

FOURTH DIVISION
December 19, 2013

No. 1-11-3213

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).

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. 05 CR 27642
)	
JEREMIAH BUSBY,)	Honorable
)	Thomas M. Tucker,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

- ¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition is affirmed; defendant's underlying *Brady* violation claim was nonmeritorious and, accordingly, he failed to raise an arguable claim of ineffective assistance of appellate counsel.
- ¶ 2 Defendant Jeremiah Busby appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et. seq.* (West 20048)). He contends that he presented an arguable claim that

appellate counsel was ineffective for failing to allege that the State failed to disclose potentially exculpatory or impeaching police reports in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), requiring further proceedings under the Act. For the reasons that follow, we affirm the summary dismissal of defendant's post-conviction petition.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with two counts of first-degree murder stemming from the fatal shooting of Shaun Henry on September 18, 2005, at the three-flat apartment building at 27 South 20th Avenue (the apartment building) in Maywood, Illinois. Defendant's May 2007 jury trial resulted in a mistrial, but he was found guilty of first-degree murder after a second jury trial in November 2007. Defendant was then sentenced to 50 years' imprisonment for first-degree murder, which included a 25-year enhancement for personally discharging the firearm that caused Henry's death. A full recitation of the facts is included in the order issued on direct appeal (*People v. Jeremiah Busby*, No. 1-08-0341 (2010) (unpublished order under Supreme Court Rule 23)), and only the pertinent facts need be included here.

¶ 5 At trial, Cary Tribble testified that in the early morning hours of September 18, 2005, defendant drove Terrell Hargrove and him to the apartment building where a party was underway. Upon arrival, defendant exited the car alone, holding a gun in his hand. Defendant followed the victim, Henry, to the back of the apartment building, and most of the party attendees went inside. Tribble heard gunshots, after which defendant ran back to the car with a gun in hand. Tribble heard defendant tell Hargrove that he had "shot the guy."

¶ 6 Siblings Christopher and Clarissa Hampton both lived at the apartment building and testified at trial. Both denied seeing defendant at the party the night of the shooting, and denied telling police otherwise. Christopher testified that he drove himself and four others to the police

station after the incident, and, on cross-examination, Clarissa testified that Tyshawn Davis, Mack King, and Tashana McGee were also interviewed by police at the station.

¶ 7 Maywood police detective David Gude, who was in charge of the investigation of the shooting, testified that he separately interviewed the Hamptons shortly after the incident. Clarissa told Gude that she saw defendant exit the driver's side of a dark-colored car that night and pull a chrome gun from his waistband, after which she advised everyone to go inside.

¶ 8 Detective Gude further testified that Christopher told him that he was standing outside with the victim, Henry, when defendant drove up in a dark-colored car, exited the car, and approached them while holding something under his shirt. Christopher stated that Henry began to jog to the back of the apartment building, and defendant followed him after asking Christopher if that person was Henry. Christopher further told Gude that he heard numerous shots and then saw defendant run to the car in which he had arrived and leave the scene in it.

¶ 9 Detective Gude further testified that while investigating the incident, he spoke with "other witnesses" aside from the Hamptons, and, that after doing so, defendant remained his only suspect. On cross-examination, Detective Gude responded in the affirmative when asked if those other witnesses "viewed a photo array or identified [defendant] as being at or in or out of that car on that evening," and testified that he would have to see "the report" to answer questions regarding their names and specifics as to what they said. A sidebar was held, during which defense counsel stated, "I don't have any reports that any other people identified [defendant]." The trial court instructed defense counsel that he could ask the names of those witnesses, but that he could not ask what they said, as that "would be hearsay evidence."

¶ 10 On direct appeal, defendant claimed that: (1) he was denied a fair trial where the State misstated evidence, implied that he threatened witnesses, and made prejudicial remarks in closing argument; (2) the State improperly argued prior inconsistent statements as substantive

evidence in closing argument; (3) trial counsel was ineffective in eliciting and failing to object to the admission of other-crimes evidence; and (4) his mittimus should be corrected. *Busby*, No. 1-08-0341, order at 1. This court corrected the mittimus and affirmed the trial court's judgment in all other respects. Order at 17-21.

