2015 IL App (4th) 130631-U

NOS. 4-13-0631, 4-14-0198 cons.

FILED
March 18, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
EMMANUEL D. LEWIS,	)	No. 07CF462
Defendant-Appellant.	)	
	)	Honorable
	)	Thomas E. Griffith, Jr.,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: We grant appointed counsel's motion to withdraw under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and affirm the trial court's judgment where no meritorious issues could be raised on appeal.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 A. Evidence at Defendant's Trial

¶ 5 Defendant, Emmanuel D. Lewis, was tried in December 2009 for the murder of Brandon Read, who died as a result of a gunshot wound received on March 29, 2007.

¶ 6 At defendant's trial, Kevun Campbell testified defendant, Christopher Graves, and Thesis Jones were his friends. Kevun testified defendant, Graves, and Jones were riding around together in a car, which belonged to Jones, on the day Read was shot. Defendant was driving. Kevun testified he saw Jones firing a gun during the day in the vicinity of Union and Center Streets. Kevun saw defendant, Jones, and Graves again after that incident in the same vehicle at the corner of Union and Division Streets. Jones asked Kevun where his sister Earleta was. Kevun took Jones inside to see Earleta. Kevun testified he heard about another shooting occurring at the corner of Edward and Center Streets later that day.

¶ 7 Earl Campbell, brother to Kevun and Earleta, testified he saw defendant, Jones, and Graves a couple of times in the area of Union and Division Streets near his house on March 29, 2007. According to Earl, the second time he saw "them," Jones said, "On the G, I'm going to get that nigger." Earl explained "on the G" means someone is serious. Jones did not specify who he was referring to when he said "that nigger." No one asked Earl who was present when this statement was made.

¶ 8 Earl testified Jones and Graves each had a gun. Earl testified defendant was driving, Jones was in the front passenger seat, and Graves was in the back seat. Earl stated he heard about Read being shot about 30 minutes after defendant, Jones, and Graves left his house. Earl also testified he saw Jones firing shots from his car at Union and Center Streets earlier in the day, prior to Read being shot. When these shots were fired, defendant was driving the car.

¶ 9 The State also presented evidence of an ongoing rivalry between the "Mob Squad" and the "Goon Squad." Earl testified Stashawn Wheeler, who was a member of the "Mob Squad," lived at the house where Read was shot. Earl testified defendant, Jones, and Graves

were members of the "Goon Squad."

¶ 10 Earleta Campbell testified she was holding a gun for Christopher Dandy on March 29, 2007. Although she said she knew little about guns, she testified the gun appeared to be "a cowboy gun" or a revolver. On the day Read was shot, Jones came to her house to get the gun. Earleta testified she called Dandy to see if he wanted her to give Jones the gun. Dandy said yes. Jones gave her $100, which she later gave to Dandy, for the gun.

¶ 11 Keirsean Bond testified he was at Stashawn Wheeler's house the day Read was shot. According to his testimony, he went there after school, about 3 p.m. While he was standing on the front porch of the house, he saw Jones's car turn off Edward Street onto Center Street. Bond testified he saw the front passenger window of the car begin rolling down. He ran into the house and heard gunshots. He later left the house and went to a barber shop before coming back to the same area later that day. Bond testified he witnessed another shooting while he was at the corner of College and Center Streets. This time Jones's car drove slowly down Edward Street and did not turn onto Center Street. Bond stated he heard approximately three gunshots and saw Read fall. Bond ran to Read and helped carry him into Stashawn Wheeler's house.

¶ 12 DeAndri Burton testified he was with Read outside of Stashawn Wheeler's house when Read was shot. After he heard the shots, he turned and saw Thesis Jones's car speed away from the scene. He saw defendant driving the vehicle.

¶ 13 Burton testified Stashawn Wheeler was a member of the "Mob Squad" and defendant, Jones, and Graves were members of the "Goon Squad." He testified members of the "Mob Squad" and the "Goon Squad" were arguing with each other one week before Read was shot.

¶ 14 While working off-duty as security for the Decatur Housing Authority, Decatur police detective David Pruitt testified he heard a report from dispatch concerning an individual being shot at 432 West Center Street. Later, Detective Pruitt received a description of a suspect vehicle in the 700 block of East Main Street. Detective Pruitt testified East Main Street does not have a 700 block. However, he went to the 800 block of East Main Street and started driving east. He located a vehicle matching the suspect vehicle's description in the 1000 block of East Main Street. He identified what appeared to be bullet holes on the passenger side of the car. Bobby Jones and Latrice Jones approached Detective Pruitt. Bobby Jones was told the vehicle was possibly involved in a shooting incident. He then advised the officers present his son had been shot at on Edward Street.

