FOURTH DIVISION
December 24, 2014

No. 1-13-0878

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.	)	03 CR 27165
	)	
JECORREY DUNCAN,	)	Honorable
	)	Jorge Luis Alonso,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Puccinski concurred in the judgment.

ORDER

¶1 *Held*: The trial court's summary dismissal of defendant's postconviction petition is affirmed where defendant failed to present meritorious claims of *Brady* violations and ineffective assistance of trial and appellate counsel; defendant's argument raised for the first time on appeal that under settled law he was improperly convicted and sentenced for both attempt murder and aggravated battery with a firearm in violation of the one-act, one-crime doctrine is forfeited because it was not alleged in defendant's postconviction petition as a ground for his ineffective assistance of counsel claim.

¶2 Following a jury trial, defendant was convicted of six counts of attempt first-degree murder and two counts of aggravated battery with a firearm. He was sentenced to a 42-year prison term: six concurrent 30-year prison terms for the attempt murder convictions, one 12-year term for the aggravated battery conviction to be served consecutive to the 30-year terms, and one 8-year term for the other aggravated battery conviction to be served concurrently with the 12-year term.

¶3 Following a direct appeal, defendant filed a *pro se* postconviction petition, which is the subject of this appeal. In his *pro se* postconviction petition, defendant alleged numerous constitutional violations, which included prosecutorial misconduct and ineffective assistance of trial and appellate counsel. The trial court summarily dismissed defendant's postconviction petition as frivolous and patently without merit. This appeal followed.

¶4 Background

¶5 Defendant and his co-defendants, Lashun Members and Willie Wells, were tried in separate but simultaneous jury trials. The evidence adduced at defendant's trial showed that on November 14, 2001, Kenneth Burks was "hanging" out with Deandre Bullock, Antoine Stanford, Kenneth Woolridge, Jeffrey Pearson and Anthony Teamer near the intersection of Christiana and Huron in Chicago. Burks testified at trial that he was a member of the Gangster Disciples. According to Burks, the Traveling Vice Lords' territory was just to the east of the intersection. Just before 8 p.m., a few men pulled up in a green "Tahoe." Burks identified LaShun Members as the driver of the Tahoe. Burks also identified Willie Wells and defendant as passengers. After Wells had a conversation with some of the men standing on the corner, the men got back into the Tahoe and drove off. Burks heard Wells say "We'll be back" as the Tahoe drove away.

¶6 Shortly thereafter, four policemen pulled up to the corner of Christiana and Huron. Chicago police officers Edward May, Sean Ryan, Daniel Gorman and Jerome Turbyville were in plainclothes in an unmarked squad car. Officer Ryan testified that after he saw Pearson throw an object near a fence by the corner, he and the other officers detained the five men standing on the corner and handcuffed them. All four officers testified at trial that after Pearson was placed in the unmarked police car, they heard loud gunshots. Officer May testified that he looked east and saw four men, three of which had guns. The fourth person ran away. According to the officers' trial testimony, one man was firing a rifle, one a shotgun, and another a handgun. Officers May and Ryan testified that they yelled loudly that they were police officers and asked the men to stop shooting. The shooting did not stop, however. Officer Ryan said he dove to the ground and returned fire until the shooting stopped. Bullock was hit by gunfire. Officer Ryan said he had a puncture wound on his arm that he believed was caused by a shotgun pellet. Temeko Smith testified she was exiting a store near Homan and Huron when she heard gunfire and was struck by a bullet.

¶7 Officer May testified that he returned fire until he ran out of bullets. According to Officer May, the man firing the handgun and the man firing the shotgun ran southeast towards an alley. The man with the rifle, who Officer May identified in court as Wells, also ran towards the alley, but was limping. When Wells reached the alley, he threw his rifle toward a garage. Wells fell down and Officer May noticed Wells was bleeding from his leg. Officer Turbyville handcuffed Wells. Officer May said that while Wells was lying on the ground handcuffed, someone told Wells he was "in trouble" because Officer Ryan had been shot. Officer May testified that Wells "blurted out, I didn't have a shotgun; my brother did."

¶8 Officer May said that although he got a good look at all three shooters, he did not send out a description of the remaining two suspects because his radio was broken. Officer Turbyville said he used his radio to call for backup, but could not remember sending out a description of the two remaining suspects. Officers Ryan and Gorman testified they did not call in a description of the remaining two suspects, nor did they give a description to the officers interviewing them at the scene. Officers May, Ryan and Gorman identified defendant in court as the man who fired the shotgun.

