FIRST DIVISION
April 27, 2015

No. 1-13-0948

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 4088
	)	
MICHAEL WOODS,	)	Honorable
	)	Rosemary Grant-Higgins,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not err in summarily dismissing defendant's postconviction petition where the petition's allegations of ineffective assistance of counsel were affirmatively rebutted by the record and the petition did not present an arguably meritorious claim of prejudice to defendant.

¶ 2 Following a jury trial, defendant Michael Woods was found guilty of two counts of armed robbery and one count of felony murder and sentenced to three concurrent 20-year terms

of incarceration. This court affirmed defendant's conviction and sentence. *People v. Woods*, 2011 IL App (1st) 092908. He subsequently filed a *pro* se petition under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)), which the circuit court summarily dismissed. On appeal, defendant contends that his petition set forth an arguably meritorious claim that his trial counsel was ineffective because the petition alleged counsel told defendant he could not testify in his own defense. We affirm.

¶ 3 At trial, Sergeant Sliva testified that he was conducting surveillance outside an auto parts store in Chicago on January 17, 2006. Around 10 p.m., a car pulled into the store's parking lot. Three people exited the car and entered the store. Subsequently, an individual wearing a white dust mask locked the door from the inside. Sliva radioed for assistance. Officers responded "within a minute" and took cover behind the cars in the parking lot. A man wearing a dust mask came to the door. The man, later identified as Cleon Jones, had a revolver in his right hand and keys in his left hand. After Jones unlocked the door, he turned toward Sliva and the other officers. Multiple officers yelled, "Police. Drop the gun." Jones raised the gun toward the officers. The officers discharged their weapons. Sliva believed they had fired about 39 shots altogether. Jones took a couple of steps backwards into the store and fell. The officers entered the store. Jones lay on the floor with the revolver on the floor about 15 feet behind him.

¶ 4 Adrian Matos testified that he formerly worked for the auto store. Just before 10 p.m. that evening, he was at the store with two other employees, Oscar Pizano and Jonathan Laluz. While Matos was talking to Pizano in the front of the store, a man wearing a scarf entered. He walked past Matos and then another man walked in. The second man wore a painter's mask and told Matos not to touch anything. The offenders grabbed Matos and Pizano and took them to the back of the office, where they demanded that Matos and Pizano empty their pockets. Laluz was also in

the room and the offenders forced him to empty his pockets. They told Matos to open the safe. After Matos opened the safe, they told him to lie down and proceeded to tie his hands behind his back with a spark plug cable. Pizano and Laluz were also tied up and on the ground. One of the offenders took Matos's store keys, and Matos heard him lock the front door. Then the offenders tried to break open an inner safe. They instructed Matos, Pizano and Laluz not to move and told them to count to 10. Matos heard footsteps to the front door, and then he heard "it's the police" or "it's the cops" before gunfire erupted. When he heard the gunshots, Matos escaped the cable and pulled Pizano and Laluz to a corner until police found them. Laluz and Pizano testified consistently with Matos's testimony.

¶ 5 Sergeant Lohman testified that he received a call concerning a robbery in progress just before 10 p.m. on January 17, 2006. He waited near a side door with several other officers. As they waited, they heard people shouting, "police, put the gun down" and then gunshots. Within seconds, the side door opened and defendant began to exit carrying a canvas bag with a co-offender five feet behind him. He said, "oh, shit," dropped the bag, and ran back into the store. Officers immediately followed, and took both offenders into custody.

¶ 6 At the close of the State's case, defendant's trial counsel moved for a directed finding, and argued that the officers' excessive force severed the causal chain leading to Jones's death. The trial court noted that from defense counsel's opening remarks, it appeared he was arguing that Woods may be guilty of armed robbery but not of murder. The court asked defendant whether he discussed this theory with his lawyer and whether he approved of such a defense. Woods answered, "Yes, sir," to both questions. The trial court denied defense counsel's motion.

