2014 IL App (1st) 113770-U

FIFTH DIVISION
May 9, 2014

No. 1-11-3770

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. 98 CR 12975
	)	
BOBBY NIXON,	)	Honorable
	)	Michael Brown,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Justice Taylor concurred in the judgment.
Presiding Justice Gordon dissented.

ORDER

¶ 1 *Held*: Trial court properly denied defendant leave to file his successive postconvicition petition where he cannot satisfy the cause and prejudice test because his claim that his trial counsel failed to investigate a witness was raised in his initial postconviction petition and is *res judicata* and defendant cannot establish his attorney's ineffectiveness under *Strickland v. Washington*.

¶ 2 Defendant Bobby Nixon appeals the trial court's denial of his motion for leave to file a successive postconviction petition, arguing that he has satisfied the cause and prejudice test because he asserted an arguable claim of ineffective assistance of trial counsel for failing to investigate or call Jose Reyes as a defense witness.

¶ 3 The following evidence was admitted at defendant's January 2000 bench trial.

¶ 4 Salatheo Moss testified for the State. On the morning of March 25, 1998, Moss was near the intersection of Avers and Augusta in Chicago when he recognized Tarrill Peters[1], Patrick Peters, Bobby Nixon, Raymond Harris, and a man he knew by the name of "Christopher" Wallace. Moss is a cousin to Tarrill and Patrick Peters. Moss had known Tarrill and Patrick most of his life. He had known defendant and Harris about ten years. As the men were standing on the sidewalk, a car came by and someone on the passenger side of the car began shooting in the direction of the group. Several shots were fired; no one was hurt. Moss testified that he then started "walking off" with Tarrill and Patrick. Moss then saw defendant take a gun from Harris. Moss testified that Harris got the gun from Wallace, and Wallace retrieved the gun from a black Cougar vehicle. After he saw defendant with the gun, Moss continued walking down the street toward his car with Tarrill and Patrick. About 40 seconds later, Moss heard shots fired and ran into a gangway. Once in the gangway, Moss "laid down." Moss testified that both Tarrill and Patrick were in the gangway with him. Patrick was shot in the back and Tarrill was shot in the arm. Moss then got up off the ground, went to his car, drove back to the gangway and took both Tarrill and Patrick to the hospital. Patrick died at the hospital. Moss met with Chicago police officers at the hospital. Moss told the officers that defendant was the individual who fired the shots into the gangway, and shot Tarrill and Patrick. After speaking with the police at the hospital, Moss went with the officers to the scene of the shooting.

¶ 5 Moss testified before the grand jury on April 22, 1998, regarding this incident. On direct examination, Moss was confronted with his sworn grand jury testimony where he testified that

[1] Tarrill Peters' name is spelled differently throughout the record. We will use the spelling indicated on the indictment and in previous decisions in this case.

defendant retrieved a gun from Harris and starting chasing and shooting at him, Tarrill and Patrick. Moss admitted at trial that he did testify accordingly at the grand jury.

¶ 6 Additionally, Moss testified that on July 13, 1999, he signed an "affidavit" presented to him by defendant's sister. Moss believed that if he signed the "affidavit," he would not be required to testify in court. The "affidavit" stated that Moss did not see defendant at the scene of the shooting, and he had never seen defendant with a gun.

¶ 7 Reginald Duncan testified that on the evening before the incident, March 24, 1998, he was in the alley near Avers and Augusta with four or five other people, including defendant and Harris. Salatheo Moss and Tarrill Peters came out of the store on the corner of Avers and Augusta. Moss and Tarrill began arguing with defendant over a "drug spot." The next morning, Duncan was again at the corner of Avers and Augusta. Defendant and Harris approached Duncan. At that point, Salatheo Moss pulled up in a Cadillac with Tarrill, Patrick and another man. After the Cadillac pulled up, defendant walked across the street and retrieved a pistol from Harris and shot toward the Cadillac. Duncan testified that the four men began running westbound on Augusta as defendant chased Moss, Tarrill and Patrick through the alley. Defendant was shooting at the men as he was chasing them. Duncan ran as well.