¶9 Detective Patrick O'Donovan testified that he accompanied Wells in the ambulance to the hospital. Detective O'Donovan said he interviewed Wells several times. After the fifth interview, Wells agreed to give a handwritten statement. Over defense counsel's objection, Detective O'Donovan was allowed to testify that after Wells provided his statement, the police were looking for defendant and another man known as Luv as possible offenders. Detective O'Donovan said Wells was shown a series of photographs. When the State asked Detective O'Donovan who he was looking for after Wells looked at the photos, Detective O'Donovan said defendant and Members.

¶10 On November 29, 2001, Members turned himself into police. Officers May and Ryan identified Members in a lineup the next day as the person they had seen firing the handgun. Sometime after the shooting, defendant's photograph was published in the police daily bulletin as a suspect.

¶11 Detective Jim Hennigan testified that on November 10, 2003, he went to Georgia to extradite defendant. While in Georgia, Detective Hennigan met with defendant in an interview room and told him why they were there. Defendant denied involvement in the shooting. He told Detective Hennigan he was at a Target store with a female friend whose name he could not

remember when the shooting occurred. Defendant told Detective Hennigan that he knew Wells, his half-brother, had been shot in that incident.

¶12 Detective Hennigan said that on November 11, 2003, defendant was taken back to the Area 4 police station in Chicago, where he was identified in a lineup by Officers May, Turbyville, and Gorman. Officer May admitted he had seen defendant's picture in the police daily bulletin after the shooting, but "a long time before the lineup."

¶13 Following the lineup, defendant was interrogated by Detectives Hennigan and O'Donovan. Detective Hennigan told defendant he had been identified in the lineup. On November 12, 2003, Detectives Hennigan and O'Donovan interrogated defendant for the fourth time. Defendant admitted he had been involved in the shooting. Defendant told Detective Hennigan that he, Members, and Wells went to the corner of Christiana and Huron and began firing. Defendant told Detective Hennigan that he heard someone say police, but kept firing. Defendant told Detective Hennigan he was firing the rifle, Members the shotgun, and Wells the handgun. Defendant said he fled the area and stayed with relatives until he went to Georgia. Detective Hennigan said defendant told him to tell the officers he was sorry, and that he did not know they were police officers when he started firing. Detective Hennigan admitted on cross-examination, however, that he had said in his police report that defendant told him they all began to run when they heard police.

¶14 Assistant State's Attorney Bregenzer testified that defendant agreed to give a handwritten statement after being informed of his *Miranda* rights. Outside the presence of the detectives, defendant told ASA Bregenzer he had been treated well. Defendant's handwritten statement, which was read to the jury, was substantially the same as the statement he gave to Detectives Hennigan and O'Donovan. According to the written statement, defendant identified and signed

photographs of Members and Wells as accomplices to the shooting. Defendant said in the statement that Wells is his brother.

¶15 Police investigators processed the crime scene area and recovered a forty-five-caliber handgun, a 20 gauge sawed-off shotgun, and a 30-caliber carbine rifle. Shotgun shells recovered from the scene were consistent with shells from the recovered shotgun, but were not a conclusive match. A latent palm print recovered from the shotgun matched defendant's print.

¶16 Defendant testified that on November 14, 2001, Wells and Members picked him up in a green Tahoe. They went to a store, and later a restaurant. Wells and Members dropped defendant off at around 6 p.m., and defendant then went to Target with his cousin's girlfriend, Nicole. A little after 8 p.m., someone called Nicole and told her Wells had been shot. Defendant said he and Nicole went to the hospital to see Wells, but they were not allowed to see him. Defendant said he stayed in Chicago until February 2003, when he moved to Georgia.

¶17 Defendant said that after he was extradited to Chicago, Detectives Hennigan and O'Donovan interrogated him repeatedly for two days. Defendant did not remember making the incriminating statement to Detective Hennigan. Defendant testified that he told ASA Bregenzer that he did not want to speak with her. Defendant said he did not read the handwritten statement before signing it. He only remembered signing one or two pages. He admitted on cross-examination, however, that his signature appeared on each page, as well as on various photographs presented during the interrogation. Defendant said he was hungry and tired when he signed the statement. Defendant said he was not involved in the shooting. He admitted the shotgun and rifle recovered from the scene were his, and that he stored the weapons at his grandmother's house. He said the last time he handled the guns was about three weeks before the shooting. Defendant admitted on cross-examination that he and his half-brother Wells were

once members of the Traveling Vice Lords street gang, but denied being affiliated with the gang in 2001.