¶ 7 Officers Daniel McNamara and Matthew Scott testified for the defense. They received a call about a robbery in progress and positioned themselves about 30 to 40 feet from the officers

in front of the store. McNamara observed someone come to the front door and unlock the door. As the front door opened, McNamara heard shouts of “Police” then saw the man at the door raise his arm at two of the officers. He could not tell whether the man had anything in his hand. McNamara then heard gunfire. Scott testified that he could not see anything before the shooting, but he did hear people shouting, “Police.”

¶ 8 After the defense rested its case, the following exchange occurred:

"The Court: Mr. Woods, I've been advised by your attorney that you've chosen to rely on the presumption of innocence and not testify on your behalf, is that correct?

Defendant Woods: Yes, sir.

The Court: You have arrived at this decision after you talked with your attorney?

Defendant Woods: Yes, sir."

¶ 9 Following arguments by the parties, the jury found defendant guilty of armed robbery of Pizano and Matos, and guilty of first degree murder based on a felony murder charge. The court sentenced him to two concurrent 20-year terms of imprisonment. Defendant appealed.

¶ 10 On direct appeal, defendant argued that his trial counsel provided ineffective assistance by conceding guilt to the armed robbery charge. This court affirmed his conviction, finding that counsel's performance was not deficient and that defendant experienced no prejudice "[g]iven the overwhelming evidence against him." *Woods*, 2011 IL App (1st) 092908, ¶ 38.

¶ 11 In October 2012, defendant filed a *pro se* postconviction petition under the Act. In the petition, defendant argued, *inter alia*, that his trial counsel was ineffective for informing him that he could not testify. He alleged that trial counsel told him not to testify, told him that he would be automatically convicted if he testified, and told him to tell the judge he did not want to testify when questioned.

¶ 12 Defendant attached two affidavits to the petition. The first affidavit asserted, *inter alia*, that after defendant and the two co-offenders had removed the money from the auto store's safe, defendant observed police officers outside of the store. The three men knew they had no choice but to surrender. Jones went to notify the police of their surrender and was shot. In the second affidavit, defendant asserts that trial counsel told him that if he testified he would "automatically be subject to conviction for first degree murder." Trial counsel never informed defendant of a deal with the State not to testify. When defendant informed trial counsel that he wanted to testify, counsel responded that if the trial court asked defendant if he wanted to testify he should say no. Trial counsel said if defendant was asked if the decision was made of his own free will or if anyone promised anything, he should "answer accordingly."

¶ 13 The trial court summarily dismissed the petition as frivolous and patently without merit. Defendant appeals.

¶ 14 While defendant raised at least 17 claims in his petition, he has abandoned all but a single claim on appeal. He argues only that the petition presents an arguably meritorious claim that trial counsel's representation was ineffective where the petition alleged trial counsel prevented defendant from testifying, despite his stated wish to testify.

¶ 15 The Act allows defendants to challenge their convictions based on a substantial violation of their rights under the federal or state constitution. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008); 725 ILCS 5/122-1 *et seq.* (West 2012). A postconviction proceeding consists of three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage of proceedings, as in this case, a postconviction petition may be summarily dismissed if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A post-conviction petition is frivolous or patently without merit only if the allegations in the petition, liberally construed in favor of the petitioner,

do not form the gist of a constitutional claim. *Edwards*, 197 Ill. 2d at 244. All factual allegations in the petition must be taken as true, unless they are contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). A petition will be dismissed where its allegations are rebutted by the original trial record. See *id.* We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Collins*, 202 Ill. 2d 59, 66 (2002).

