

No. 1-12-1912

**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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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 28637
	)	
BRANDYN ANDERSON,	)	Honorable
	)	Vincent M. Gaughn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE LIU delivered the judgment of the court.  
Justices Simon and Pierce concurred in the judgment.

**O R D E R**

- ¶ 1 **Held:** Second-stage dismissal of defendant's *pro-se* post-conviction petition affirmed where defendant failed to make a substantial showing of ineffective assistance of trial counsel.
- ¶ 2 Defendant Brandyn Anderson appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et.seq.* (West 2010)). He contends that he made a

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substantial showing of a claim of ineffective assistance of trial counsel to warrant an evidentiary hearing.

¶ 3 The record shows that defendant was convicted of first degree murder on evidence establishing that in the early morning hours of August 15, 2004, he and a friend approached a black Chevrolet Blazer occupied by Jason Blackman at Winchester Avenue and Garfield Boulevard in Chicago, Illinois. They approached the vehicle on foot from opposite sides and fired numerous gunshots into it, resulting in Blackman's death. Gabriel Hawkins, who knew defendant from the neighborhood, saw defendant approach Blackman's vehicle with a gun in his hand, while another individual approached it from the opposite side, just before Hawkins heard approximately 15 gunshots. Approximately three months later, Hawkins identified defendant as the person he saw approaching Blackman's vehicle with a gun in a photo array and in a line up.

¶ 4 Defendant admitted his participation in the shooting in a videotaped statement,<sup>1</sup> in which he detailed the chronology of events that led to the shooting. He stated, *inter alia*, that he and his friend Alton Spann shot at a black Blazer because they believed it belonged to a member of a rival gang. They approached the vehicle from opposite sides and each fired numerous shots into it. The parties stipulated that the autopsy revealed that Blackman suffered 12 gunshot wounds, which variously entered his body from the left and right sides. The trial court found defendant guilty of first degree murder and sentenced him to 33 years' imprisonment.

¶ 5 This court affirmed that judgment on direct appeal, over defendant's contentions that trial counsel was ineffective for, *inter alia*, failing to present Timothy Randolph as an alibi witness and for failing to support the alternative defense theory of misidentification with competent

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<sup>1</sup> Prior to trial, defendant filed a motion to suppress this statement, which the trial court denied after a hearing was held thereon. Defendant did not raise the propriety of this denial on direct appeal.

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evidence of defendant's metal jaw bracket. *People v. Anderson*, No. 1-07-2314 (2009) (unpublished order under Supreme Court Rule 23). In doing so, this court found that even assuming that counsel's performance was substandard, defendant had failed to show that he was prejudiced thereby in light of the overwhelming evidence of his guilt, which included the videotaped statement in which he admitted to firing shots into Blackman's vehicle, and Hawkins' eyewitness testimony. Order at 11-12.

¶ 6 Defendant subsequently filed a *pro-se* post-conviction petition in which he alleged, in relevant part, that his trial counsel was ineffective for failing to "notify" alibi witnesses to "appear for trial," in spite of outlining an alibi theory of defense during opening statements. In an affidavit filed in support of the petition, defendant averred, *inter alia*, that he told his trial counsel (1) that he was at a party on the night of the shooting, (2) that he did not leave the party until after 1 a.m., and (3) that Timothy Randolph, Kathy Randolph, Clifton Johnson, and "Murice" could verify this information. In support of his petition, defendant attached the affidavit of Clifton Johnson, who averred that he, Maurice and defendant went to Timothy Randolph's party between 5 p.m. and 5:45 p.m. on August 14, 2004, and all three remained there until "after midnight to 1 a.m." He further averred that at that time, he, Maurice and defendant "went back to Winchester," where they saw someone lying in the street bleeding while onlookers called police.

¶ 7 Defendant also attached the affidavit of Kathy Randolph, who averred that on January 8, 2006, defendant's trial counsel visited her at her home and she told him that defendant attended a party she hosted for her son Timothy on August 14, 2004, and that defendant did not leave the party until just after 1 a.m. on August 15, 2004. Randolph further averred that she informed counsel that she was willing to testify accordingly in court, but that counsel never contacted her

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again in spite of telling her that he would inform her when to appear. Defendant's petition was advanced to the second stage of review and he was provided with appointed counsel.

¶ 8 On January 11, 2012, post-conviction counsel filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), in which he stated that he would not be presenting a supplemental post-conviction petition on behalf of defendant because defendant's *pro se* petition adequately presented his claims of a deprivation of his constitutional rights. The State filed a motion to dismiss defendant's petition, arguing, *inter alia*, that defendant's claims were barred by *res judicata* and waiver, and had no merit because counsel's actions were the result of sound trial strategy.