¶18 The parties stipulated that Alyssa Sepe, a nurse who was working at Cook County Hospital on the night that Bullock was brought in for gunshot wounds, would testify that she recovered People's Exhibit Number 47, one fired bullet, from the floor of the emergency room. However, Sepe did not know where the bullet came from or from which patient that bullet came from. The parties further stipulated that nurse Sepe turned over the bullet to the Chicago Police Department forensic investigators and that the chain of custody was proper. Forensic Scientist William Demuth, an expert in the field of firearm examination and comparison, testified that he examined People's Exhibit Number 47, the bullet recovered by nurse Sepe from the floor of the emergency room (the "stipulated bullet"), and determined it had not been fired from Officer May's gun, defendant's gun, or the two co-defendants' guns. He further testified that his findings were "inconclusive" as to whether the bullet was fired from Officer Ryan's or Officer Gorman's gun.

¶19 The jury found defendant guilty of six counts of attempt first-degree murder and two counts of aggravated battery with a firearm. Following a sentencing hearing, the trial court sentenced defendant to six concurrent 30-year prison terms for the attempt murder convictions, one 12-year term for one of the aggravated battery conviction to be served consecutive to the 30-year terms, and one 8-year term for the other aggravated battery conviction to be served concurrently with the 12-year term, making defendant's aggregate sentence 42 years.

¶20 On direct appeal, defendant argued that: (1) he made a *prima facie* case that the State engaged in a discriminatory use of peremptory challenges to exclude African Americans from the jury, in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986); (2) he was denied his right to a

fair trial before a fair and impartial judge; (3) he was denied his Sixth Amendment right of confrontation when the trial court allowed the State to admit an allegedly testimonial hearsay statement made by a non-testifying co-conspirator under the co-conspirator hearsay exception; and (4) he was denied his Sixth Amendment right to confrontation when the trial court allowed the State to elicit testimony that during a police interrogation, a non-testifying co-defendant named defendant as an accomplice in the shooting. Following a remand to the trial court to conduct further *Batson* proceedings, we affirmed defendant's convictions and sentence.

¶21 Defendant filed the instant *pro se* postconviction petition on October 11, 2012, and subsequently amended it on November 8, 2012. The petition made claims of ineffective assistance of trial counsel, prosecutorial misconduct, ineffective assistance of appellate counsel and abuse by the trial court. Defendant argued that trial counsel was ineffective by: (1) failing to call an alibi witness, (2) failing to object to the State's improper closing argument, (3) stipulating to nurse Sepe's testimony regarding a bullet that was found in the hospital emergency room and the chain of custody for that bullet (the "stipulated bullet"), (4) failing to cross examine Debra McGarry, (5) failing to investigate overall, (6) failing to argue evidence of blood and flesh on the stipulated bullet, (7) failing to object to evidence of Detective O' Donovan's six interviews with co-defendant Wells, (8) failing to object to Detective Hennigan's perjured testimony that Officer Ryan had been shot, (9) failing to challenge the original grand jury indictment, and (10) failing to establish who shot victim Deandre Bullock. Defendant argued that the State committed prosecutorial misconduct by: (1) calling a witness (Officer Ryan) who was under investigation for criminal conduct, (2) failing to tender ballistics evidence, namely the blood and tissue on the stipulated bullet, (3) violating the chain of custody of the stipulated bullet, (4) introducing hearsay evidence of Detective O'Donovan's interviews with co-defendant Wells in violation of a

motion *in limine*, (5) changing the wording in the grand jury indictment, (6) making improper arguments during the entire proceeding including presenting evidence of gang violence without giving the jury gang violence instructions, and (7) introducing Detective Hennigan's perjured testimony. Defendant argued that appellate counsel was ineffective because he failed to raise any meritorious issues on appeal, such as all those that he raised in his postconviction petition. Defendant argued that the trial court abused its discretion by: (1) improperly denying a mistrial where defendant was held for more than 48 hours before a probable cause hearing, and (2) improperly sustaining the State's objection to Officer Strong's testimony about the descriptions of the perpetrators where defendant had been subjected to a suggestive line-up. Attached to defendant's postconviction petition is an affidavit of defendant that verifies his identity, his inability to pay court fees and lack of any property, and that states defendant "recently obtained some misplaced legal documents consistent with affiant's trial proceedings." Also attached to the petition was a "Fired Bullet Worksheet," which, with respect to the stipulated bullet, indicates "Apparent blood/tissue" with arrows from that indication to two other comments: "disinfected w/ 10% bleach x 5 min" and "material removed w/ detergent".

¶22 On January 9, 2013, upon review of defendant's arguments in his postconviction petition, the trial court dismissed the petition as frivolous and patently without merit. In its order, the trial court judge made several findings, including: (1) the stipulation regarding nurse Sepe's testimony stated that she did not know for certain if the bullet she found on the hospital floor came from Bullock, (2) "it does not appear from the record that this [stipulated] bullet formed an important part of the State's case," and (3) "without this bullet, there remained overwhelming evidence that Bullock was at the scene, that petitioner and his co-defendants were shooting at him, and that Bullock was shot multiple times, not just once."