¶ 16 To prevail on a claim of ineffective assistance of counsel a defendant must show that counsel's performance "was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Domagala*, 2013 IL 113688, ¶ 36, quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984). In a first-stage postconviction petition proceeding, a petition alleging ineffective assistance of counsel must show "(1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result." *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 17 We begin by examining whether defendant's petition sets forth an arguable claim that trial counsel's performance was deficient. Defendant argues that the petition presents an arguable claim that trial counsel's representation was objectively unreasonable where it alleged defendant informed counsel of his desire to testify, but counsel told him he could not. He asserts in both his petition and supporting affidavit that trial counsel directed him to indicate to the trial court that he did not wish to testify and that counsel informed him that he would be automatically subject to conviction for murder if he testified. The State responds that defendant's assertion that he was prevented from testifying is rebutted by the record. It notes that the trial court questioned defendant on his choice not to testify and defendant indicated that he did not wish to testify.

¶ 18 The right to testify in one's own defense is fundamental. *People v. Madej*, 177 Ill. 2d 116, 145 (1997); *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855 (2009). As such, a defendant's choice to testify is not a matter of trial strategy. *People v. Brown*, 336 Ill. App. 3d 711, 719 (2002). Consequently, only the defendant can decide whether or not to testify, though this decision is made with the advice of counsel. *Id.* Counsel's undue interference with this right can constitute ineffective assistance of counsel. See *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 19 Defendant's claim that defense counsel prevented him from testifying is affirmatively rebutted by the record. Following the close of evidence, the trial court asked defendant if it was his wish not to testify. Defendant replied that it was. The court asked if he had come to this decision after speaking with counsel. Again, defendant replied affirmatively. Defendant clearly and personally waived the right to testify on the record. He now asks us to disregard the objective meaning of his replies because he asserts his attorney told him how to answer the judge's questions. We reject defendant's contention that he subjectively desired to testify despite his objective statements to the contrary. Because the record indicates that defendant chose not to testify, his claim that trial counsel was deficient for interfering with his right to testify is not arguably meritorious.

¶ 20 Even if we were to find that the record does not rebut defendant's claim and conclude that defendant's petition presents an arguable claim of trial counsel's deficient performance, it does not present an arguable claim that the alleged deficiency prejudiced defendant. Defendant argues trial counsel's actions resulted in arguable prejudice, because defendant would have testified that he and his co-offenders attempted to surrender which would have supported a defense of withdrawal. The State responds that defendant was not arguably prejudiced. It asserts that even if

the allegations in defendant's affidavit are taken as true, his testimony could not have supported a defense of withdrawal.

¶ 21 A defendant can escape liability for felony murder "by establishing that he overtly withdrew from the commission of or attempted commission of the forcible felony." *People v. Jones*, 376 Ill. App. 3d 372, 388 (2007). However, there can be no defense of withdrawal when the offense immediately underlying felony murder has been accomplished. See *People v. Brown*, 26 Ill. 2d 308 (1962); *Jones*, 376 Ill. App. 3d at 388. Armed robbery is complete when an individual takes property from another through the use or threat of force, while armed with a dangerous weapon. See *People v. Dennis*, 181 Ill. 2d 87, 103 (1998).

¶ 22 Even taking all of defendant's allegations as true, his petition fails to put forth an arguable claim of prejudice. Defendant's affidavit admits that he and his co-offenders entered the auto parts store with a handgun and ordered the employees to the back. He admits that Jones made one of the employees open the safe and then lie back down on the floor. Jones pried open the inner safe, filled a bag with money, and handed it to defendant. The men noticed the police outside and then decided to surrender. The events detailed in defendant's affidavit do not support a defense of withdrawal. Defendant admits that the proceeds from the robbery were in his hands before the offenders allegedly decided to surrender. According to defendant, the offenders took property by force; saw a large number of police; realized they could not escape; and finally decided to surrender. The recognition that one is captured is not withdrawal. Because the underlying crime had been completed, withdrawal was not available as a defense to felony murder. Therefore, we conclude that defendant's petition fails to adequately allege that defendant was arguably prejudiced by trial counsel's alleged actions.

¶ 23 Defendant's petition fails to make an arguable claim under either *Strickland* prong, and therefore the petition does not set forth an arguably meritorious claim of ineffective assistance of counsel. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 24 Affirmed.