

No. 1-12-1500

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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. 06 CR 00745
	)	
GARRYL WILLIS,	)	Honorable
	)	William H. Hooks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Palmer concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court erred in dismissing defendant's postconviction petition at the first stage because he sufficiently set forth a claim of ineffective assistance of trial counsel for failing to investigate and call witnesses for the defense, and the automatic application of a mandatory minimum sentence of 45 years for a juvenile defendant and the automatic transfer provision are constitutional.
- ¶ 2 Defendant Garryl Willis appeals the first-stage dismissal of his postconviction petition, arguing that the trial court erred in finding the petition to be frivolous and patently without merit because he raised the gist of a meritorious claim of ineffective assistance of trial counsel for failing to properly investigate and present testimony from multiple witnesses that identified

another individual as the perpetrator. Defendant also asserts for the first time on appeal that the automatic application of mandatory minimum sentence of 45 years for a juvenile defendant and the statute providing for an automatic transfer to adult court for a juvenile defendant charged with first degree murder violate the eighth amendment of the United States Constitution and the proportionate penalties clause of the Illinois Constitution.

¶ 3 Following a jury trial, defendant was found guilty of first degree murder in the December 2005 homicide of Stanley James. He was subsequently sentenced to two consecutive terms of 25 years' imprisonment for the murder and a mandatory add-on term for the use of a firearm during a homicide. Defendant's conviction and sentence were affirmed on direct appeal. We will discuss the facts as necessary for the issues raised on appeal. For a more detailed discussion of these facts, see *People v. Willis*, No. 1-07-3108 (February 11, 2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 4 The following evidence was presented at defendant's August 2007 jury trial.

¶ 5 Henry Sykes and David Taylor testified that on December 10, 2005, they were driving around in Sykes' car with the victim, Stanley James. Sykes drove his white Mercury Grand Marquis to "Hollywood," a dollar store and restaurant, located at the corner of 79th and St. Lawrence Streets in Chicago. James bought some food and Sykes drove them to his grandmother's house. Taylor decided he also wanted something to eat and asked Sykes to return to Hollywood so Taylor could get some food. Sykes drove back to Hollywood and parked his car in the parking lot. Sykes and Taylor entered the store while James remained in the front passenger seat eating his food.

¶ 6 Inside the store, Sykes and Taylor saw defendant, known to them as "Boo Boo," and his brother Quvadás Alexander, known to them as "CoCo." Sykes and Taylor stated that defendant

was wearing a green leather jacket. Sykes further described it as having stripes and a basketball emblem on it. Taylor said that Alexander's coat was tan. The men greeted each other and shook hands. Sykes then went to the cooler to obtain a juice while Taylor went to the restaurant area to obtain some food. Sykes testified that defendant and Alexander were at the counter and getting ready to leave when he obtained his juice.

¶ 7 As Sykes was walking to the counter, he heard several gunshots. Sykes called to Taylor to ask if he heard gunshots. Taylor responded that he had not. They ran to the door to see what happened and saw that the front passenger side window of the car had been shot out and James was slumped over in his seat. Sykes called 911 from a telephone inside Hollywood while Taylor ran outside and went into Sykes' car to retrieve their cellular telephones. Taylor observed that James was slumped over in the seat and was gasping for breath. Sykes waited less than five minutes for an ambulance before he drove James to the hospital.

¶ 8 Sykes and Taylor were later taken to the police station and were tested for the presence of gunshot residue on their hands. At trial, Sykes and Taylor identified defendant's green jacket as the same jacket that defendant was wearing the day of the shooting.

¶ 9 Michelle Rim testified that on December 10, 2005, she was eating lunch with her cousin Sunny Shin at the family's dry cleaning business. The dry cleaner was located across the street from Hollywood. Her back was to the street when she heard two gunshots. She turned around and heard four more gunshots. Rim stated that she saw a man shooting at a white car in Hollywood's parking lot. She described the shooter as wearing a green jacket and holding a gun in his left hand, but she was unable to see his face or determine his race. At trial, Rim identified defendant's jacket as the one worn by the shooter.

¶ 10 Stanley Sterns testified that at around 2 p.m. on December 10, 2005, he was driving east on 79th Street. When Sterns was approximately a block away from Hollywood, he heard four gunshots. As he continued toward St. Lawrence Street, he saw a man wearing a green jacket pointing a gun at a white car. He was approximately 35 to 40 feet away from the shooter. He described him as black skinned, five foot nine or ten inches tall with a slim build. He saw the shooter turn and walk north on St. Lawrence. Sterns observed two men run out of Hollywood, look inside the car, and run back into the store.

¶ 11 Sterns continued driving, but later he returned to the crime scene and spoke with the police. He gave them a description of the shooter. Later, Sterns viewed a lineup at the police station. He pointed to defendant in the lineup as fitting his physical description, but was unable to positively identify defendant as the shooter. The police showed Sterns a green jacket which Sterns said looked like the one worn by the shooter.