¶23 Defendant now appeals the trial court's summary dismissal of the postconviction petition claiming that the petition stated an arguable basis of a constitutional claim where: (1) the State committed prosecutorial misconduct when it allegedly failed to tender evidence that there was flesh and blood on the stipulated bullet that had been wiped clean, or (2) alternatively, defense counsel was ineffective for failing to make any argument relating to the flesh and blood that was wiped clean from the stipulated bullet, and (3) trial counsel and appellate counsel were ineffective due to their failure to challenge defendant's conviction and 12-year sentence for aggravated battery with a firearm to Bullock under the one-act, one-crime doctrine. For the reasons below, we affirm the trial court's summary dismissal of defendant's postconviction petition.

¶24 Analysis

¶25 The Postconviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides an avenue by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. *People v. Jones,* 211 Ill. 2d 140, 143-44 (2004). To be entitled to postconviction relief, a defendant must demonstrate that he has suffered a substantial deprivation of his federal or state constitutional rights in the proceedings that produced the conviction or sentence being challenged. *People v. McNeal,* 194 Ill. 2d 135, 140 (2000). The scope of the postconviction proceeding is limited to constitutional matters that have not been, and could not have been, previously adjudicated. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Accordingly, any issues which could have been raised on direct appeal, but were not, are procedurally defaulted and any issues which have previously been decided by a reviewing court are barred by the doctrine of *res judicata. People v. Rissley,* 206 Ill. 2d 403, 412 (2003).

¶26 Section 122-2 of the Act requires that a postconviction petition must, among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2010). At the first stage of review of a postconviction petition, 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 2010). 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 2010).

¶27 A petition is "frivolous or patently without merit" if "the petition has no arguable basis either in law or in fact." *People v. Hodges,* 234 Ill. 2d 1, 16 (2009). A petition lacking an arguable basis either in law or in fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id*. Our review of the trial court's summary dismissal of a postconviction petition is *de novo*. *Id.* at 9.

¶28 *Brady* Violation (Prosecutorial Misconduct)

¶29 Defendant argues that he presented an arguable basis of a constitutional claim of prosecutorial misconduct because he showed that the State allegedly withheld evidence contained in the "Fired Bullet Worksheet" that showed that the stipulated bullet contained flesh and blood that had been wiped cleaned. To successfully show a *Brady* violation pursuant to *Brady v. Maryland,* 373 U.S. 83 (1963), defendant must make a showing on three propositions: (1) the evidence was suppressed by the State either willfully or inadvertently; (2) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *People v. Jarrett*, 399 Ill. App. 3d 715, 727-28 (2010) (citing *People v. Burt*, 205 Ill. 2d 28, 47 (2001)).

¶30 Defendant concedes that "[e]vidence was presented at trial that this fired bullet was tested and was found not to have come from [defendant's] gun or the guns of the two co-defendants" and that "it was inconclusive as to whether [the stipulated bullet] came from the guns of two officers who had been firing weapons at the scene (Ryan and Gorman)." However, defendant argues that due to prosecutorial misconduct, the jury did not hear "evidence that the fired bullet had blood and flesh on it that was cleaned off of the fired bullet by police before they tested it." According to defendant, this evidence was "critical to [defendant's] defense" because, had the jury heard such evidence, "the jury could have found that [defendant] was not accountable for the shooting of Bullock" because it could have "concluded that if the police fired one bullet that struck Bullock, it is likely that all of the bullets that struck Bullock were fired by the police."

¶31 The State, in turn, argues that defendant failed to attach an affidavit to his postconviction petition to show that the State failed to tender the "Fired Bullet Worksheet" or the evidence contained therein and, for that reason alone, the prosecutorial misconduct argument in defendant's postconviction petition must fail. The State further argues that, notwithstanding the lack of proof that the State withheld evidence, defendant failed to establish a prosecutorial misconduct claim because he cannot show how the evidence of blood and tissue on the stipulated bullet would be favorable to him or how the absence of such evidence prejudiced him at trial.

¶32 Illinois courts have long recognized that a criminal defendant's right to due process and a fair trial is violated by the prosecution's failure to disclose material evidence favorable to the defense and that such claims are cognizable in postconviction proceedings. *People v. Harris,* 206 Ill. 2d 1, 44 (2002). Pursuant to *Brady*, the State has an affirmative duty to disclose any evidence that is favorable to the accused and material to either guilt or punishment. *Brady*, 373 U.S. at 87. To successfully show a *Brady* violation, the defendant must make a showing on three

propositions: (1) the evidence was suppressed by the State either willfully or inadvertently; (2) the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching; and (3) the accused was prejudiced because the evidence is material to guilt or punishment. *Jarrett*, 399 Ill. App. 3d at 727-28 (citing *Burt*, 205 Ill. 2d at 47).