¶ 8 Kenneth Wallace testified for the State. Wallace told the court that on March 25, 1998, there was a shooting by the corner store on Avers and Augusta. He acknowledged speaking to the police the next day, March 26, 1998, and was asked about the incident. Wallace denied telling the police that he was outside of the store on the morning of the shooting. He denied telling the police that defendant asked him to get a gun and give it to Harris, and that he did, in fact, retrieve a black revolver from under the front seat of defendant's black Cougar.

¶ 9 Wallace acknowledged meeting with an assistant State's Attorney at the police station and signing a written statement about the incident. Wallace testified in court that he was "told" to sign the statement and that the contents of the statement were not true. The statement indicated that defendant asked him to get a gun from Harris, and that he got the gun from defendant's black Cougar. The statement also stated that Wallace was treated well by the police, was given pop to drink, cigarettes to smoke, was allowed to use the washroom and call his girlfriend. Wallace testified in court that when he met with the assistant State's Attorney, he told her: "I ain't know nothing."

¶ 10 Wallace admitted that he testified under oath before the grand jury concerning the facts of March 25, 1998. Again, at the grand jury, Wallace testified that defendant asked him to get a gun from out of defendant's car. Wallace also told the grand jury that he gave a written statement to the police. At trial, Wallace acknowledged that he did testify accordingly at the grand jury. On cross-examination, Wallace told the court that he signed the statement at the police station so that he could go home, not because it was true.

¶ 11 Tarrill Peters testified that on March 25, 1998, he, his brother Patrick and his cousin Salatheo Moss were at a corner store at Avers and Augusta in Chicago. After making a purchase, the three men left the store and encountered defendant whom Tarrill had known for over 10 years. Tarrill testified that he and defendant were arguing over defendant's girlfriend. At that point, a car drove by and began shooting at the group. Tarrill then ran through the gangway with Patrick and Moss. Tarrill testified: "then the guys in the car then they jumped in the car and start shooting some more. They shot me and my brother and they jumped back in the car." After Tarrill noticed that his brother Patrick had been shot, Tarrill went to his brother and

held him while Moss drove his car to the alley and picked them up. Tarrill denied that he told a Chicago police officer that defendant was the shooter.

¶ 12 Tarrill also testified before the grand jury. Tarrill told the court that he did answer the questions posed to him by the assistant State's Attorney at the grand jury, but he stated that a police officer gave him a piece of paper and told him how to testify. Tarrill said he did not have the piece of paper with him, that the officers kept it. At the grand jury, Tarrill testified that defendant took a gun from Harris and chased him, Patrick and Moss into the gangway with the gun and shot at them. Tarrill told the grand jury that after he heard shots, he heard his brother Patrick hollering, "I'm hit in my back." Tarrill then saw defendant standing behind Patrick. At trial, Tarrill denied giving those answers to the grand jury, despite the fact that the assistant State's Attorney was reading from the grand jury transcript.

¶ 13 Assistant State's Attorney Kurt Smitko testified that on April 22, 1998, he interviewed Salatheo Moss in reference to the March 25, 1998, shooting. Smitko testified that in the interview, Moss told him that defendant was the person firing the shots in the gangway on March 25, 1998. Moss also did not tell Smitko that Moss did not remember what happened. Smitko presented Moss to the grand jury. At the grand jury proceeding, Moss testified that defendant got the gun from Harris and started chasing and shooting at Moss, Tarrill and Patrick, through the gangway. After the shooting, Moss located Tarrill and Patrick and took both men to the hospital in his car.

¶ 14 Smitko also interviewed Tarrill. Tarrill told Smitko that defendant fired the shots at him and his brother in the gangway. As with Moss, Tarrill was then brought before the grand jury. Before the grand jury, Tarrill testified that Harris gave defendant a gun and followed Tarrill, Patrick and Moss through the gangway. Tarrill then heard shots fired and saw Moss fall to the

ground "like he was playing possum." After a couple more shots, Tarrill heard Patrick say, "I'm hit in my back." Tarrill then got struck in the arm by a bullet. Tarrill went back to assist his brother and saw defendant get into the back seat of a vehicle.