¶ 12 Officer Edward Acevedo testified that he is a Chicago police officer and on December 10, 2005, he was on patrol when he received a call of shots fired. When he arrived at the scene, other officers had already arrived. At the scene, Officer Acevedo observed three spent bullet casings, blood on the ground and broken glass. About five to ten minutes after he arrived, Officer Acevedo received a call that a victim with bullet wounds had been transported to Jackson Park Hospital. Officer Acevedo proceeded to the hospital and upon arrival, he saw a white Grand Marquis had a bullet hole on the passenger side mirror and there was blood and glass inside the vehicle. He also noticed that the windshield and the passenger side window were shattered. Officer Acevedo, later assisted by Officer Bobby Weatherly, remained outside near the car to protect the scene until evidence technicians arrived. Officer Acevedo later spoke with Sykes and received a description of two offenders. Both were black males in their 20s, one

offender was wearing a green jacket and Timberland boots while the other wore a beige jacket with blue jeans.

¶ 13 Officer Joseph Verdin testified that he is employed as a Chicago police officer and on December 10, 2005, he and his partner, Officer Chris Doherty, responded to a call to go to a house at 78th and St. Lawrence with several other officers. Officer Verdin entered the house and proceeded to the attic and found three people lying down on a bed watching television. He identified defendant as one of the people on the bed. He placed defendant and another male, identified as Alexander, into custody. He gave them a protective pat-down, handcuffed them together, and placed them in a squad car. He found a green jacket and handed it to defendant. He also gave a beige jacket to Alexander. The officers searched the residence for a gun, but nothing was found. Defendant and Alexander were transported to Area Two and placed in separate interview rooms.

¶ 14 Robert Berk, a trace evidence analyst with Illinois State Police, testified at trial that he analyzed the gunshot residue tests. Berk stated that defendant's left hand tested positive for gunshot residue. Berk explained that this result indicates that the person either discharged a firearm, had contact with an item that has primer gunshot residue on it or the hand was exposed in the environment when a gun was discharged. Berk also stated that Sykes' right hand tested positive for gunshot residue. The tests for Alexander and Taylor were negative for the presence of gunshot residue.

¶ 15 Forensic evidence was presented regarding the collection of spent cartridge cases and bullets from the scene, the car, and James' body. An expert testified that all recovered cartridge cases were fired from the same firearm. Of the recovered bullets, one was unsuitable for comparison. Two copper bullets were fired from the same firearm and three brass bullets were

fired from the same firearm, but the expert was unable to determine whether the copper bullets were fired from the same firearm as the brass bullets.

¶ 16 Alexander testified at trial that on December 10, 2005, he went with defendant, his brother, to Hollywood to purchase some chips and cigars. He stated that he was wearing a tan coat and defendant was wearing a green jacket. He identified the green jacket recovered by police as the one defendant was wearing that day. At Hollywood, they ran into Sykes and Taylor, two of their friends. They greeted each other and shook hands. When Alexander and defendant left the store, they saw a white Mercury in the parking lot with James sitting in the car. They nodded at each other. Alexander testified that they were walking to a friend's house when he heard gunshots. He stated that he did not see the shooter and they ran to their friend's house. Alexander said he was with defendant all day and did not see him with a gun. They were arrested at a friend's house.

¶ 17 Alexander testified that at the police station, he met with some detectives and Assistant State's attorney (ASA) Jim Murphy. He stated at trial that ASA Murphy did not introduce himself to Alexander nor did he explain that he was a lawyer, but not Alexander's or defendant's lawyer. Alexander testified that he was forced to sign a handwritten statement identifying defendant as the shooter. He admitted to signing every page of the statement, but he claimed that he never read it. He stated at trial that he made some of the statements, but he denied telling ASA Murphy that defendant had a gun and was a member of the Gangster Disciples gang. He also denied saying that defendant flashed a gang sign at James in the car, who flashed the same sign back. Alexander stated that he was threatened by one of the detectives that if he did not say what the detective wanted, then the detective would put the case on Alexander and the detective would drop Alexander off in front of James' house. He testified that he was forced to say that he

was treated fine by the police. Alexander also testified that the detectives told him what to say prior to his grand jury testimony.

¶ 18 ASA Murphy testified that on December 11, 2005, he was assigned to the felony review unit of the Cook County State's Attorney's Office when he received an assignment shortly after midnight to go to Area Two regarding James' homicide. When he arrived he spoke with Detective John Carlassare and Detective Lorenzo Sandoval. He went to speak with Alexander around 3 a.m. Detective Sandoval was present during questioning. ASA Murphy introduced himself to Alexander and explained that he was a lawyer and a prosecutor, that he was not defendant's lawyer nor Alexander's lawyer. He then spoke with Alexander about the shooting for about 15-20 minutes. ASA Murphy then asked Alexander if he would give a handwritten statement, and explained the process. ASA Murphy also requested Detective Sandoval to step out of the room and then he asked Alexander about his treatment by the police.