¶33 Here, defendant makes no allegation that evidence that there was flesh and blood on the stipulated bullet that was wiped clean was withheld from his attorney. Defendant's affidavit attached to his postconviction petition merely states that he "recently obtained some misplaced legal documents consistent with affiant's trial proceedings." This allegation does not support a finding that the State willfully or inadvertently suppressed evidence. On this basis alone, defendant's prosecutorial claim must fail as he cannot satisfy the first element of a *Brady* claim. *Jarrett*, 399 Ill. App. 3d at 727-28 (one of the three elements that must be satisfied in order to successfully show a *Brady* violation is that "the evidence was suppressed by the State either willfully or inadvertently[.]").

¶34 Even if we assume that the State willfully or inadvertently suppressed evidence that the stipulated bullet contained blood and flesh that had been wiped clean, defendant failed to show how the presence of blood and flesh on the stipulated bullet was favorable to him. Such evidence was inconsequential to defendant's case given that the jury had already heard testimony from forensic scientist Demuth that the stipulated bullet did not come from defendant's gun or co-defendants' guns. As such, the presence of unidentified blood and flesh on a bullet that the jury was already aware did not come from defendant's gun or co-defendants' guns does not add anything to that evidence—and it certainly does not add any evidence favorable to defendant given that it is possible the bullet was not even related to this case. The jury found defendant guilty of shooting at Bullock knowing that the stipulated bullet that was found on the floor of the

hospital emergency room on the night that Bullock was brought in for gunshot wounds did not come from defendant's or co-defendants' guns. Thus, because the presence of unidentified blood and tissue on the stipulated bullet is inconsequential to defendant's case, defendant cannot show that such evidence was favorable to him. *Jarrett*, 399 Ill. App. 3d at 727-28 (one of the three elements that must be satisfied in order to successfully show a *Brady* violation is that "the undisclosed evidence is favorable to the accused because it is either exculpatory or impeaching.").

¶35 Last, defendant also cannot show how the absence of evidence that there was blood and tissue on the stipulated bullet was material to his guilt given the overwhelming evidence that was presented against defendant at trial. Evidence is material if there is a reasonable probability that the result of the defendant's trial would have been different had the prosecution disclosed the evidence. *Harris*, 206 Ill. 2d at 311; *People v. Anderson*, 375 Ill. App. 3d 990, 1011 (2007). "A reasonable probability of a differing result is one that is sufficient to undermine confidence in the trial's actual outcome." *People v. Thomas,* 364 Ill. App. 3d 91, 101 (2006); see also *People v. Hobley*, 182 Ill. 2d 404, 433 (1998).

¶36 At trial, all four police officers identified defendant as one of the men who shot at them on November 14, 2001. All four officers also testified defendant was the individual holding the shotgun at the time of the shooting. Moreover, defendant confessed to his involvement when he spoke with the police and ASA Bregenzer following his arrest and agreed to memorialize his statement in a handwritten statement. Defendant's fingerprints were also found on the recovered shotgun used in the shooting. Although we recognize defendant recanted his confession and testified he was not present for the shooting at trial, we note that the rest of the evidence presented against him overwhelmingly established his guilt beyond a reasonable doubt, including

that Bullock was at the scene, defendant and co-defendants were shooting at Bullock and Bullock was shot multiple times, not just once. Even if we assume that the State withheld evidence that there was blood and flesh on the stipulated bullet that had been wiped clean, and assumed that defendant could show that such evidence was favorable to him, defendant was not prejudiced by the absence of that evidence as it did not undermine the trial court's actual outcome in any way. See *Thomas,* 364 Ill. App. 3d at 101; see also *Hobley*, 182 Ill. 2d at 433. As such, we find defendant failed to establish a *Brady* violation because: (1) he failed to show that the State willfully or inadvertently withheld evidence, (2) evidence of blood and tissue on the stipulated bullet was inconsequential to his case, and (3) the absence of evidence of blood and tissue on the stipulated bullet was not material to his guilt.

¶37 Ineffective Assistance of Trial Counsel

¶38 In the alternative, defendant argues that, if the evidence in the "Fired Bullet Worksheet" showing that the stipulated bullet contained flesh and blood that had been wiped clean was in fact turned over to defense counsel, he presented an arguable basis of a constitutional claim of ineffective assistance of trial counsel because trial counsel failed to make any argument before the jury relating to the flesh and blood found on the stipulated bullet. We disagree.