¶ 15 Assistant State's Attorney Veryl Gambino testified that she interviewed Kenneth Wallace on March 26, 1998, and took a written statement from him. In his written statement, Wallace stated that he also goes by the name "Christopher" Wallace. Wallace told Gambino that on the day of the incident he was with defendant and Harris. Wallace retrieved a gun from the black Cougar after being asked to do so by defendant. Wallace gave the gun to Harris and then went into the store. When Wallace came out of the store he saw defendant, Harris, Tarrill, Patrick, and Moss walking southbound on Avers. At that point, a car came by and the passenger in the car reached out of the window and began firing a gun. As soon as the shooting began, Wallace ran down Augusta.

¶ 16 Assistant State's Attorney Barbara DeKerf testified that Kenneth Wallace was a witness at the grand jury proceedings. Wallace testified before the grand jury. According to the grand jury testimony, as published to the court at trial by DeKerf, Wallace's testimony before the grand jury was substantively the same as that of his written statement.

¶ 17 Detective Leonard Kukulka of the Chicago Police Department testified that he met Tarrill Peters at the hospital shortly after the shooting on March 25, 1998. Tarrill told Kukulka that he and his brother Patrick were near Augusta and Avers when he was approached from behind by defendant. Tarrill turned around and noticed that defendant had a gun. Tarrill and Patrick began to run as defendant was shooting at them. Defendant chased the men through a gangway while defendant continued to shoot. Tarrill saw Patrick fall to the ground. Tarrill continued to run.

When the shooting stopped, Tarrill turned around and saw defendant running toward Avers and get into a car and leave the scene.

¶ 18 On that same day, Kukulka interviewed Salatheo Moss. Moss told Kukulka that he saw Wallace go to a black Cougar and retrieve a gun. Wallace gave the gun to Harris who, in turn, gave the gun to defendant. Defendant then began chasing Moss, Tarrill and Patrick down the street and through a gangway, shooting at the men.

¶ 19 On March 26, 1998, Kukulka interviewed Kenneth Wallace. Wallace told Kukulka that on March 25, 1998, he was at Augusta and Avers with defendant. Defendant asked Wallace to get the gun from under the front seat of the car. Wallace retrieved the gun, handed it to Harris and went into the store. Kukulka testified that defendant was placed under arrest on April 20, 1998.

¶ 20 Chicago police officer Patrick O'Malley testified for the defense. O'Malley testified that on March 25, 1998, he was on duty and was approximately a block and a half from the scene of the incident. O'Malley heard several loud gunshots and proceeded in that direction. Once in that area, O'Malley observed three men "hurriedly entering a Chevy." O'Malley stopped the vehicle and arrested Raymond Harris and two men by the names of Brandon Frasier and Derrick Holman.

¶ 21 The parties stipulated that gunshot residue tests were administered to Tarrill Peters, Brandon Frasier, Salatheo Moss, Raymond Harris and Derrick Holman. Derrick Holman's test results were consistent with "discharging/handling/being in close proximity to a discharged firearm."

¶ 22 After considering all the evidence and testimony, the trial court found defendant guilty of first degree murder, attempted murder and aggravated battery. He was sentenced to 50 years for

first degree murder, 15 years for attempted murder and 15 years for aggravated battery, sentences to run concurrently. We affirmed defendant's convictions on direct appeal. *People v. Nixon,* No. 1-00-3222 (June 25, 2002) (unpublished order pursuant to Supreme Court Rule 23).