¶ 19 ASA Murphy identified the handwritten statement he took from Alexander at trial. He then read the statement for the jury. In the statement, Alexander stated that he was 18 years old and his nickname was CoCo. On December 10, 2005, he was hanging out with defendant playing games. They decided to go to the store at 79th and St. Lawrence. Defendant told Alexander that he was carrying a gun. Alexander stated that defendant was a member of the Gangster Disciples street gang. At the store, they saw two friends, identified as Taylor and Sykes, and spoke with them for a minute. They left the store and saw a guy sitting in a white Mercury. Defendant walked closer and flashed a gang sign at the person in the car, who flashed the same sign back to defendant. Alexander thought "everything was fine." He said the man in the car did not have weapons. "Then all of a sudden, [defendant] pulls out a semi-automatic handgun, points it at the guy in the passenger's seat and fires the gun five times or so."

Defendant was standing a few feet from the car at this time. Alexander started to run away with defendant following him. He had no idea that defendant was going to shoot the guy in the car. Alexander asked defendant why he did it and defendant said he “just did it.” Alexander concluded his statement by saying that he had been treated fine by the police and ASA Murphy and that no threats or promises were made in exchange for the statement.

¶ 20 Detectives Sandoval and Carlassare both denied in their testimony that they threatened Alexander in exchange for his statement. They also denied providing a script for Alexander to memorize for his statement. Detective Sandoval stated that he was present when Alexander gave his handwritten statement to ASA Murphy. He also testified that Alexander was not given Miranda warnings prior to giving his statement because he was not considered a suspect at the time of his statement. Later, on December 15, 2005, the detectives picked up Alexander at his home and transported him to the grand jury at 26th and California. Both stated that they did not discuss the circumstances of the shooting with Alexander. They also denied threatening Alexander that they would put the case on him if he did not testify before the grand jury nor did they give him a script to memorize prior to testifying before the grand jury.

¶ 21 ASA Suzanne Collins testified that she met with Alexander prior to his grand jury testimony. Alexander did not tell her that he had been threatened by the detectives to testify. ASA Collins identified a transcript of Alexander’s grand jury testimony, which was admitted as an exhibit and provided to the jury during deliberations. Alexander’s grand jury testimony was substantially similar to his handwritten statement.

¶ 22 Defendant presented one witness in his defense. ASA Robert Podlasek testified that on December 10, 2005, he worked in the felony review unit of the state’s attorney’s office and he received a call to go to Area Two. At Area Two, Podlasek spoke with witnesses Rim, Sterns and

Sung Hi Shin, Rim's cousin. In his report, he identified Sterns as witness 4, Rim as witness 5 and Shin as witness 6. He stated that he wrote in his report that neither witness 5 nor 6 could identify the defendant's green jacket. Podlasek explained that he received this information from Shin because Rim was frightened and afraid to speak to him. Rim was concerned about her family's business that was in the neighborhood and she did not want any problems. Podlasek also testified he showed Sterns a photograph of the green jacket and that Sterns told him that the green in the photograph was lighter than the green in the shooter's jacket.

¶ 23 Following deliberations, the jury found defendant guilty of first degree murder. The trial court subsequently sentenced defendant to a term of 50 years in prison, which included a mandatory 25-year enhancement for commission of a homicide with a firearm.

¶ 24 On direct appeal, defendant argued (1) the State failed to prove beyond a reasonable doubt that he shot James; (2) the trial court committed reversible error by refusing to give defendant's requested accomplice witness jury instruction; (3) the trial court improperly admitted two prior consistent statements of a witness that recanted at trial; and (4) defendant's constitutional right to be physically present was violated when the trial court allowed defendant's attorney to waive his presence at the discussions of two jury notes. This court affirmed defendant's conviction and sentence. See *Willis*, No. 1-07-3108.

¶ 25 In March 2011, defendant filed his *pro se* postconviction petition, alleging that (1) his trial counsel was ineffective for failing to interview and call Denisha Johnson and Dymica Evans as defense witnesses, failing to interview and call an unnamed witness listed as a person interviewed by the police, and failing to *voir dire* the jury regarding gang bias under *People v. Strain*, 194 Ill. 2d 467 (2000), (2) defendant's fourth amendment right was violated when he was taken from a friend's house, and (3) his appellate counsel was ineffective for failing to argue that

the trial court failed to adhere to Supreme Court 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) when questioning the potential jurors during *voir dire*. Defendant attached affidavits from Johnson and Evans to his petition.

¶ 26 In her affidavit, Johnson stated that on December 10, 2005, she was in an attic bedroom at her house located at 7800 South St. Lawrence when Alexander came in with a black gun in his hand. He was wearing a green leather jacket, which he removed and placed on the bed next to her. He then went into another room in the attic where they kept old clothes and put the gun in one of the bags. Johnson said that Alexander asked her if she heard gunshots and she stated that she had not. She asked him what happened and Alexander replied, "I got into it with Stan, and shoot him." [*sic.*]

¶ 27 Her sister then came upstairs with defendant, who took off his tan coat with fur around the hood. Johnson stated that Alexander saw the police were coming and told defendant that if the police ask him something not to say "s*** cause you don't know s***." Defendant said, "yeah." Alexander also told Johnson and her sister the same thing.

¶ 28 The police then came into the room with their guns out and took defendant and Alexander, but they gave Alexander's green leather jacket to defendant and defendant's tan jacket to Alexander. Alexander returned to the house two days later and retrieved the gun. He told them not say anything about the gun.

