Illinois Supreme Court Rule 23). In doing so, we struck the ARDC documents from the brief and considered the petitioner's argument without them. *Id*. We then found that some of the petitioner's claims regarding counsel Prusak's ineffectiveness, namely that he failed to show up on court on numerous occasions and that he had pursued a different theory of the case in closing argument were barred by *res judicata* because they had already been raised and rejected on direct appeal. *Id*.

¶ 44 With respect to the petitioner's claim regarding counsel's failure to interview and call possible exculpatory witnesses, including Wendell, Shanta, Benson, Swain, and Rhodes, we found that the claim was forfeited because it could have been raised on direct appeal. *Id*. In addition, we found that regardless of forfeiture, this claim had no merit because the petitioner had failed to overcome the presumption that counsel's actions were a product of sound trial strategy. *Id*. First, we found that Prusak did in fact call Carolyn to the stand. *Id*. Next, we held that Shanta's affidavit supported the presumption that Prusak's decision was reasonable because she admitted that he contacted her, investigated her knowledge of the incident, but then decided not to call her to testify. *Id*. In addition, we found that Prusak's failure to call any of the exculpatory witnesses was not prejudicial because the testimony was at best cumulative of Carolyn's testimony, which was already presented at trial, and which stood in stark contrast to the overwhelming eyewitness testimony of Tyrone and Striblien both of whom knew the petitioner from before and both of whom identified him as their shooter. *Id*.

¶ 45 D. Successive postconviction petition

¶ 46 On December 14, 2010, the petitioner filed a motion for leave to file a successive postconviction petition along with the proposed successive petition. On March 14, 2011, the trial court advanced that petition to the second stage, and appointed a public defender to

represent the petitioner. On December 5, 2015, the public defender withdrew from the case and the court appointed private counsel, Thomas Brandstrader, to represent the petitioner.

¶ 47 On September 18, 2015, private counsel obtained leave to file an amended successive postconviction petition. That petition realleged the same claims that the petitioner had raised in his initial postconviction petition, but further argued that his claims were now corroborated and confirmed by the ARDC proceedings against Prusak. In support, the petitioner attached the same affidavits he had attached to his original petition. In addition, he attached the ARDC documents.

¶ 48 Those documents included: (1) an ARDC complaint filed on August 29, 2006, pertaining to matters handled by counsel Prusak between 2002 and 2008 in nine criminal cases, none of which involved the petitioner; (2) the resulting petition to impose discipline on consent; and (3) a December 9, 2008, decision by the Illinois Supreme Court to suspend Prusak from the practice of law for three years or until further order of the court.

¶ 49 Relevant to this appeal, these documents describe the specific criminal cases in which Prusak was found ineffective. The petition to impose discipline on consent determines that Prusak "engaged in serious misconduct in nine criminal cases, demonstrating a pattern of misconduct and use of inappropriate language to his clients and their families between May 2002 and June 2006." Specifically, the petition finds that Prusak "provided ineffective assistance of counsel and engaged in a conflict of interest when he represented two co-petitioners in one criminal case, neglected three criminal appeals of three clients, neglected the matters of five other different clients, inadequately supervised his associates in three matters, did not refund unearned fees in three matters, and made misrepresentations to clients and to the Commission." The petition further details that during this time Prusak abused alcohol and cannabis, and suffered from several psychiatric disorders (including depressive disorder, anxiety disorder and attention deficit

hyperactivity disorder), "which [were] causally connected to his misconduct." Accordingly, the attached December 9, 2008, ARDC decision states that Prusak is suspended for three years and until further order of the court, with the suspension stayed after the first month by probation with conditions, provided that he make certain restitution.[1]

¶ 50 On January 8, 2016, the State filed a motion to dismiss. After hearing arguments, the trial court granted the State's motion, finding that the petitioner's claims of ineffective assistance of counsel had already been ruled on. The court held that the petitioner was not raising anything new except for the ARDC documents against Prusak in other cases. The court stated that it was unclear whether any of the cases the ARDC examined were reversed because of Prusak's deficient performance, and even if they were, that this would not be pertinent to a determination of whether Prusak was ineffective in the instant case. The petitioner now appeals.

¶ 51 II. ANLYSIS

¶ 52 On appeal, the petitioner contends that the court erred in dismissing his petition at the second stage of postconviction review where he made a substantial showing of Prusak's ineffectiveness. For the reasons that follow, we disagree.