¶ 23 In November 2002, defendant filed his postconviction petition alleging that (1) newly discovered evidence demonstrated that defendant was actually innocent of the crimes for which he was convicted; (2) defendant was denied the right to effective assistance of counsel where (a) his trial counsel failed to properly investigate the crime and present available and compelling evidence of defendant's innocence, (b) his trial counsel failed to secure the testimony of an eyewitness Jose Reyes, and (c) his trial counsel told him that if he exercised his right to a jury trial the State would enter into evidence a gun police recovered from defendant on his arrest, but never connected to the shooting; (3) the State knowingly presented the false testimony of Reginald Duncan; (4) the State failed to disclose that Duncan had been offered a deal in an unrelated pending criminal case in exchange for his testimony against defendant and the State elicited false testimony from Duncan that he did not have a deal with the State; (5) the State had advance notice that Duncan's testimony would be substantially different from his reported police statement, and the State failed to inform defendant and his counsel that Duncan would now testify that defendant was the shooter; (6) defendant was deprived of his constitutional right to a jury trial because (a) he would have exercised his right if he had been informed that Duncan would identify him as the shooter, and (b) his trial counsel told him that if he exercised his right to a jury trial the State would enter into evidence a gun police recovered from defendant on his arrest, but was never connected to the shooting; and (7) defendant was denied his constitutional right to present witnesses in his defense because the State willfully withheld information on the

whereabouts of Mario Rayyes, an eyewitness who identified someone other than defendant as the shooter.

¶ 24 The trial court summarily dismissed defendant's postconviction petition, but later granted defendant's motion to reconsider the ruling. The State then filed a motion to dismiss defendant's petition, which after arguments, the trial court granted.

¶ 25 Defendant also filed a petition for postjudgment relief pursuant to section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2000)), alleging that defendant was entitled to statutory relief based on the perjured testimony of Duncan. The State filed a motion to dismiss defendant's section 2-1401 petition, which the trial court granted. Both dismissals were upheld after defendant's motions to reconsider the rulings.

¶ 26 On appeal, this court affirmed the dismissals of defendant's postconviction petition and section 2-1401 petition. *People v. Nixon*, Nos. 1-04-1357 and 1-04-2368 (February 21, 2006) (unpublished order pursuant to Supreme Court Rule 23). Specifically, we found that *res judicata* barred us from considering defendant's claim of ineffective assistance of trial counsel for failing to investigate a potential witness, Jose Reyes, because Reyes' names was disclosed twice in the direct appeal record: once as a potential witness for the State and the second as an individual interviewed by the police after the shooting. We concluded that the information was discoverable on direct appeal and was waived. See *Id*. pp. 26-27.

¶ 27 On September 21, 2011, defendant filed a *pro se* motion for leave to file a successive postconviction petition. In his petition, defendant raised one issue, that his trial attorney was ineffective for failing to investigate and call Jose Reyes as a witness to prove his innocence and his appellate counsel was ineffective for failing to raise this claim on direct appeal. The trial court denied defendant leave to file his successive postconviction petition, finding that defendant

"fail[ed] to demonstrate that he suffered any prejudice from his failure to assert these claims in his previous petition. In fact, [defendant] already raised this exact issue on direct appeal and in his initial post-conviction petition. The trial court, appellate court, and our supreme court have consistently denied [defendant] his requested relief. Accordingly, this claim is barred by the doctrine of *res judicata*."

¶ 28 This appeal followed.

¶ 29 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2004)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2004); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999).

¶ 30 However, the Post-Conviction Act only contemplates the filing of one postconviction petition with limited exceptions. 725 ILCS 5/122-1(f) (West 2010); see also *People v. Pitsonbarger*, 205 Ill. 2d 444, 456 (2002). Under section 122-1(f), a defendant must satisfy the cause and prejudice test in order to be granted leave to file a successive postconviction petition. 725 ILCS 5/122-1(f) (West 2010).

> "For purposes of this subsection (f): (1) a prisoner shows cause by identifying an objective factor that impeded his or her ability to raise a specific claim during his or her initial post-conviction

> proceedings; and (2) a prisoner shows prejudice by demonstrating that the claim not raised during his or her initial post-conviction proceedings so infected the trial that the resulting conviction or sentence violated due process." 725 ILCS 5/122-1(f) (West 2010).