¶ 11 On September 21, 2011, defendant filed the *pro se* post-conviction petition at bar alleging that he was deprived of his right to effective assistance of appellate counsel who failed to assert, *inter alia*, that he was denied a fair trial due to a *Brady* violation. Defendant specifically claimed that the State failed to tender police reports regarding Detective Gude's interviews of Davis, King, and McGee, three of the individuals who rode to the police station with Christopher and Clarissa Hampton on the night of the incident. Defendant further alleged that the State relied on Detective Gude's testimony regarding his interview of those three witnesses as substantive proof of his guilt. No affidavits were filed in support of the petition.

¶ 12 After a timely review, the circuit court dismissed defendant's petition as frivolous and patently without merit. Defendant now challenges the propriety of the dismissal order. In this appeal defendant has concentrated solely on his *Brady* violation claim and his ineffective assistance of appellate counsel claim related to the *Brady* violation. He argues his claims had an arguable basis in law and fact, and requires further proceedings under the Act.

¶ 13 ANALYSIS

¶ 14 At the first stage of a post-conviction proceeding, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009). Our review of a summary dismissal of a post-conviction petition is *de novo*. *Id.* at 9.

¶ 15 Defendant's claim centers on the State's alleged failure to tender police reports containing statements from Davis, King and McGee, whom all, according to Detective Gude, identified defendant as the person who got out of the black car on the day of the murder. As such, defendant asserts a *Brady* violation. Pursuant to *Brady*, the State has an affirmative duty to disclose any evidence that is favorable to the accused and material to either guilt or punishment. *Brady*, 373 U.S. at 87. In order to successfully show a *Brady* violation, the defendant must make a showing that: (1) the evidence was suppressed by the State either willfully or inadvertently; (2) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Jarrett*, 399 Ill. App. 3d 715, 727-28 (2010) (citing *People v. Burt*, 205 Ill. 2d 28, 47 (2001)). While there is conflicting testimony as to whether any evidence was in fact suppressed by the State, even if we assume that it was, defendant's *Brady* claim fails because he cannot establish that such evidence was favorable to him or that it would have been material to his guilt or punishment.

¶ 16 In order to satisfy the second element of *Brady*, defendant must show that the suppressed evidence is favorable to him because it is either exculpatory or impeaching. *People v. Beaman*, 229 Ill. 2d 56, 74 (2008). Here, the evidence shows that Detective Gude testified that even with all the information he obtained from the additional eyewitnesses—Davis, King and McGee—his only suspect in the murder investigation was still defendant. If anything, this implies that any evidence disclosed from these witnesses was favorable to the State. Regardless, defendant's argument that any evidence from these three witnesses would be favorable to him is at best speculation and, as such, fails to show that such evidence was favorable to him. Thus, defendant cannot establish the second element of *Brady*, and his claim should fail on that basis alone.

¶ 17 However, defendant has also failed to show that the suppressed evidence was material to his claim. Evidence is material if there is a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed. *Beaman*, 229 Ill. 2d at 74. Thus, to establish materiality, an accused must show that “ ‘the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.’ ” *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366, 393 (1998)). Here, the evidence at trial shows that Tribble testified that on the day of the murder, he had driven with defendant and Hargrove to the apartment building. Once at the apartment building, Tribble observed defendant get out of the car with a gun in his hand and walk around the back of the apartment building with the victim as the remaining people that had been outside the apartment building went inside. Tribble then heard gunshots, after which he observed defendant run back to the car with a gun still in his hand. When defendant got into the car, Tribble heard him tell the other passenger, Hargrove, that he had "shot the guy." The evidence further shows that on the night of the murder, defendant was in possession of Richard Cavanaugh's vehicle, a black Hyundai Sonata, which had been seen at the apartment building on the night of the murder. And, even though their statements were later recanted at trial, Detective Gude testified that when he spoke with the Hamptons shortly after the murder, Clarissa told him she saw defendant get out of a black car with a gun on the night of the murder, at which point she advised everyone else to get inside the apartment building, and Christopher told him that he was with the victim when he saw defendant arrive at the apartment building in a dark-colored car, approach them with something under his shirt, follow the victim around the back of the apartment building after which he heard several shots fired and then saw defendant run back to the car he came in and leave. Based on the above facts, there was sufficient evidence to convict defendant of first-degree murder such that we cannot say any alleged suppressed evidence from the statements of Davis, King or McGee would