¶39 Ineffective assistance of counsel claims are judged under the now familiar standard set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998). *Strickland* established a two-pronged test to evaluate ineffectiveness-of-counsel claims. Ineffective assistance of counsel is established by a showing that: (1) counsel's performance was so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and (2) that the deficient performance so prejudiced the defense as to deny the defendant a fair trial. *Strickland,* 466 U.S.

at 687; see *People v. Albanese,* 104 Ill. 2d 504, 525-27 (1984). Both prongs of the *Strickland* test must be satisfied before a defendant can prevail on a claim of ineffective assistance of counsel. *Coleman*, 183 Ill. 2d at 397-98. Courts, however, may resolve ineffectiveness claims under the two-prong *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. See *People v. Erickson,* 161 Ill. 2d 82, 90 (1994); *Albanese,* 104 Ill. 2d at 525-27.

¶40 Defendant's ineffective assistance of trial counsel claim fails under both prongs of the *Strickland* test. First, trial counsel's performance in not presenting evidence of blood and flesh on the stipulated bullet was not "so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms" because it was a matter of trial strategy. Allegations arising from matters of judgment or trial strategy will not support a claim on ineffective assistance of counsel. *People v. Labosette*, 236 Ill. App. 3d 846, 856 (1992). The decision to rely on one theory of defense to the exclusion of other theories is a matter of trial strategy. *People v. Clark*, 207 Ill. App. 3d 439, 450 (1991). Defendant's defense at trial was that he could not have committed any of the crimes he was charged with because he was at Target with a friend at the time of the shooting. As such, trial counsel's decision not to present evidence or argument relating to the blood and flesh that was wiped cleaned from the stipulated bullet, which defendant argues could have shown that the police rather than himself or any co-defendant shot at Bullock, was a matter of trial strategy. Accordingly, we cannot find trial counsel's decision not to present evidence or argument that the stipulated bullet contained flesh and blood that had been wiped clean was so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms, especially given defendant's

defense to the charged crimes was that he was not present at the shooting. See *Strickland,* 466 U.S. at 687.

¶41 Second, we do not find that the omission of evidence relating to blood and flesh that was wiped clean from the stipulated bullet prejudiced the defendant such that he was denied a fair trial given the overwhelming evidence presented against him. As previously stated, at trial, all four police officers identified defendant as one of the men who shot at them on November 14, 2001. All four officers also testified defendant was the individual holding the shotgun at the time of the shooting. Defendant's fingerprints were also found on the recovered shotgun used in the shooting. Moreover, defendant confessed to his involvement when he spoke with the police and ASA Bregenzer following his arrest and agreed to memorialize his statement in a handwritten statement. Although we recognize defendant recanted his confession and testified he was not present for the shooting at his trial, we note that the rest of the evidence presented against him overwhelmingly established his guilt beyond a reasonable doubt. As such, we cannot say that defense counsel's decision not to present evidence of blood and flesh that was wiped clean from the stipulated bullet prejudiced defendant such that he was denied a fair trial. See *Strickland,* 466 U.S. at 687; see also *Albanese*, 104 Ill. 2d at 525. Therefore, we find there is no grounds for relief for defendant's ineffective assistance of trial counsel claim where defendant failed to satisfy either prong of *Strickland*.

¶42 Ineffective Assistance of Trial and Appellate Counsel

¶43 Last, defendant argues that, liberally construed, he presented an arguable basis of a constitutional claim that trial and appellate counsel were ineffective because neither sought to vacate his conviction and sentence for aggravated battery with a firearm against Bullock. Specifically, defendant argues that his act in shooting at Bullock—or as stated in the indictment,

that fact that he "shot Deandre Bullock about the body"—formulated the basis of two separate convictions and sentences: his attempt first-degree murder of Bullock, for which he received a 30-year sentence, and his aggravated battery with a firearm against Bullock, for which he received a 12-year sentence. This, defendant argues, is improper under the one-act, one-crime doctrine laid out in *People v. King*, 66 Ill. 2d 551 (1977). Accordingly, defendant argues that we must either remand the case for further proceedings or correct defendant's *mittimus* pursuant to Illinois Supreme Court Rule 615(b)(1). In response, the State argues that defendant has forfeited this argument as he admittedly failed to raise it in his postconviction petition and, additionally, any error in failing to merge the aggravated battery conviction into the attempt murder conviction was merely voidable and not void and, therefore, not properly before this court.