¶ 31 Both elements of the cause and prejudice test must be satisfied to prevail. *Pitsonbarger*, 205 Ill. 2d at 464. "In the context of a successive post-conviction petition, however, the procedural bar of waiver is not merely a principle of judicial administration; it is an express requirement of the statute." *Pitsonbarger*, 205 Ill. 2d at 458 (citing 725 ILCS 5/122-3 (West 1996)). We review the dismissal of a postconviction petition without an evidentiary hearing *de novo*. *Pitsonbarger*, 205 Ill. 2d at 456.

¶ 32 "Where, as here, the death penalty is not involved and the defendant makes no claim of actual innocence, Illinois law prohibits the defendant from raising an issue in a successive postconviction petition unless the defendant can establish a legally cognizable cause for his or her failure to raise that issue in an earlier proceeding and actual prejudice would result if defendant were denied consideration of the claimed error." *People v. Brown*, 225 Ill. 2d 188, 206 (2007) (citing *Pitsonbarger*, 205 Ill. 2d at 459-60). Defendant has not argued a claim of actual innocence on appeal; therefore, he must satisfy the cause and prejudice test to be granted leave to file his successive petition.

¶ 33 "A narrow exception to the rule prohibiting successive post-conviction petitions holds that a claim presented in a successive petition may be given consideration when the proceedings on the initial petition were 'deficient in some fundamental way.' " *People v. Britt-El*, 206 Ill. 2d 331, 339 (2002) (quoting *People v. Flores*, 153 Ill. 2d 264, 273-74 (1992)). "To establish a fundamental deficiency which will permit consideration of the successive petition, a defendant

must demonstrate both 'cause and prejudice' with respect to each claim raised." *Id.* "A defendant must establish cause and prejudice as to each individual claim asserted in a successive postconviction petition to escape dismissal under *res judicata* and waiver." *People v. Guiterrez*, 2011 IL App (1st) 093499, at ¶12.

¶ 34 In *Britt-El*, the defendant sought leave to file a successive postconviction petition in which he advanced the same claims of ineffective assistance of counsel as he had in his initial petition. The defendant, similar to defendant in the instant case, argued that the claims were not properly heard on the merits in his first postconviction petition because that petition was dismissed as untimely filed. He asserted that he should be permitted to raise the issues for a second time in a successive petition to be considered on the merits. *Britt-El*, 206 Ill. 2d at 337. The supreme court disagreed, finding that the defendant "received every procedural right, including the opportunity to have his claims heard on the merits, that was available to him at the time his first post-conviction petition was filed." *Id.*

¶ 35 The defendant also sought to have his claims reviewed in light of subsequent authority issued after the completion of his initial postconviction proceedings. *Id.* at 338-39. However, the supreme court declined to apply any changes in the law retroactively to the defendant's case and his successive petition was properly dismissed. *Id.* at 342-43.

¶ 36 Here, defendant asserts that his claim of ineffective assistance of trial counsel for failing to investigate and call Jose Reyes at trial satisfied the cause and prejudice test. Defendant admits that he previously raised this same claim in his initial postconviction petition, but maintains that "there was a fundamental deficiency in his original post-conviction proceedings, since no state court addressed the merits of this ineffectiveness claim because procedural bars were applied erroneously."