¶ 15 Bobby Jones left and came back with his son, Thesis Jones. Detective Pruitt testified he also spoke to defendant and Graves. Defendant told Detective Pruitt he, Jones, and Graves had been shot at on Edward Street. Detective Pruitt testified he later searched Jones's home for a gun but did not find one.

¶ 16 Detective Scott Cline of the Decatur police department testified he located a black nylon bag containing a .22-caliber Savage handgun on the back porch area of the residence of Dora Halliburton and Latrice Jones at 1036 East Main Street the day after the shooting. The handgun looked like a revolver but the cylinder did not rotate. It was actually a single-shot weapon according to Detective Cline. The pistol contained a spent .22-caliber cartridge in the chamber. Toni Mabon, who was living with Jones and pregnant with his child at the time of Read's death, testified she had seen Jones, Graves, and defendant all with the black bag in which the pistol was found.

¶ 17 Ashley Wheeler testified she was walking with 15 to 20 of her friends on the night Read was shot. When they walked by the Campbell house, Jones, Graves, and defendant were parked in front of the house. Her friend Joy and Jones started arguing. Graves was playing with a gun. According to Ashley, Graves told her and her friends if they did not get off the block he was going to shoot them. Ashley and her friends ran to the corner of Church and Center Streets and then the corner of Edward and Center Streets. While at that intersection, she saw Jones's car driving south on Edward Street. It slowed down as it approached the intersection with Center Street. She heard gunshots coming from Jones's car. She looked over at the car and saw Jones, Graves, and defendant inside. Defendant was driving. Wheeler testified she heard more than two gunshots. The only shots she heard came from Jones's car. Graves was the only person she saw shooting from the car. After the shots were fired, Jones's car increased its speed and proceeded south on Edward Street. She testified she ran when the shots were fired but came back and saw Read had been shot.

¶ 18 The State also introduced a videotape of defendant's interrogation by the police. At the start of the interrogation, defendant claimed no one fired any shots from the vehicle while he was driving. However, he said Stashawn Wheeler and others shot at him, Jones, and Graves. Defendant also initially denied being in the area where Read was shot when the shooting occurred. However, he eventually admitted Jones and Graves had guns and fired them down Center Street when Read was shot.

¶ 19 The State also introduced a video from a cell phone in which defendant, Graves, and Jones appeared. In the video, the "Goon Squad" was rapping about the "Mob Squad." The video included threats directed at the "Mob Squad."

¶ 20 Defendant testified he did not see any guns while he was in the car with Jones and Graves. He testified not everything he told the police during his interrogation was true because he was scared. Defendant stated he did not know what was going to happen when he drove down Edward Street. He also testified he did not know the vehicle had been shot until the officers apprehended him after Read was killed. According to his testimony, he only drove by the intersection of Edward and Center Streets one time on the day Read was shot. However, he admitted being in control of the vehicle from 3 or 4 p.m. to 8:15 p.m. on the day Read was killed.

¶ 21 Defendant testified the video in which he, Graves, and Jones appeared was just an example of freestyle rap, meaning they did not have anything written down. He acknowledged saying "fuck Mob Squad" and "they can suck my dick" on the video.

¶ 22 The jury found defendant guilty of first degree murder. The jury also found either defendant or someone for whose conduct he was legally responsible was armed with a firearm when the incident occurred. The trial court sentenced defendant to 40 years in prison.

¶ 23 B. Defendant's Direct Appeal

¶ 24 On direct appeal, defendant argued (1) the State failed to prove his guilt beyond a reasonable doubt; (2) the trial court abused its discretion in allowing the State to introduce Thesis Jones's hearsay statement, "On the G, I'm going to get that nigger," where it did not fall within the coconspirator exception to the hearsay rule; and (3) an amended sentencing judgment should be issued because the Illinois Department of Corrections' (DOC) records erroneously reflected defendant was serving a 55-year sentence.