¶ 9 Because defendant's original *pro se* post-conviction petition was not verified and his supporting affidavit was not notarized, the circuit court allowed defendant to file an amended *pro se* post-conviction petition in which he corrected those deficiencies. The amended petition included all of his prior claims and attachments, as well as an additional supporting affidavit from Edwon Carter. He averred therein that on August 15, 2004, he saw someone named Glen "running off Winchester" with a gun in his hand, then saw him shooting "in a truck." Carter further averred that when he learned a few months later that defendant had been charged with the murder, he did not believe it because defendant was not around when this happened. He finally stated that he did not previously come forward with this information because he was not contacted by defendant's attorney, or anyone else, but that he is willing to testify if called to do so.

¶ 10 Post-conviction counsel filed an amended 651(c) certificate, in which he stated that after examining the amended *pro se* post-conviction petition, and supporting affidavit from Carter, he determined that no supplemental petition would be presented. The State filed a supplemental

motion to dismiss, in which it addressed Carter's affidavit, and argued that defendant failed to make a substantial showing of either prong of the *Strickland* standard in relation to counsel's failure to call Carter as an alibi witness at trial.

¶ 11 After a hearing on May 23, 2012, the circuit court orally granted the State's motion to dismiss. In doing so, the court stated, in pertinent part:

"THE COURT: "There's a lot of time that you interview witnesses and you don't want to call them because of credibility issues or even more scienter, they might be perjurious. So, as if – he did interview some of the witnesses – they were – witnesses were put on the list of witnesses, I find that that would be in the nature of trial strategy rather than ineffectiveness. So, I find that there would be no ineffective assistance of counsel – of trial counsel on either prong of *Strickland* also. So, the State's motion to dismiss the post-conviction petition would be sustained because there has been no substantial showing of a violation of substantial constitutional rights to merit relief, post-conviction relief."

¶ 12 On appeal, defendant challenges the propriety of that dismissal, and our review is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). We initially observe that defendant has concentrated solely on his claim of ineffective assistance of trial counsel based on counsel's failure to present alibi witnesses at trial, thereby abandoning the remainder of the claims raised in his petition and forfeiting them for appeal. Ill. S. Ct. R. 341(h)(7); *People v. Guest*, 166 Ill. 2d 381, 414 (1995). Additionally, because we review the judgment and not the trial court's reasoning, we may affirm the order based on any reason supported by the record. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 13 At the second stage of post-conviction proceedings, defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). A petition may be dismissed at this stage only where the allegations contained in the petition, liberally construed in light of the trial record, fail to make such a showing. *People v.*

*Hall*, 217 Ill. 2d 324, 334 (2005). In making that determination, all well-pleaded facts in the petition and affidavits are taken as true; however, nonfactual assertions which amount to conclusions are insufficient to require a hearing. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 14 To establish a claim of ineffective assistance of trial counsel warranting further proceedings under the Act, defendant must show that counsel's performance was deficient and that he suffered prejudice as a result, *i.e.*, a reasonable probability that but for this deficient performance, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984). To succeed on a claim of ineffective assistance of counsel, both prongs of *Strickland* must be satisfied. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 15 Defendant's ineffectiveness claim is based on trial counsel's failure to present alibi witnesses at trial. The State responds that defendant's claim is barred by *res judicata* because he raised this exact issue on direct appeal, and it was rejected by this court.

¶ 16 The purpose of a post-conviction proceeding is to permit inquiry into constitutional issues that have not been, and could not have been previously adjudicated on direct review. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010). In considering a post-conviction petition, issues in the petition that were raised and decided on direct appeal are barred from post-conviction review by *res judicata*, and issues that could have been presented on direct appeal, but were not, are waived. *Taylor*, 237 Ill. 2d at 372.

¶ 17 In his direct appeal, defendant claimed ineffective assistance of counsel based on defense counsel's failure to call an alibi witness (Timothy Randolph) at trial. We held that even assuming that trial counsel's failure to call such a witness constituted deficient performance, due to the overwhelming evidence of his guilt, defendant had failed to show that but for this deficiency there was a reasonable probability that the result of his trial would have been

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different, and thereby failed to satisfy the requisite prejudice prong of the *Strickland* standard. Order at 10-12.