¶ 37 Despite his assertions to the contrary, defendant cannot establish "cause." There was no objective factor that impeded defense counsel's efforts to raise the claim in an earlier proceeding (725 ILCS 5/122-1(f) (West 2010)) because defendant did raise this claim in his initial postconviction proceeding, which was considered by this court. In his initial postconviction petition, defendant raised multiple claims of ineffective assistance of trial counsel, which included the claim that his attorney failed to obtain Reyes's testimony. Defendant asserted in his petition that Reyes witnessed the shooting at Avers and Augusta. In his postconviction petition, defendant attached copies of Reyes's initial statement to police, both a handwritten version and a summary in the police report. In the statement, Reyes said he was in his house when he heard gunshots. He came downstairs and saw two shooters, one described as 5'8" and about 150 pounds and the other as 5'10" with a heavy build. He saw both men get into a Chevy and leave the scene. Defendant stated that according to his presentence investigation, he is 5'4" and 138 pounds. Defendant noted that while Reyes never identified the offenders, "he gave descriptions of the offenders to the police that are radically different than [defendant's] appearance." Defendant argued that "[n]o reasonable trial strategy exists for failing to present Reyes' testimony where he would provided evidence that proved [defendant's] innocence."

¶ 38 This court concluded the claim was waived.

> "Jose Reyes was identified twice in the record on direct appeal; once, as a potential witness to be called by the State; and second, as an individual interviewed by police after the shooting. The police report, dated April 2, 1998, identified Reyes by name, age, date of birth, address, phone number, social security number, and driver's license number. Reyes's identity was available and

> known prior to trial. Petitioner could have raised this issue on direct appeal. Because he failed to do so, the issue is waived. See *Barrow*, 195 Ill. 2d at 519 ("issues that could have been presented on direct appeal, but were not, are considered waived")." *Nixon*, No. 1-04-1357, at pp. 26-27.

¶ 39 Defendant contends that this holding was in error and asserts that the supreme court "has since ruled definitively on this issue, and the claim was proper for litigation in the initial review collateral proceedings." Defendant relies on the decisions in *People v. Ligon*, 239 Ill. 2d 94 (2010) and *People v. Bew*, 228 Ill. 2d 122 (2008), for support. In both cases, the supreme court observed that ineffective assistance of counsel claims are "preferably brought on collateral review rather than on direct appeal. This particularly true, as here, the record on direct appeal is insufficient to support a claim of ineffective assistance of counsel." *Bew*, 228 Ill. 2d at 134; see also *Ligon*, 239 Ill. 2d at 105. Neither case is "definitive" as defendant contends. Rather, both cases note that claims of ineffective assistance of trial counsel may be more suited for a postconviction petition when the record on direct appeal lacks support for the claim.

¶ 40 However, in this case, the direct appeal record contained identifying information for Reyes and listed him as a potential witness for the State and as an individual interviewed by the police after the shooting. His address was included in the record and showed that he lived near the location of the shooting. While Reyes's statements to the police were not part of trial record, Reyes's identity was disclosed in the trial record and we previously concluded that this was sufficient to have been discoverable on direct appeal. Defendant has not offered any evidence that was previously undiscovered regarding Reyes's potential testimony. The fact that this court did not reach of the merits of defendant's claim is of no moment. "A ruling on an initial post-

conviction petition has *res judicata* effect with respect to all claims that were raised or could have been raised on the initial petition." *People v. Orange*, 195 Ill. 2d 437, 449 (2001). This claim was previously considered and rejected in defendant's initial postconviction petition and *res judicata* bars reconsideration in this appeal.

¶ 41 As an alternative, defendant contends that his attorney on direct appeal and the initial postconviction proceedings was ineffective for failing to assert her own ineffectiveness when she did not challenge trial counsel's failure to investigate and call Reyes on direct appeal. As defendant asserts, the supreme court "has held that a defendant's failure to raise a claim of ineffective assistance of appellate counsel in his initial post-conviction petition will not operate as a waiver if the defendant was represented by the same attorney on direct appeal and in his initial post-conviction proceeding. In such cases, the claim of ineffective assistance of appellate counsel may be raised for the first time in a second post-conviction petition." *People v. Erickson*, 183 Ill. 2d 213, 223 (1998).

¶ 42 Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient 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." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 43 A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal. *Simms*, 192 Ill. 2d at 362. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223.