¶ 53 We begin by setting forth the well-established principles regarding postconviction proceedings. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122–1 *et seq*. (West 2008)) provides a means by which a criminal petitioner can assert that his conviction was a result of a substantial deprivation of his constitutional rights under either the United States Constitution or the Illinois Constitutions. *People v. Tate*, 2012 IL 11214, ¶ 8; see also *People v. Hodges*, 234 Ill. 2d 1, 9 (2009); *People v. Peeples*, 205 Ill. 2d 480, 509 (2002). A postconviction proceeding is

[1] We note that the ARDC website of which we may take judicial notice (*BAC Home Loans Servicing v. Popa*, 2015 IL App (1st) 142053, ¶ 21) further establishes that Prusak failed to comply with the conditions of his probation, and that the stay of his suspension was vacated. At present, the ARDC website shows that he has been suspended from the practice of law until further order of the court.

not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. *Tate*, 2012 IL 11214, ¶ 8. Accordingly, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited. *Id.*, ¶ 8.

¶ 54 In a noncapital case, such as this one, a postconviction proceeding consists of three stages. *Tate*, 2012 IL 11214, ¶ 9. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether " 'the petition is frivolous or is patently without merit.' " *Hodges*, 234 Ill. 2d at 10, (quoting 725 ILCS 5/122–2.1(a)(2) (West 2006)).

¶ 55 If the circuit court does not dismiss the petition as frivolous or patently without merit, the petition advances to the second stage of postconviction proceedings. At the second stage, the circuit court must determine whether the petition and any accompanying documentation make " 'a substantial showing of a constitutional violation.' " *Tate*, 2012 IL 11214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). In doing so, the court must not engage in fact-finding or credibility determinations, but must take as true all well-pleaded facts that are not positively rebutted by the original trial record. *People v. Domagala*, 2013 IL 11368, ¶ 35. If no substantial showing of a constitutional violation is made, the petition is dismissed. *Tate*, 2012 IL 11214, ¶ 10 (citing *Edwards*, 197 Ill. 2d at 246). If, however, a substantial showing of a constitutional violation is set forth, the petition must be advanced to the third stage for the circuit court to conduct an evidentiary hearing. *Tate*, 2012 IL 11214, ¶ 10 (citing *Edwards*, 197 Ill. 2d at 246). Our review of a circuit court dismissal of a postconviction petition at the second stage of postconviction proceedings is *de novo*. *Tate*, 2012 IL 11214, ¶ 10.

¶ 56 Claims of ineffective assistance of counsel are resolved under the standard set forth in

Strickland v. Washington, 466 U.S. 668 (1984). See *People v. Rodriguez*, 2018 IL App (1st) 160030, ¶ 48; see also *People v. Lacy*, 407 Ill. App. 3d 442, 456 (2011); see also *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under the two-prong test set forth in *Strickland*, a petitioner must establish both: (1) that his counsel's conduct fell below an objective standard of reasonableness; and (2) that he was prejudiced by counsel's conduct. See *Rodriguez*, 2018 IL App (1st) 160030, ¶ 48; see also *Lacy*, 407 Ill. App. 3d at 456; *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 57 Under the first prong of *Strickland*, the petitioner must prove that his counsel's performance was deficient because it fell below an objective standard of reasonableness " 'under prevailing professional norms.' " *Lacy*, 407 Ill. App. 3d at 456-57 (citing *Colon*, 225 Ill. 2d at 135); see also *Rodriguez*, 2018 IL App (1st) 160030, ¶ 49; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). In this respect, it is the petitioner's burden to overcome the strong presumption that the challenged action or inaction might have been the product of sound trial strategy. *Lacy*, 407 Ill. App. 3d at 456-57.

¶ 58 Under the second prong of *Strickland*, the petitioner must show that "but for" counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Rodriguez*, 2018 IL App (1st) 160030, ¶ 50; *Lacy*, 407 Ill. App. 3d at 457; see also *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220.

¶ 59 On appeal, the State initially asserts that the petitioner's claims are barred by several equitable doctrines, including, the law of the case doctrine, *res judicata*, and forfeiture. The State argues that because all of the claims raised by the petitioner have already been addressed and rejected by this court in affirming the petitioner's conviction on direct appeal and in

dismissing his original postconviction petition, the petitioner should be procedurally barred from raising them yet again, in this, his successive, postconviction petition. In addition, the State argues that the claims are forfeited because the petitioner could have raised them in his original postconviction petition but did not. In the alternative, the State contends that the petitioner's claims have no merit because the ARDC documents have no bearing on the petitioner's case.