¶ 25 In January 2012, this court affirmed the trial court's judgment but remanded the matter for the trial court to issue an amended sentencing judgment reflecting an aggregate 40-

year prison sentence, inclusive of the mandatory 15-year firearm enhancement. *People v. Lewis*, 2012 IL App (4th) 100140-U, ¶ 49 (petition for leave to appeal denied at No. 113952, 968 N.E.2d 1069 (table) (May 30, 2012)).

¶ 26 C. Defendant's Section 2-1401 Petition (No. 4-13-0631)

¶ 27 On March 28, 2013, defendant filed a *pro se* "Petition for Relief from Criminal Judgment Under § 2-1401(f)." In his petition, defendant argued his appellate counsel was ineffective for failing to argue (1) the trial court erred in not appointing new counsel pursuant to his *Krankel* (*People v. Krankel*, 102 Ill. 2d 181, 464 N.E.2d 1045 (1984)) motion; (2) trial counsel was ineffective for failing to obtain a bank surveillance video, gas station receipts, or witnesses from work or church, all of which would have shown he was not present at the first shooting; (3) the aggravated-discharge-of-a-firearm conviction must be reversed under the one-act, one-crime doctrine; and (4) Illinois's truth-in-sentencing law is unconstitutional. Defendant further argued his trial counsel was ineffective for the same reasons and for failing to call Jones and Brandi Brown to testify.

¶ 28 On May 22, 2013, the trial court denied defendant's petition, finding it was without merit where (1) defendant's petition was untimely as it was filed after the two-year deadline had run; and (2) even if it were timely filed, defendant did not challenge the factual basis for the judgment, and a section 2-1401 petition is not the proper vehicle for ineffective-assistance claims.

¶ 29 On June 12, 2013, defendant filed a motion for rehearing, which the trial court denied on July 8, 2013.

¶ 30 On July 18, 2013, defendant filed his notice of appeal. That appeal was docketed as appellate court case No. 4-13-0631.

¶ 31 D. Defendant's Postconviction Petition (No. 4-14-0198)

¶ 32 On December 4, 2013, defendant *pro se* filed a petition for postconviction relief. Defendant's petition repeated the same arguments in his section 2-1401 petition and additionally argued the following: (1) the State failed to prove his guilt beyond a reasonable doubt, (2) Jones's hearsay statement should have been excluded, and (3) the sentencing judgment should be corrected to reflect an aggregate 40-year sentence.

¶ 33 On February 28, 2014, the trial court dismissed defendant's postconviction petition, finding it frivolous and patently without merit.

¶ 34 On March 13, 2014, defendant filed his notice of appeal. Defendant's appeal was docketed as appellate court case No. 4-14-0198.

¶ 35 On September 16, 2014, defendant filed a motion to consolidate the two cases, which we granted.

¶ 36 On October 1, 2014, OSAD moved to withdraw as appellate counsel on the ground no meritorious issues can be raised on appeal and included a brief in conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Notice of OSAD's motion was sent to defendant. On its own motion, this court granted defendant leave to file additional points and authorities by November 3, 2014. Defendant has not done so. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 37 II. ANALYSIS

¶ 38 OSAD moves to withdraw pursuant to *Finley*, arguing no meritorious arguments can be raised on appeal. Specifically, OSAD asserts defendant's contentions fail to present a meritorious basis for an appeal from the trial court's dismissal of either his section 2-1401 petition or his postconviction petition. After a review of the record consistent with our responsibilities under *Finley*, we agree.

¶ 39 A. Defendant's Section 2-1401 Petition (No. 4-13-0631)

¶ 40 In his petition, defendant argued his appellate counsel was ineffective for failing to argue (1) the trial court erred in not appointing new counsel pursuant to his *Krankel* motion; (2) trial counsel was ineffective for failing to obtain a bank surveillance video, gas station receipts, or witnesses from work or church, all of which would have shown he was not present at the first shooting; (3) the aggravated-discharge-of-a-firearm conviction must be reversed under the one-act, one-crime doctrine; and (4) Illinois's truth-in-sentencing law is unconstitutional. Defendant further argued his trial counsel was ineffective for the same reasons and for failing to call Jones and Brandi Brown to testify.