¶ 44 Here, defendant argues that his appellate counsel should have raised trial counsel's ineffectiveness for failing to investigate and call Reyes as a defense witness at trial. The only information in the record about Reyes's potential testimony was his general statements to the police after the shooting in which he gave general descriptions of the shooters. Reyes never identified anyone as the shooter. Defendant sets forth numerous conclusions that Reyes's testimony was critical to his case, resting heavily on his description of the one of the shooters as being 5'8" and 150 pounds, which he contends was not consistent with his build of 5'4" and 138 pounds.

¶ 45 However, "[i]t is of course well settled that a claim that trial counsel failed to investigate and call witnesses must be supported by an affidavit from the proposed witness." *People v. Jones*, 399 Ill. App. 3d 341, 371 (2010) (citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000)). "In the absence of such an affidavit, a reviewing court cannot determine whether the proposed witness could have provided testimony or information favorable to the defendant, and further review of the claim is unnecessary." *Id.* "It should go without saying that the absence of evidence cannot overcome the 'strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance.' " *Burt v. Titlow*, ___ U.S. ___, 134 S. Ct. 10, 17 (2013) (quoting *Strickland*, 466 U.S. at 689).

¶ 46 Defendant has not shown that his appellate counsel rendered deficient performance for failing to advance this claim of ineffective assistance of trial counsel. Defendant has not offered anything beyond conjecture as to what Reyes's testimony would be. We must presume that trial counsel's decision not pursue Reyes as a defense witness was a tactical decision.

¶ 47 Further, defendant has not shown a reasonable probability that the result of the trial would have been different. We point out that Reyes's police statement did not exonerate defendant, but offered only general descriptions of the events and offenders. Moreover, we observe that defense counsel did present evidence that the shooters fled in the Chevy vehicle, which was curbed by Officer O'Malley. This evidence was considered by the trial court as the fact finder and rejected in light of the identification testimony from the State's witnesses. Since it is unlikely that the result of the trial would have been different, defendant cannot show prejudice under *Strickland*. Because defendant failed to establish ineffective assistance of trial counsel, his appellate counsel was not ineffective for failing to raise this claim on direct appeal.

¶ 48 Finally, defendant asserts for the first time on appeal that he should be permitted to relitigate his trial counsel's ineffectiveness for failing to investigate and secure the testimony of Mario Rayyes. " 'The question raised in an appeal from an order dismissing a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act.' Thus, any issues to be reviewed must be presented in the petition filed in the circuit court." *People v. Jones*, 211 Ill. 2d 140, 148 (2004) (quoting *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)). Since defendant did not raise this claim in his successive postconviction petition, we cannot review this claim for the first time on appeal and will not consider it any further.

¶ 49 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 50 Affirmed.

¶ 51 Presiding Justice Gordon, dissenting:

¶ 52 I must respectfully dissent because the majority misinterprets and thus fails to apply the controlling supreme court precedent, which is *People v. Britt-El*, 206 Ill. 2d 331 (2002).

¶ 53 In *Britt-El*, the defendant made two distinct and unrelated claims: first, that his claim should not be considered as a successive petition because his first proceeding was not a valid proceeding (*Britt-El*, 206 Ill. 2d at 336-37) and second, that "even if" his current petition was a successive or second petition, it could "nevertheless be considered on the merits" because the first proceeding was "fundamentally deficient pursuant to *Wright*" (*Britt-El*, 206 Ill. 2d at 338 (citing *People v. Wright*, 189 Ill. 2d 1 (1999))). The supreme court acknowledged that defendant's first argument was wholly "unrelated to the [second] argument concerning *Wright*"

(*Britt-El*, 206 Ill. 2d at 336). The supreme court rejected the first argument, stating defendant had "received every procedural right" due at the time in the first proceeding, and thus the current petition was a second or successive petition. *Britt-El*, 206 Ill. 2d at 337.

¶ 54 In the case at bar, the majority mistakenly quotes the "every procedural right" language as though it were part of the supreme court's decision on the second issue. *Supra* ¶ 34 (quoting *Britt*-El, 206 Ill. 2d at 337). Defendant does not argue that his current petition is something other than a successive or second petition and thus that language has no application to the case at bar.