¶ 18 Defendant maintains that *res judicata* is inapplicable here because on appeal this court only considered whether he established prejudice under *Strickland* and did not "actually decide[]" his claim. We disagree. It is well settled that a court need not determine whether counsel's performance was deficient prior to examining whether defendant suffered any prejudice as a result of the alleged deficiency. *People v. Graham*, 206 Ill. 2d 465, 476 (2003). Accordingly, contrary to defendant's assertion, we decided the issue on appeal, and, because the ineffectiveness claim defendant raised in his post-conviction petition is identical to the one he raised on direct appeal, it is barred by *res judicata*. *Taylor*, 237 Ill. 2d at 372.

¶ 19 That said, we note that defendant's argument on direct appeal related only to counsel's failure to call Timothy Randolph, while in his post-conviction petition, defendant cited counsel's failure to call Cliffon Johnson, Kathy Randolph, and Edwon Carter. The record shows, however, that in his answer to discovery, defense counsel named seven potential witnesses, including Timothy Randolph, Kathy Randolph and Cliffon Johnson; and thus, the three potential witnesses were of record. Defendant has offered no explanation as to why his ineffective assistance claim on direct appeal only included Timothy Randolph, and did not include Kathy Randolph and Cliffon Johnson, who were also alleged to be at the same party as defendant. Under these circumstances, we find that defendant waived his ineffective assistance of counsel claim for failure to call Kathy Randolph and Cliffon Johnson as alibi witnesses because he could have raised this issue on direct appeal, but failed to do so.<sup>2</sup> *Taylor*, 237 Ill. 2d at 372.

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<sup>2</sup> We note that defendant has also argued that we may review this issue pursuant to the principle of fundamental fairness, but failed to provide any argument on why this principle would be applicable in his case. We thus decline to undertake such review here.

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¶ 20 As to Edwon Carter, we observe that Carter's name was not listed as a potential witness in defense counsel's answer to discovery. However, his absence may be explained by the fact that neither in the petition itself, nor in his supporting affidavit, does defendant state that he ever informed defense counsel of Carter's existence or potential alibi testimony. In fact, Carter himself stated in his affidavit that he "didn't step up sooner \*\*\* because I wasn't called by his attorney or anybody else regarding the matter." Thus, defendant has not shown how counsel can be deemed deficient in failing to call a witness about whose existence he was not aware.

¶ 21 Even if we were to assume that trial counsel's failure to call Carter as an alibi witnesses constituted deficient performance, we find that defendant has failed to make a substantial showing that he was prejudiced thereby given the deficiencies in the affidavit and the overwhelming evidence of his guilt. In his affidavit, Carter averred that he saw "Glen" running off Winchester with a gun in his hand and shooting into a truck, but gave no timeframe or exact location for these events, nor did he come forward when he learned of defendant's arrest. In addition, the substance of Carter's affidavit does not account for the injuries to Blackman, which were caused by guns fired from opposite directions, nor does it negate Hawkins' eyewitness testimony regarding his observation of defendant approaching Blackman's vehicle with a gun in his hand immediately prior to hearing numerous gunshots. In addition to this eyewitness testimony from a neighborhood acquaintance, the evidence included defendant's videotaped statement in which he admitted to shooting numerous gunshots into Blackman's vehicle. As this court noted on direct appeal, the substance of defendant's statement corroborated Hawkins' testimony regarding the sequence of events leading up to the shooting. Order at 11-12.

¶ 22 Defendant, however, argues that he has consistently maintained that his statement was coerced, and implies that for this reason we should exclude this statement in reaching our determination. We have no legal basis for discounting or excluding defendant's statement from our consideration in this appeal. Although defendant filed a pre-trial motion to suppress this statement, the record shows that this motion was fully litigated and ultimately denied by the trial court. Defendant did not raise the propriety of this denial on direct appeal. Although, in his post-conviction petition, defendant included a claim of ineffective assistance of appellate counsel based on counsel's failure to raise the propriety of the trial court's denial of his motion to suppress his statement, as discussed above, he has not included that issue in this appeal, and has thus forfeited that issue. *Guest*, 166 Ill. 2d at 414.

¶ 23 In sum, given the substance of defendant's statement, in addition to Hawkins' eyewitness testimony, the evidence of defendant's guilt was overwhelming, and we therefore find that he has failed to make a substantial showing that there is a reasonable probability that but for counsel's inaction regarding the named witness, the result of the proceeding would have been different. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998); *People v. Jones*, 155 Ill. 2d 357, 366-67 (1993).

¶ 24 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.