¶44 Ineffective assistance of counsel claims are judged under the now familiar standard set forth by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668 (1984). *Coleman*, 183 Ill. 2d at 397-98. *Strickland* established a two-pronged test to evaluate ineffectiveness-of-counsel claims. Ineffective assistance of counsel is established by a showing that: (1) counsel's performance was so seriously deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and (2) that the deficient performance so prejudiced the defense as to deny the defendant a fair trial. *Strickland,* 466 U.S. at 687; see *Albanese*, 104 Ill. 2d at 525. Both prongs of the *Strickland* test must be satisfied before a defendant can prevail on a claim of ineffective assistance of counsel. *Coleman*, 183 Ill. 2d at 397-98. Courts, however, may resolve ineffectiveness claims under the two-prong *Strickland* test by reaching only the prejudice component, for lack of prejudice renders irrelevant the issue of counsel's performance. See *Erickson,* 161 Ill. 2d at 90; *Albanese,* 104 Ill. 2d at 525-27. Further, where the underlying claim lacks merit, a defendant cannot be said to have received

ineffective assistance of appellate counsel for appellate counsel's failure to raise the claim on appeal. *People v. Johnson,* 206 Ill. 2d 348, 378 (2002).

¶45 The one act, one crime rule states that a defendant may not be convicted of multiple crimes based upon the same physical act. *People v. Latto,* 304 Ill. App. 3d 791, 806 (1999). Multiple convictions are improper if they are based on precisely the same physical act. *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996); see also *People v. Segara*, 126 Ill. 2d 70, 76-77 (1988); *People v. Szabo*, 94 Ill. 2d 327, 350 (1983).

¶46 First, we must address the State's argument that defendant forfeited any argument relating to ineffective assistance of counsel for failing to vacate his conviction and sentence for aggravated battery with a firearm against Bullock. Initially, defendant concedes that he did not "specifically assert a claim of ineffective assistance of trial and appellate counsel due to their failure to make one-act, one-crime arguments before the trial and appellate courts." Rather, defendant argues that because his postconviction petition does allege claims of ineffective assistance of trial and appellate counsel, many of which pertain to the shooting of Bullock and the validity of defendant's convictions with respect to the shooting of Bullock, these arguments, when liberally construed pursuant to *People v. Hodges*, 234 Ill. 2d 1 (2009), are sufficient to find that defendant raised the issue of counsels' ineffectiveness in failing to raise the one-act, one-crime doctrine in his postconviction petition. We disagree.

¶47 "The question raised in an appeal from an order dismissing a postconviction petition is whether the allegations *in the petition,* liberally construed and taken as true, are sufficient to invoke relief under the Act." (Emphasis in original) *People v. Jones*, 211 Ill. 2d 140, 148 (2004), *as modified on denial of reh'g* (May 24, 2004) (citing *Coleman,* 183 Ill. 2d at 388). Thus, any issues to be reviewed by us must be presented in the postconviction petition that was filed in the

circuit court. 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."); see also *People v. McNeal,* 194 Ill. 2d 135, 148-49 (2000); *People v. Davis,* 156 Ill. 2d 149, 159 (1993); *People v. Johnson*, 154 Ill. 2d 227, 233 (1993).

¶48 Here, in defendant's appellate brief, counsel has not been able to identify any portion of the postconviction petition where, even liberally construing defendant's postconviction allegations, we could find that defendant raised a one-act, one-crime argument—or *any* argument challenging his sentence for aggravated battery with a firearm against Bullock. The allegations in defendant's postconviction petition that deal with the shooting of Bullock are all attempts by defendant to show that he received ineffective assistance of counsel because there was insufficient evidence to prove his guilt in shooting at Bullock. Such arguments go to the sufficiency of the underlying evidence to support defendant's convictions. The argument now raised on appeal does not have anything to do with the evidence presented against defendant at trial; rather, defendant's claim on appeal deals with the appropriateness of his sentence for aggravated battery with a firearm. Thus, defendant never raised, and the trial court never heard, any arguments relating to the appropriateness of defendant's 12-year sentence for his aggravated battery with a firearm conviction. Thus, because defendant's postconviction petition does not include any arguments relating to the one-act, one-crime doctrine, or any arguments relating to the appropriateness of his sentence, defendant forfeited this argument and we cannot review it for the first time on appeal from the dismissal of his postconviction petition. 725 ILCS 5/122-3 (West 2010) ("Any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived."); *People v. Cathey*, 2012 IL 111746,¶21 (finding that the "appellate court below erroneously reached an issue that was not raised in defendant's

postconviction petition"); *Davis,* 156 Ill. 2d at 159 (issue of erroneous judgment raised for the first time on appeal from a dismissal of a postconviction petition was insufficient to effect divestiture of the court's jurisdiction and, as a result, was voidable and not subject to collateral attack.).

¶49 Although defendant argues that his sentence was in violation of the one-act, one-crime doctrine under settled law, because he raised the issue for the first time in this appeal of the summary dismissal of his postconviction petition, we cannot address the issue here, even if it is meritorious.