¶ 41 Section 2-1401 of the Code of Civil Procedure allows for relief from final judgments more than 30 days after their entry. 735 ILCS 5/2-1401 (West 2012). "Relief under section 2-1401 is predicated upon proof, by a preponderance of [the] evidence, of a defense or claim that would have precluded entry of the judgment in the original action and diligence in both discovering the defense or claim and presenting the petition." *People v. Vincent*, 226 Ill. 2d 1, 7-8, 871 N.E.2d 17, 22 (2007). To be entitled to relief under section 2-1401, the petitioner must set forth specific factual allegations supporting each of the following elements: (1) the existence of a meritorious defense or claim; (2) due diligence in presenting this defense or claim

to the circuit court in the original action; and (3) due diligence in filing the section 2-1401 petition. *People v. Bramlett*, 347 Ill. App. 3d 468, 473, 806 N.E.2d 1251, 1255 (2004) (quoting *In re Estate of Barth*, 339 Ill. App. 3d 651, 662, 792 N.E.2d 315, 324 (2003)); see also *In re Marriage of Goldsmith*, 2011 IL App (1st) 093448, ¶ 15, 962 N.E.2d 517. This court reviews a trial court's dismissal of a section 2-1401 petition for an abuse of discretion. *People v. Davis*, 2012 IL App (4th) 110305, ¶ 11, 966 N.E.2d 570.

¶ 42 A section 2-1401 petition must be filed within two years after entry of the judgment being challenged. 735 ILCS 5/2-1401(c) (2012); *People v. Pinkonsly*, 207 Ill. 2d 555, 562, 802 N.E.2d 236, 241 (2003). A section 2-1401 petition filed beyond the two-year limitation will normally not be considered. *People v. Caballero*, 179 Ill. 2d 205, 210, 688 N.E.2d 658, 660 (1997). Here, defendant filed his petition on March 28, 2013, more than two years after his February 2010 sentencing date. See *People v. Gray*, 2013 IL App (1st) 112572, ¶ 8, 988 N.E.2d 1045 (two-year statute of limitations for a section 2-1401 petition begins to run when a defendant is sentenced). Thus, defendant's petition was not timely filed. Further, defendant did not allege anything prevented him from filing his petition until after the limitations period had run. See *People v. Harvey*, 196 Ill. 2d 444, 447, 753 N.E.2d 293, 295 (2001) (relief sought more than two years after the entry of the judgment will not be considered without a clear showing the petitioner was under a legal disability or duress or the grounds for relief were fraudulently concealed).

¶ 43 However, section 2-1401(f) provides, "[n]othing contained in this Section affects any existing right to relief from a void order or judgment." 735 ILCS 5/2-1401(f) (West 2012). Accordingly, Illinois courts have held "[p]etitions brought on voidness grounds need not be

brought within the two-year time limitation." *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 104, 776 N.E.2d 195, 202 (2002); see also *Gray*, 2013 IL App (1st) 112572, ¶ 7, 988 N.E.2d 1045 ("The two-year limitation *** does not apply to petitions brought on voidness grounds."); *People v. Morfin*, 2012 IL App (1st) 103568, ¶ 30, 981 N.E.2d 1010 ("A petition challenging a judgment as void is not subject to the limitations period ***.").

¶ 44 Here, only defendant's truth-in-sentencing claim arguably alleges his sentence is void. As such, this issue could potentially be raised in an untimely section 2-1401 petition. However, OSAD maintains defendant's argument in this regard is without any arguable merit. We agree.

¶ 45 The Illinois truth-in-sentencing statute was first enacted in 1995, pursuant to Public Act 89-404 (Pub. Act 89-404, § 40 (eff. Aug. 20, 1995)). Before its passage, those convicted of certain crimes were eligible to earn one day of good-conduct credit for each day spent in prison. See 730 ILCS 5/3-6-3(a)(2) (West 1994). In *People v. Reedy*, 295 Ill. App. 3d 34, 36, 692 N.E.2d 376, 379 (1998), the Second District held Public Act 89-404 unconstitutional as it was in violation of the single-subject rule of the Illinois Constitution of 1970 (Ill. Const. 1970, art. IV, § 8(d)). That decision was appealed to the supreme court.

¶ 46 During the pendency of the appeal, the Illinois General Assembly reenacted the truth-in-sentencing provision in Public Act 90-592 (Pub. Act 90-592, § 5 (eff. June 19, 1998) (deleting and recodifying the entire truth-in-sentencing provision originating from Public Act 89-404)). Thereafter, the supreme court affirmed the Second District, finding Public Act 90-592 validly reenacted the truth-in-sentencing law. *People v. Reedy*, 186 Ill. 2d 1, 17-18, 708 N.E.2d 1114, 1121-22, (1999).