¶ 29 Johnson said that defendant called her in 2006 and asked her to talk to his lawyer. At first, she declined and did not want to be involved because Alexander told her not to talk to police. She got defendant's attorney's phone number and called a few times, but he never returned her call. She stopped calling when Alexander came to her house and said that if she or

her sister said anything to anyone, then the same thing that happened to James would happen to them or their mother.

¶ 30 Evans stated in her affidavit that on December 10, 2005, she was at 7812 South St. Lawrence when defendant and Alexander left the house. She was babysitting their younger siblings. When they left the house, Alexander was wearing "his green Pelle Pelle jacket." She also stated that Alexander had a gun which he checked to make sure he had bullets and remembered it was a black gun because she told him to put it away because of the young children in the house. Evans said that she wanted to be called as a witness at defendant's trial, but was never contacted by his attorney.

¶ 31 Defendant also included a redacted copy of the police report, which included a summary of an interview with an unnamed witness. The witness stated that he was going to the store on the east side of St. Lawrence when two black males were walking westbound from the store. One male bumped into him and he described the male as 18-20 years old, medium complexion, approximately 5'7" and 135 pounds, wearing a black hat and a green leather jacket. He viewed a lineup and was unable to identify an offender. He was shown the green leather jacket worn by defendant and the witness said it was similar except the offender's jacket had rhinestones on the sleeves.

¶ 32 Defendant also attached his own unsworn affidavit. In his affidavit, defendant stated that on December 10, 2005, he was with Alexander and three other friends smoking marijuana and drinking when they were dropped off at his house, 7812 South St. Lawrence. He played video games with Alexander until Alexander decided to go to the store. Defendant said that Alexander had the green jacket the entire day and he never put it on. He wore a beige winter jacket with fur around the hood.

¶ 33 He saw Sykes and Taylor at the store and James sitting in Sykes' car. Alexander "threw up" a gang sign and then James "threw up" a gang sign. Alexander then told defendant to "keep walking lil bro." Defendant said he knew something was going to happen, but he did not know what. He was in the alley when he heard gunshots, but he did not know who was shooting. He ran to "Denise's backyard" to catch his breath when Alexander ran in behind him. They went into the house. They saw Alonna Carter in the kitchen. When he asked Alexander what happened, Alexander said James "reached" and "the less you know, the better." He said when the police came into the room, they put Alexander's coat on defendant's shoulders and gave defendant's coat to Alexander.

¶ 34 Defendant stated that he told his lawyer about several witnesses who could testify about what he was wearing that day. His attorney told defendant he would look into it. Defendant said his attorney told him at trial that "he wasn't able to locate the witnesses [defendant] asked him to [locate] and that it would be best to move forward with the defense he had planned."

¶ 35 In May 2011, the trial court summarily dismissed defendant's postconviction petition. The court found defendant's claims of ineffective assistance of trial counsel for failing to investigate witnesses to be waived because defendant failed to raise these claims on direct appeal. Waiver aside, the court concluded that the evidence was overwhelming and defendant failed to show prejudice as a result of his attorney's decision not to call these witnesses. The court also found defendant's fourth amendment claim to be waived and his claim of ineffective assistance of appellate counsel was meritless and refuted by the record.

¶ 36 In June 2011, defendant filed a motion to reconsider the dismissal of his postconviction petition. Among the arguments made by defendant, he contended that the trial court should relax its application of the waiver doctrine because he could not have raised the claim of ineffective

assistance of trial counsel on direct appeal because he did not learn of his attorney's failure to contact the witnesses until after trial and that he can show prejudice as a result of his attorney's decision not to investigate these witnesses. He also asked for the appointment of an attorney to obtain an affidavit from Alonna Carter. He asserted that she could testify that Alexander confessed and bragged to her about killing James, that Alexander was wearing the green jacket, and that Alexander washed his hands in the sink while she was doing dishes in the kitchen after the shooting. Defendant stated that Carter moved before he was able to obtain an affidavit from her. Defendant attached an affidavit from his mother stating that she gave his attorney the contact information for Carter, Johnson, and Evans. The trial court denied defendant's motion for reconsideration in August 2011.

¶ 37 This appeal followed.

¶ 38 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). “The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.” *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have

been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005).

¶ 39 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether “the petition is frivolous or is patently without merit.” 725 ILCS 5/122-2.1(a)(2) (West 2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or fact if it is “based on an indisputably meritless legal theory,” such as one that is “completely contradicted by the record,” or “a fanciful factual allegation,” including “those which are fantastic or delusional.” *Hodges*, 234 Ill. 2d at 16-17.

¶ 40 If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2002). At the dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. At this stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations, as all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385.

¶ 41 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.

¶ 42 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be dismissed if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17.