¶ 60 The petitioner, on the other hand, contends that the claims he is now making are different because this court has never had an opportunity to review Prusak's ARDC documents. He argues that in light of those documents, which establish that Prusak was abusing drugs and alcohol and neglecting other criminal cases in the same time period during which he was involved in the petitioner's defense, any prior findings by this court, particularly any reliance on the presumption that counsel's actions were a product of sound trial strategy, have been undermined and must be reexamined. In addition, the petitioner asserts that he could not have relied on the ARDC documents in his original postconviction petition because that petition was filed on October 7, 2008, two months before Prusak's suspension began and that suspension was noted publically on the ARDC website.

¶ 61 With respect to the merits, the petitioner contends that the ARDC documents now unequivocally confirm that when: (1) Prusak changed the theory of defense mid-trial, (2) failed to interview and call exculpatory witnesses, and (3) file motions to suppress the lineup identifications and the gun, he was acting "like a neglectful person who was high on drugs." Accordingly, the petitioner asserts that he has made a substantial showing of Prusak's ineffectiveness.

¶ 62 Equitable doctrines aside, for the reasons that follow, we find that regardless of whether the

ARDC documents somehow negate the presumption that Prusak's actions were a product of sound trial strategy, under the record below, the petitioner cannot make a substantial showing that he was prejudiced by any of Prusak's actions.

¶ 63 It is axiomatic that since a petitioner must satisfy both prongs of the *Strickland* test in order to prevail on an ineffective assistance of counsel claim, dismissal is proper if either prong is missing. *People v. Peterson*, 2017 IL 120331, ¶ 79; *People v. Cherry*, 2016 IL 118728, ¶ 24; *People v. Flores*, 153 Ill. 2d 264, 283 (1992). Thus, if a court finds that the petitioner was not prejudiced by the alleged error, it may dismiss on that basis alone without further analysis. *People v. Graham*, 206 Ill. 2d 465, 476 (2003); *Albanese*, 104 Ill. 2d at 527.

¶ 64 As already noted above, to satisfy the second prong of *Strickland* at a second-stage postconviction proceeding, a petitioner must make a substantial showing of a reasonable probability that the result would have been different. *Rodriguez*, 2018 IL App (1st) 160030, ¶ 50; see also *Evans*, 209 Ill. 2d at 220. "[A] reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome--or put another way, that counsel's deficient performance rendered the result of [the proceedings] unreliable or fundamentally unfair." *Id.*; see also *Plummer*, 344 Ill. App. 3d at 1019 (citing *Strickland*, 466 U.S. at 694).

¶ 65 In the present case, the evidence of the petitioner's guilt at trial was overwhelming. Two eyewitnesses, who were familiar with the petitioner, testified that the petitioner was the shooter. Specifically, Striblien stated that the petitioner aimed the gun at him and fired from approximately four feet away. He then watched as the petitioner tracked him with the gun, and continued shooting at him as he fled. Tyrone similarly averred that he had an unobstructed view of the petitioner as the petitioner aimed the gun and fired at him from close range. Both Tyrone

and Striblien identified the petitioner from line-ups and in court. In addition, a gun recovered from the petitioner's mother's home was identified in court as the weapon that the petitioner used to shoot the victims.

¶ 66 Under this record, we find very little merit in the petitioner's contention that but for Prusak's failure to introduce the testimony of additional eyewitnesses who would have supported his mother's testimony regarding the existence of a different shooter, the outcome of his trial would have been different. A review of the affidavits of the petitioner's sister and brother reveal that the information they would have offered was merely cumulative of Carolyn's testimony at trial, that the petitioner fired a warning shot into the air before his gun jammed, and a different shooter fired at the victims. There is no reasonable probability that such cumulative testimony, particularly when offered by the petitioner's family members, would have changed the outcome of the case, where the petitioner was already identified by two witnesses, whom the trial court found to be credible. See *People v. Slim*, 127 Ill. 2d 302, 307 (1989) (an identification by a single witness, if positive and credible, is sufficient to sustain a conviction).

¶ 67 For similar reasons, we reject the petitioner's assertion that Prusak's failure to file motions to suppress the gun and the two lineup identifications of the petitioner would have changed the outcome of his proceedings. To establish the prejudice prong in the context of a motion to suppress, a petitioner must show by a reasonable probability both: (1) that the motion would have been granted and; (2) that the outcome of the trial would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶ 15.