¶50 In *People v. Davis*, the defendant was found guilty of possession of cannabis with intent to deliver and of an included offense, possession of cannabis; a single sentence was imposed for the two convictions. *Davis*, 156 Ill. 2d at 152. On appeal from the denial of the defendant's postconviction petition, the defendant argued that his conviction under both offenses was improper. *Id*. at 153. Although the defendant had not appealed from his original conviction and only raised a single issue unrelated to the question of the dual convictions in his postconviction petition, the defendant contended that the conviction for the lesser offense was void and thus could be challenged at any time, without regard to whether the issue had been properly preserved in his postconviction petition for review. *Id*. at 155-56. Although the appellate court remanded the matter to vacate the judgment on the lesser included offense of possession of cannabis, our supreme court held that while the conviction on a lesser included offense was improper, such a conviction was not void, but rather voidable. *Id*. at 157-58. As such, the conviction was not subject to collateral attack. The court explained: "the court's erroneous judgment was insufficient to effect divestiture of the court's jurisdiction. The judgment was, therefore, voidable and is not subject to collateral attack." *Id*.

¶51 Similarly, in *People v. Coady,* the defendant was convicted of felony murder and the underlying offense of armed robbery. *People v. Coady*, 156 Ill. 2d 531, 537 (1993). The defendant raised the argument that his armed robbery conviction, which was a lesser included offense of felony robbery, was improper for the first time on appeal from the dismissal of his postconviction petition. *Id*. The appellate court and our supreme court affirmed the dismissal of the petition and, in doing so, our supreme court held:

> "Though the defendant's conviction for armed robbery might be deemed erroneous in view of his separate conviction for the greater offense of felony murder, that portion of the judgment was merely voidable, and not void. As a voidable order, it is not subject to collateral attack without regard to whether the defendant has properly preserved the issue for review." *Coady*, 156 Ill. 2d at 538.

While we recognize that the case before us is different from *Davis* and *Coady* in that defendant here received sentences under both offenses, which was improper under the one-act, one-crime doctrine, we nonetheless find our supreme court's dictates in *Davis* and *Coady* are clear: where a defendant fails to raise an issue in a postconviction petition, we do not have jurisdiction to review that issue when it is raised collaterally for the first time on appeal from the dismissal of a postconviction petition. See *Davis*, 156 Ill. 2d at 157-58; see also *Coady*, 156 Ill. 2d at 538.

¶52 Defendant also argues that we may address his one-act, one-crime argument and vacate his sentence for aggravated battery with a firearm against Bullock because a corrected *mittimus* may be issued at any time pursuant to Illinois Supreme Court Rule 615 and *People v. Quintana*, 332 Ill. App. 3d 96 (2002). However, given our finding that we are without jurisdiction to

address that issue, we do not see how we can nonetheless address the issue in order to determine whether the *mittimus* requires correction. *People v. Miles*, 117 Ill. App. 3d 257, 260 (1983) ("in case of variance between the *mittimus* and the judgment, the latter will prevail; and that an amended *mittimus* may be issued at any time.").

¶53 We note that defendant also argued that in the case of his co-defendant, LaShun Members, Members was able to have his aggravated battery with a firearm conviction and sentence vacated based upon the same one-act, one-crime argument defendant raises here. However, in the case of Members, this issue was raised on direct appeal and the State conceded the issue. Here, the argument was raised for the first time on appeal following defendant's summary dismissal of his postconviction petition, as a collateral attack, and the State made several arguments as to why we cannot vacate defendant's aggravated battery with a firearm sentence (which we have found to be valid arguments).

¶54 In finding that defendant waived this one-act, one-crime argument because he failed to include it in his postconviction petition, we note that our ruling in this respect "does not leave a postconviction petitioner such as defendant entirely without recourse. A defendant who fails to include an issue in his original or amended postconviction petition, although precluded from raising the issue on appeal from the petition's dismissal, may raise the issue in a successive petition if he can meet the strictures of the 'cause and prejudice test.' " *Jones,* 211 Ill. 2d at 148. Under this test, the defendant must demonstrate "cause" for failing to raise the error in prior proceedings and actual "prejudice" resulting from the claimed error. *Id*. at 149.

¶55 Here, we observe that defendant was represented by an attorney throughout his trial and on direct appeal where his case was before us twice due to a remand. However, it was not until this appeal of the summary dismissal of his *pro se* postconviction petition that any argument

relating to defendant's 12-year sentence for aggravated battery with a firearm was raised. Thus, it would be reasonable to inquire why this issue was not raised earlier and, accordingly, possible that defendant can demonstrate cause and prejudice in a successive postconviction petition. See *Jones*, 211 Ill. 2d at 148.

¶56 Conclusion

¶57 For all the reasons above, we affirm the trial court's summary dismissal of defendant's postconviction petition.

¶58 Affirmed.