¶ 43 Defendant contends that his trial counsel was ineffective for failing to investigate and call Johnson, Evans and Carter as witnesses at trial. Defendant also asserts that his attorney should have investigated an unnamed witness that was interviewed by the police. The crux of the women's testimony would have been that defendant was wearing a beige coat and Alexander was wearing the green jacket in contrast to trial testimony that defendant was wearing the green jacket. According to her affidavit, Evans saw defendant and Alexander prior to the shooting and defendant was wearing the beige coat with Alexander in the green jacket. Johnson then saw both men after the shooting with defendant in the beige coat and Alexander in the green jacket. According to defendant, Carter also saw them after the shooting and would also testify consistent with Johnson. Defendant also asserts that Johnson and Carter could testify that Alexander made inculpatory statements that he shot James. Finally, Carter could also testify that Alexander

washed his hands in the kitchen sink while she was doing dishes, which according to defendant, explains why Alexander's gunshot residue test was negative.

¶ 44 First, we point out that defendant failed to provide an affidavit detailing Carter's proposed testimony and only offers his version of what her testimony would be. Under the Post-Conviction Act, defendant must provide affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). "A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness." *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.* Since no affidavit was offered from Carter, we cannot review what testimony she might have provided and are unable to determine whether trial counsel was ineffective for failing to investigate her as a potential witness. Therefore, we decline to consider any claims relating to Carter.

¶ 45 Similarly, defendant also asserts that his trial counsel was ineffective for failing to call an unnamed witness that was interviewed by the police. As previously stated, a claim that trial counsel failed to investigate and present a witness must be supported by an affidavit of this proposed testimony. *Enis*, 194 Ill. 2d at 380. Defendant only offers the redacted police report to support his claim. This is insufficient to support a claim of ineffective assistance of trial counsel. We cannot determine whether this unnamed witness would have offered any testimony beneficial to defendant. Further, we note that the police report only stated that the witness saw two black males and one bumped into him. He was unable to identify anyone in a lineup. The witness also said the green jacket worn by defendant was similar to the offender's jacket, but that the

offender's jacket had rhinestones on the sleeves. This statement did not provide any exonerating evidence for defendant. Defendant has failed to support this allegation of ineffective assistance of counsel and the claim was properly dismissed.

¶ 46 Next, we turn to whether defense counsel was ineffective for failing to investigate Johnson and Evans as potential witnesses. "Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). In order to prove ineffective assistance of counsel, defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Giles*, 209 Ill. App. 3d 265, 269 (1991). Neither mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent. *People v. Young*, 341 Ill. App. 3d 379, 383 (2003). "Generally, an attorney cannot be found to have made decisions based on valid trial strategy where he or she fails to conduct a reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses." *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008) (citing *People v. Makiel*, 358 Ill. App. 3d 102, 107-08 (2005), citing *People v. Coleman*, 267 Ill. App. 3d 895, 899 (1994)). Defense counsel's failure to conduct an investigation and to develop a defense and the failure to present available witnesses to corroborate a defense have been found to be ineffective assistance because defense counsel has a legal and ethical professional obligation to explore and investigate a client's case. *Makiel*, 358 Ill. App. 3d at 107-08.

¶ 47 At this stage we must assume that Evans's and Johnson's affidavits are true and we are not to make any credibility determinations. See *Coleman*, 183 Ill. 2d at 385. Both women stated

that they would have been willing to testify at defendant's trial, but were never contacted by defendant's attorney. Johnson further stated that she called defense counsel and left messages on at least two occasions, but defense counsel never called her back. She stopped trying to reach counsel after Alexander threatened her. Taken together, the statements from both women set forth that Alexander was wearing the green jacket identified as being worn by the shooter before and after the shooting. This testimony could have been significant when the eyewitnesses to the shooting, Sterns and Rim, were unable to identify the shooter. The women's testimony would have offered a motive for Alexander to identify defendant as the shooter. This testimony could have aided defendant's case to provide a counter to the State's evidence.

¶ 48 Defendant has set forth sufficient allegations that his attorney failed to engage in any investigation regarding the potential exculpatory testimony Evans and Johnson could have provided. Defendant's allegations do not lack an arguable basis in law and in fact and it is unrebutted by the record that defense counsel did not interview or investigate these potential witnesses. It was not an arguably reasonable trial strategy to fail to investigate and call potentially exculpatory witnesses that identified another individual as the person in the green jacket. Based on our first stage analysis of his postconviction petition and his supporting documents, we find that defendant has set forth an arguable claim that his trial counsel's performance fell below an objective standard of reasonableness.

¶ 49 We also believe that defendant has shown that he was arguably prejudiced by his attorney's failure to investigate these witnesses. At trial, defense counsel presented only one witness in defense. An ASA testified that neither Rim nor her cousin could identify the shooter's green jacket and that Sterns told him that the shooter's jacket was a lighter shade of green than the jacket shown in a photograph. Testimony from Evans and Johnson could have helped to

rebut Sykes and Taylor's testimony that defendant was wearing the green jacket. The women's testimony also would have highlighted Alexander's motive to lie in his prior statements to implicate defendant and his subsequent recanting of those statements at trial. It is arguable that this evidence created a reasonable probability that the result of the trial could have been different. Accordingly, we find that the trial court erred in dismissing defendant's postconviction petition as frivolous and patently without merit and remand the case to the trial court for second stage proceedings under the Post-Conviction Act.