¶ 55 In the case at bar, defendant makes only the second *Britt-El* argument, which is that his second or successive petition may be "considered on the merits because the proceedings on his initial post-conviction petition were fundamentally deficient." *Britt-El*, 206 Ill. 2d at 338. In *Britt-El*, the supreme court acknowledged that it is well established that "a claim presented in a successive petition may be given consideration when the proceedings on the initial petition were 'deficient in some fundamental way.' " *Britt-El*, 206 Ill. 2d at 339 (quoting *People v. Flores*, 153 Ill. 2d 264, 273-74 (1992)).

¶ 56 The majority in the case at bar then states that "the supreme court [in *Britt-El*] declined to apply any changes in the law retroactively." *Supra* ¶ 35. However, the supreme court in *Britt-El* went on to carefully consider "whether the holding of [the particular case at issue] should be given retroactive application to defendant's first post-conviction proceeding." *Britt-El*, 206 Ill. 2d at 341. The case at issue was *People v. Boclair*, 202 Ill. 2d 89 (2002), in which the supreme court held that "a circuit court may not *sua sponte* dismiss a petition on the basis of timeliness." *Britt-El*, 206 Ill. 2d at 341 (describing *Boclair*). Finding that this particular case was not worthy of retroactive application, our supreme court reasoned: "the only way it can be said that defendant has suffered any prejudice is that, during the first post-conviction proceedings,

defendant was denied the *possibility* that the State *might* have elected to waive the timeliness issue." (Emphases added.) *Britt-El*, 206 Ill. 2d at 343.

¶ 57 By contrast, in the case at bar, the prejudice to defendant was not merely "possible" but real, where the court failed to consider the merits of his first postconviction petition on the ground of waiver, although his ineffectiveness claim was based on facts outside the record and thus the first time he could have raised the claim was on a postconviction petition.

¶ 58 Since the time when the trial and appellate courts considered defendant's initial petition, the supreme court has definitely stated that, where a record "has not been precisely developed for the object of litigating a specific claim of ineffectiveness *** thereby not allowing both sides to have an opportunity to present evidence thereon, such a claim *should* be brought on collateral review rather than on direct appeal." (Emphasis added.) *People v. Ligdon*, 239 Ill. 2d 94, 105-06 (2010) (citing in support *People v. Bew*, 228 Ill. 2d 122, 134 (2008) (citing *Massaro v. United States*, 538 U.S. 500, 504-06 (2003)), and *People v. Whitehead*, 169 Ill. 2d 355, 372 (1996) (a claim of ineffective assistance of trial counsel cannot be considered on direct appeal where the evidentiary basis is *dehors* the record), *overruled on other grounds by People v. Coleman*, 183 Ill. 2d 366, 382-83 (1998))).

¶ 59 In the case at bar, there is no dispute that the record on direct appeal was not "precisely developed for the object of litigating [this] specific claim of ineffectiveness." *Ligdon*, 239 Ill. 2d at 105-06. Although the direct-appeal record identified Reyes as a potential witness for the State, his statements to the police were not part of the trial record. Thus, defendant's ineffectiveness claim with respect to Reyes could not possibly have been litigated on direct appeal, when Reyes was listed as a witness *for the State*, and his actual exonerating statements were not included.

¶ 60 Defendant's initial postconviction petition asserted actual innocence based on newly discovered evidence, as well as ineffective assistance of trial counsel. The petition was supported by four exonerating affidavits from witnesses stating that defendant did not commit the shooting, as well as a recantation video from a trial witness. At trial, a police officer testified on behalf of the defense, while the State called four convicted felons as event witnesses. There was no physical evidence connecting defendant to the offense, no confessions or statements by defendant, and no arrest of defendant at the scene. However, a gunshot residue test of a suspect, who did flee the scene, came back positive. I would reverse and permit the filing of this second or successive petition, so that the trial court could then consider the claim regarding Reyes, in light of all the exonerating evidence now in the record.