"undermine confidence in the verdict." *Beaman*, 229 Ill. 2d at 74. As such, defendant has also failed to prove the third element of a *Brady* claim, which is also sufficient to find his *Brady* claim nonmeritorious.

¶ 18 Given that defendant's claim of a *Brady* violation is nonmeritorious, it follows that appellate counsel was not ineffective for failing to raise his *Brady* claim on appeal. "At the first stage of post-conviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. However, if the underlying issue is nonmeritorious, the defendant has suffered no prejudice. *People v. Simpson*, 204 Ill. 2d 536, 566-67 (2001). Accordingly, we find that defendant suffered no prejudice and, as such, defendant's claim that his appellate counsel was ineffective is without merit.

¶ 19 We recognize that defendant also claimed in his appellate brief an ineffective assistance of trial and appellate counsel claim based on defense counsel's failure to argue that the State's failure to disclose the police reports in question was a violation of Illinois Supreme Court Rule 412. Ill. S. Ct. R. 412 (eff. 1976). The State responded by arguing that this issue had been waived. We agree.

¶ 20 The Act provides that "any claim of substantial constitutional rights not raised in the original or an amended petition is waived." 725 ILCS 5/122-3 (West 2004). Although defendant alleged in his petition that appellate counsel "failed to read the record and argue these issues," in using the phrase "these issues," defendant was referring back to the issues which he specified in his petition, and not any issue one could conceive in the future. Defendant's present 412-related argument is not, as defendant contends, a legal justification for the *Brady* claim he advanced in his petition. Rather, it is a new and separate claim which was not included in his post-conviction

petition and, as such, it is waived. See *People v. Winsett*, 153 Ill. 2d 335, 346 (1992) (Considerations of *res judicata* and waiver limit the scope of post-conviction relief to constitutional matters which have not been, and could not have been, previously adjudicated.).

¶ 21 However, even if we were to overlook defendant's waiver of this issue, see *People v. De La Paz*, 204 Ill. 2d 426, 432 (2003), we would still find that the trial court properly dismissed defendant's post-conviction petition. In order to succeed on an ineffective assistance of counsel claim, defendant must be able to generally demonstrate both that counsel's representation was deficient and that he was prejudiced as a result. *People v. Harris*, 182 Ill. 2d 114, 137 (1998). To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *People v. Hale*, 2013 IL 113140, ¶ 18 (2013). In other words, the defendant must show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *People v. Griffin*, 178 Ill. 2d 65, 74 (1997). Given that we have already found that the evidence presented at trial was sufficient to convict defendant of first-degree murder, and found that even if any withheld evidence was favorable to defendant it was not sufficient to undermine the guilty verdict, we cannot say that any alleged Supreme Court Rule 412 violation rendered the result of the trial unreliable or fundamentally unfair. See *Id.* As such, we find that defendant's ineffective assistance of trial and appellate counsel is also without merit as defendant is unable to show prejudice resulting from any potential violation of Supreme Court Rule 412 .

¶ 22 CONCLUSION

¶ 23 For all the reasons above, we affirm the trial court's summary dismissal of defendant's *pro se* post-conviction petition.

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¶ 24 Affirmed.