¶ 68 In the present case, the petitioner provides no support for his position that the motions to suppress the gun and the lineup identifications would have been granted. Even if he could, however, and those motions had been successful, there is no reasonable probability that the

outcome of the trial would have been different. Regardless of the admission of the lineup identifications, both eyewitnesses, who were previously acquainted with the petitioner, identified the petitioner at trial as the man who shot them, and testified at length about the shooting. Moreover, the trial court itself addressed the propriety of the identifications, albeit in the context of denying Prusak's motion for a directed finding, and held that both identifications were proper since they were made during broad daylight and with no obstructions, by witnesses who were familiar with the petitioner and who had no bias or motive to lie.

¶ 69 Similarly, even without the introduction of the gun, there was overwhelming evidence presented at trial that during the incident the petitioner was in possession of a gun. The petitioner's own mother admitted at trial that when the petitioner stepped out of her home, he fired a gun into the air as a warning shot to the victims. Under this record, the petitioner has failed to make a substantial showing that but for Prusak's failure to file the suppression motions there was a reasonable probability that the outcome of his trial would have been any different.

¶ 70 Finally, we address the petitioner's allegation regarding Prusak's changing the theory of the case mid-trial. In this respect, the record reveals that after the State rested its case, Prusak made a motion for a directed finding, which the court denied. In arguing this motion, Prusak told the court that the State had failed to prove that the petitioner was the shooter, where the petitioner, who had "long hair and braids" at the time of the shooting was apprehended soon afterwards with "no hair at all with no evidence of any hairs on his [] body or anywhere." In denying the motion for a directed finding, the court noted that counsel had argued "misidentification" of the petitioner, but that the State's evidence had established that both eyewitnesses, who were acquainted with the petitioner, and were not motivated by either bias or revenge, had identified the petitioner as the shooter.

¶ 71 Subsequently, in closing argument, Prusak argued that the two victims had come looking for the petitioner, grabbed his mother, held her and would not let her go. He argued that the petitioner armed himself and fired only a warning shot in order to protect his mother. In the alternative, Prusak contended that if the court did not believe that the petitioner fired only a warning shot, but had instead also fired at the victims, it was only to protect his mother, and certainly not with an intent to seriously harm or kill the victims. Prusak therefore asked the court to find that the petitioner was acting in defense of his mother and that he was not guilty of attempted first degree murder, aggravated battery or aggravated discharge of a firearm.

¶ 72 As the aforementioned record reveals in the instant case the trial court was undoubtedly aware of both the petitioner's misidentification theory and the theory of defense against others. In addition, the present case was a bench trial in which the court was fully aware of the evidence presented and the applicable law, rather than a jury trial in which the jury is dependent on the instructions it receives. See *People v. McLaurin*, 2015 IL App (1st) 131362, ¶ 34. After having heard all the evidence and the two theories of defense, the trial court acquitted the petitioner of the highest charge. In light of the overwhelming identification testimony, and the trial court's ultimate decision to acquit the petitioner of the first degree murder charge, we do not see how the petitioner could make a substantial showing that but for Prusak's argument regarding the petitioner's defense of his mother, the outcome of the proceedings would have been any different. In fact, had Prusak continued only with the misidentification defense, there is a reasonable probability the petitioner would have been found guilty of all charges, including attempted first degree murder.

¶ 73 For all of the aforementioned reasons, we conclude that the petitioner has failed to make a

substantial showing of prejudice, so as to be able to proceed to the third stage of postconviction proceedings on his ineffective assistance of counsel claims.

¶ 74 In coming to this decision, we reiterate that we have reviewed the ARDC documents attached by the petitioner, and find that they do not aid the petitioner's prejudice argument. The petitioner correctly points out that these documents establish that Prusak had a drug and alcohol problem and was neglecting nine criminal cases in the same time period during which he was defending the petitioner's case. Nonetheless, these documents nowhere reference the petitioner. Nor do they permit us to speculate that Prusak's addiction directly impacted the outcome of the petitioner's case. While the record does show that Prusak failed to appear on numerous court dates at the petitioner's trial, we may not impute his addiction or neglect to these absences, especially when many of them were explained on the record by Prusak as caused by conflicts in schedule or family matters outside his control. Moreover, even if the absences were the result of neglect or drug abuse, the trial court, on at least one occasion, told the petitioner that it would not take Prusak's conduct, in failing to appear in court, in any way against the petitioner. Under such a record, we find that the petitioner cannot make a substantial showing of prejudice under *Strickland*.

¶ 75 III. CONCLUSION

¶ 76 Accordingly, we affirm the judgment of the circuit court.

¶ 77 Affirmed.