¶ 50 Next, defendant raises two constitutional challenges to his sentence. Defendant did not raise these issues in his postconviction petition, but a defendant may challenge the constitutionality of a statute at any time. *In re M.I.*, 2013 IL 113776, ¶ 39; *People v. Harris*, 2012 IL App (1st) 092251, ¶ 11.

¶ 51 First, defendant contends that the automatic transfer provision of the Juvenile Court Act (705 ILCS 405/5-130 (West 2004)) violates both substantive and procedural due process rights, the eighth amendment of the United State Constitution, and the proportionate penalties clause under the Illinois Constitution. At the time of the offense in December 2005, defendant, born July 16, 1989, was 16 years old.

¶ 52 We review the constitutionality of a statute as a matter of law, subject to *de novo* review. *People v. Sharpe*, 216 Ill. 2d 481, 486-87 (2005). All statutes carry a strong presumption of constitutionality, and to overcome this presumption, the party challenging the statute must clearly establish that the statute violates the constitution. *Sharpe*, 216 Ill. 2d at 487. "We generally defer to the legislature in the sentencing arena because the legislature is institutionally better equipped to gauge the seriousness of various offenses and to fashion sentences accordingly." *Sharpe*, 216 Ill. 2d at 487. "The legislature's discretion in setting criminal

penalties is broad, and courts generally decline to overrule legislative determinations in this area unless the challenged penalty is clearly in excess of the general constitutional limitations on this authority." *Sharpe*, 216 Ill. 2d at 487.

¶ 53 Defendant argues that under the automatic transfer provision, Illinois requires all 15 and 16 year old juveniles to be prosecuted and sentenced as adults without any opportunity for a trial court to review those juveniles' individual characteristics. The automatic transfer provision of the Juvenile Court Act excludes juveniles over 15 years of age who are charged with particular enumerated crimes, including first degree murder, from juvenile court jurisdiction. 705 ILCS 405/5-130 (West 2004). The Illinois Supreme Court has upheld the automatic transfer provision as constitutional. See *People v. J.S.*, 103 Ill.2d 395, 405 (1984); *People v. M.A.*, 124 Ill.2d 135, 147 (1988). Here, following trial in adult court, defendant received a sentence of 50 years, which included a mandatory 25-year enhancement for the use of a handgun in commission of a homicide.

¶ 54 Defendant relies on the recent Supreme Court decisions in *Roper v. Simmons*, 543 U.S. 551 (2005), *Graham v. Florida*, 560 U.S. 48 (2010), *J.D.B. v. North Carolina*, 564 U.S. ____ (2011), and *Miller v. Alabama*, 567 U.S. ____ (2012), to assert that the automatic transfer provision violates due process, the eighth amendment, and proportionate penalties clause because he was automatically transferred to adult court without any consideration of his youthfulness.

"In *Roper*, the Supreme Court held that the eighth amendment prohibits the death penalty for juvenile offenders.

Roper, 543 U.S. at 568. The Court reasoned that the 'death penalty is reserved for a narrow category of crimes and offenders,' and that 'juvenile offenders cannot with reliability be classified among the

worst offenders.' *Id.* at 569. In *Graham*, the Supreme Court held that the eighth amendment forbids a sentence of life without the possibility of parole for juveniles who did not commit homicide. *Graham*, 560 U.S. at 74-75. The Court said that, although the state is not required to release a juvenile during his natural life, the state is forbidden 'from making the judgment at the outset that those offenders never will be fit to reenter society.' *Id.* at 75. In *J.D.B.*, the Supreme Court held that a child's age, when known or objectively apparent to a reasonable police officer, is a relevant consideration in the *Miranda* custody analysis. *J.D.B.*, 564 U.S. at ___, 131 S.Ct. at 2406. In *Miller*, the Supreme Court held that the eighth amendment prohibits a sentencing scheme that mandates life in prison without the possibility of parole for juvenile offenders, including those convicted of homicide. *Miller*, 567 U.S. at ___, 132 S.Ct. at 2469. The Court stated that a judge must have the opportunity to look at all of the circumstances involved before determining that life without the possibility of parole is the appropriate penalty. See *id.* at ___, 132 S.Ct. at 2469." *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 48.

¶ 55 Defendant acknowledges that the automatic transfer provision has previously been held to comply with constitutional requirements, but contends that those cases were wrongly decided in light of *Roper*, *Graham*, *J.D.B.*, and *Miller*. However, several recent appellate decisions have already considered and rejected the same constitutional arguments advanced by defendant. See

People v. Pacheco, 2013 IL App (4th) 110409 (*pet. for leave to appeal allowed*, No. 116402 (September 25, 2013)), *People v. Patterson*, 2012 IL App (1st) 101573 (*pet. for leave to appeal allowed*, No. 115102 (January 30, 2013)), *People v. Croom*, 2012 IL App (4th) 100932, *People v. Jackson*, 2012 IL App (1st) 100398, and *People v. Salas*, 2011 IL App (1st) 091880. We see no reason to depart from the analysis in these decisions, as detailed below.

¶ 56 In rejecting the defendant's due process challenge, the *Jackson* court found:

"Both *Roper* and *Graham* decided constitutional challenges made to sentencing statutes: whether the death penalty and natural life in prison without parole for juveniles constituted cruel and unusual punishment under the eighth amendment. No due process arguments were raised or addressed in either *Roper* or *Graham*. In the instant case, we are concerned not only with a non-sentencing statute but a challenge made under the due process clause. Therefore, defendant's argument is without merit as *People v. J.S.* remains on solid footing with the Supreme Court's holdings in *Roper* and *Graham*. Defendant's substantive due process rights were not violated when he was automatically transferred to adult court pursuant to the automatic transfer provision of the Illinois Juvenile Court Act of 1987 (705 ILCS 405/5–130 (West 2006))." *Jackson*, 2013 IL App (1st) 100398, ¶ 16.

¶ 57 Further, as the Fourth District observed in *Pacheco*,

"In *Croom*, 2012 IL App (4th) 100932, ¶ 16, this court noted *Roper* and *Graham* did not consider due process arguments and found

those cases distinguishable because each ‘applied (1) a different analysis (2) under a different test for (3) an alleged violation of a different constitutional provision regarding severe sentencing sanctions—not the automatic transfer to adult court at issue here.’ *Miller* does not require a different result because it only dealt with eighth-amendment arguments and not substantive and procedural due process.” Pacheco, 2013 IL App (4th) 110409, ¶ 63.

¶ 58 Similarly, Illinois courts have declined to find that the automatic transfer provision violates the eighth amendment's prohibition against cruel and unusual punishment. The *Salas* court concluded:

"The statutes at issue in *Roper* and *Graham* imposed the death penalty (*Roper*) and natural life in prison without parole (*Graham*) on juveniles and clearly constituted punishments that were subject to constitutional analysis under the eighth amendment. By contrast, the automatic transfer statute at issue here does not impose any punishment on the juvenile defendant, but rather it only provides a mechanism for determining where defendant's case is to be tried, *i.e.*, it provides for the forum in which his guilt may be adjudicated. The punishment imposed on defendant here, specifically, his 50-year sentence of imprisonment, was made pursuant to the Unified Code of Corrections and not pursuant to the automatic transfer statute. As the automatic transfer statute

does not impose any punishment, it is not subject to the eighth amendment." *Salas*, 2011 IL App (1st) 091880, ¶ 66.

¶ 59 The *Jackson* court further reasoned:

"The automatic transfer provision is not a penalty provision in even the broadest sense. It merely dictates for a small class of older juvenile defendants who are charged with the commission of certain heinous crimes where their cases are to be tried. Guilt has not been determined at this stage, let alone what punishment, if any, should be imposed. The automatic transfer provision does not dictate any form of punishment as that term is used throughout criminal statutes. Because the automatic transfer provision does not mandate or even suggest a punishment, any analysis as to whether or not it violated the eighth amendment's proscription against cruel and unusual punishment is futile. The automatic transfer provision does not impose any punishment. Therefore, it is not subject to the eighth amendment. We find no violation of the cruel and unusual punishment clause." *Jackson*, 2012 IL App (1st) 100398, ¶ 24.

¶ 60 The *Salas* court also reached the same conclusion when considering the defendant's challenge to the proportionate penalties clause of the Illinois constitution.

"Our analysis of defendant's eighth amendment challenge also applies to his proportionate penalties challenge. The Illinois Supreme Court has held: the 'proportionate penalties clause is

coextensive with the cruel and unusual punishment clause.

[Citation.] Both clauses apply only to the criminal process—that is, to direct actions by the government to *inflict punishment*.'

(Emphasis added.) *In re Rodney H.*, 223 Ill. 2d 510, 518 (2006).

The automatic transfer statute imposes no penalty or punishment and so neither the proportionate penalty clause nor the *Roper* and *Graham* analysis applies here." *Salas*, 2011 IL App (1st) 091880,

¶ 70.

¶ 61 Here, defendant has not provided any persuasive argument for us to depart from the well reasoned analysis of the cases discussed. Accordingly, defendant's constitutional challenge of the automatic transfer provision fails.

¶ 62 Defendant also raises similar constitutional arguments in regard to the mandatory minimum sentence for a first degree murder, the mandatory firearm enhancement, and the truth-in-sentencing provision, which result in a mandatory minimum sentence of 45 years. Defendant contends that the imposition of this sentence on a juvenile offender fails to allow the trial court to have "an opportunity to make an individualized determination as to whether any or all of these statutes should apply in light of [defendant's] age and culpability. The imposition of these harsh mandatory penalties on minors violates the Eighth Amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution."

¶ 63 Defendant points to the convergence of three statutes for his argument. First, the sentence for first degree murder is 20 to 60 years in prison. 730 ILCS 5/5-8-1(a)(1)(a) (West 2004). Next, under the firearm-enhancement statute, if a defendant commits the offense while armed with a firearm, "25 years shall be added to the term of imprisonment imposed by the

court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004). Finally, pursuant to the truth-in-sentencing statute, a person serving a term of imprisonment for first degree murder "shall receive no good conduct credit and shall serve the entire sentence imposed by the court[.]" 730 ILCS 5/3-6-3(a)(2)(i) (West 2004). Based on the convergence of these sentencing statutes, defendant, who was 16 years old at the time of the murder, faced a mandatory minimum sentence of 45 years in prison, during which he would not be eligible for good-conduct credit. Defendant argues that in light of the decisions in *Roper*, *Graham*, and *Miller*, this sentencing structure violated the eighth amendment and the proportionate penalties clause. We are not persuaded.

¶ 64 Unlike those cases, which involved the imposition of the death penalty (*Roper*) and a mandatory life sentence without the possibility of parole (*Graham* and *Miller*) without allowing the trial court any discretion in sentencing, the trial court in the instant case was able to consider defendant's age and culpability in sentencing defendant. The trial court had the discretion to impose a sentence between 45 and 85 years. At sentencing, the trial court indicated that it considered defendant's history and rehabilitative potential.

"I am considering the fact that that act occurred and that the jurors found you guilty of two counts of first degree murder of Stanley James based on the fact that you used, personnel [sic] discharged a firearm. That you did so while he was unarmed and in that vehicle eating food. Your leadership skills were misused to say the very least.

You have a lot, though, to recommend you for rehabilitation within a structured setting. It seems that you are

capable of conforming your conduct to certain rules and requirement[s].

And I am impressed with the glowing report of all of your teachers in this regard.

However, the minimum sentence that this status [*sic*] will permit is 45 years. And the crime you committed was done with impunity. And I cannot give you just the minimum.

But I am taking into consideration that you are creative, your leadership skills and the fact that I think you can utilize your time helpfully for yourself and for others. That I believe you will actually utilize your time helpfully.

I will not give the the [*sic*] sentence the State requests. I cannot give you 45. I will give you 50 years in the Illinois Department of Corrections. And I believe that you can utilize these skills that you possess.

¶ 65 In *Miller*, the Supreme Court concluded a mandatory life sentence without parole precluded consideration of an offender's age, background, and relative culpability and would likely result in a greater sentence than adults would serve. The *Miller* court stated, "*Graham*, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles." *Miller*, at ___, 132 S.Ct. at 2475. That opportunity occurred in this case when the trial court considered defendant's mitigating evidence and criminal history before imposing a sentence five years above the minimum. The Supreme Court has not held that a mandatory

minimum sentence of 45 years violates the eighth amendment and we decline to extend their holding to the circumstances of this case. Unlike this line of Supreme Court cases, the trial court had an opportunity to use discretion in sentencing defendant.

¶ 66 We also note that the Illinois Supreme Court in *People v. Davis*, 2014 IL 115595, recently considered the applicability of *Miller* to mandatory life sentences without the possibility of parole for juveniles as a violation of the eighth amendment. The supreme court held that *Miller* set forth a new substantive rule and a mandatory life sentence without parole for a juvenile could be retroactively challenged. *Id.* at ¶ 34-43. However, the supreme court made no reference to extending *Miller* to be applicable beyond a mandatory life sentence without parole. Rather, the court observed that "[a] minor may still be sentenced to natural life imprisonment without parole so long as the sentence is at the trial court's discretion rather than mandatory." *Id.* at ¶ 43. Here, the trial court had discretion to consider mitigating evidence before imposing a sentence and no eighth amendment violation occurred.

¶ 67 Further, the Illinois Supreme Court has stated the "proportionate penalties clause is coextensive with the cruel and unusual punishment clause." *Rodney H.*, 223 Ill. 2d at 518. "A sentence does not offend the requirement of proportionality if it is commensurate with the seriousness of the crime and gives adequate consideration to the rehabilitative potential." *People v. St. Pierre*, 146 Ill. 2d 494, 513 (1992). When considering a constitutional challenge regarding the imposition of an adult sentence, the *Pacheco* court reasoned:

"The Supreme Court did not hold in *Roper*, *Graham*, or *Miller* the eighth amendment prohibits a juvenile defendant from being subject to the same mandatory minimum sentence as an adult, unless the mandatory minimum sentence was death or life in prison

without the possibility of parole. Defendant was sentenced to neither of these. The minimum 20-year term defendant faced in this case does not compare with the death penalty or a mandatory term of life in prison without the possibility of parole. The sentencing range applicable to defendant in this case is not unconstitutional pursuant to *Roper*, *Graham*, and *Miller*, and the sentence defendant received violated neither the eighth amendment nor the proportionate penalties clause." *Pacheco*, 2013 IL App (4th) 110409, ¶ 58.

¶ 68 We agree with the conclusion reached in *Pacheco* and adopt it in this case. For the same reason his eighth amendment challenge failed, defendant's proportionate penalties argument also cannot succeed. Accordingly, we uphold the imposition of defendant's 50-year sentence.

¶ 69 Based on the foregoing reasons, we affirm defendant's sentence and reverse the trial court's first stage dismissal of defendant's postconviction petition and remand for further proceedings consistent with this decision.

¶ 70 Affirmed in part; reversed in part and remanded.