¶ 47 Contrary to defendant's claim in his petition, the supreme court specifically upheld the constitutionality of Public Act 90-592. *Reedy*, 186 Ill. 2d at 17, 708 N.E.2d at 1121 ("we note that, unlike all preceding amendments to Public Act 89-404, Public Act 90-592 truly served to cure the effect that the former act's invalidation had on the truth-in-sentencing law").

¶ 48 In sum, because defendant's petition was not timely filed and his voidness claim is without arguable merit, we grant OSAD's motion to withdraw as counsel in case No. 4-13-0631.

¶ 49 B. Defendant's Postconviction Petition (No. 4-14-0198)

¶ 50 The Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-7 (West 2012)), provides a method by which criminal defendants can assert their convictions were the result of a substantial denial of their rights under the United States or Illinois Constitutions. 725 ILCS 5/122-1(a)(1) (West 2012). "[A] postconviction proceeding is a collateral attack upon the prior conviction and affords only limited review of constitutional claims not presented at trial." *People v. Harris*, 224 Ill. 2d 115, 124, 862 N.E.2d 960, 966 (2007).

¶ 51 To survive dismissal, a *pro se* postconviction petition's allegations, taken as true, must present the "gist" of a constitutional claim and must set forth some facts which can be corroborated and are objective in nature or explain their absence. *People v. Hodges*, 234 Ill. 2d 1, 9-10, 912 N.E.2d 1204, 1208 (2009); *People v. Jones*, 211 Ill. 2d 140, 144, 809 N.E.2d 1233, 1236 (2004). Otherwise, a petition is considered frivolous or patently without merit. *People v. Delton*, 227 Ill. 2d 247, 254, 882 N.E.2d 516, 519 (2008) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996)).

¶ 52 A petition is frivolous or patently without merit if it has no "arguable basis either in law or in fact," which is defined as being "based on an indisputably meritless legal theory or a

fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. "An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. This court reviews a trial court's dismissal of a defendant's postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9, 912 N.E.2d at 1208.

¶ 53 As in his section 2-1401 petition, defendant contends in his postconviction petition his appellate counsel was ineffective for failing to argue the following: (1) the trial court erred in not appointing new counsel pursuant to his *Krankel* motion; (2) his trial counsel was ineffective for failing to obtain a bank surveillance video, gas station receipts, or witnesses from work or church, all of which would have shown he was not present at the first shooting; (3) the aggravated-discharge-of-a-firearm conviction must be reversed under the one-act, one-crime doctrine; and (4) Illinois's truth-in-sentencing law is unconstitutional. Defendant also again argues his trial counsel was ineffective for failing to call Jones and Brandi Brown to testify.

¶ 54 Unlike his section 2-1401 petition, defendant's postconviction additionally alleges the following: (1) the State's evidence was insufficient to convict him beyond a reasonable doubt, (2) the trial court erred in admitting Jones's hearsay statement, and (3) DOC's records incorrectly show a 55-year sentence instead of a 40-year sentence.

¶ 55 To establish ineffective assistance of trial counsel at the first stage of postconviction proceedings, the defendant must show it is arguable counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's deficient representation. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). "A petitioner who contends that appellate counsel rendered ineffective assistance of counsel must show that the failure to raise an issue on direct appeal was objectively unreasonable and that the decision

prejudiced petitioner." *People v. Childress*, 191 Ill. 2d 168, 175, 730 N.E.2d 32, 36 (2000). Both prongs of *Strickland* must be met, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107, 735 N.E.2d 616, 626 (2000). Appellate counsel will not be found to be ineffective for failing to raise frivolous or otherwise nonmeritorious issues on appeal because the defendant suffers no prejudice. *Childress*, 191 Ill. 2d at 175, 730 N.E.2d at 36. For the following reasons, we find neither defendant's trial nor appellate counsel provided ineffective assistance.

¶ 56 1. *Krankel*

¶ 57 Prior to trial, defendant filed a *pro se* motion alleging ineffectiveness on the part of his appointed counsel and requesting the court to appoint a new attorney to represent him. According to defendant's allegations, over the two years he was awaiting trial, his appointed counsel had only met with him a few times, had not discussed any trial strategy with him, and had failed to acquire evidence pertaining to his defense.

¶ 58 Under the rule developed in *Krankel* and its progeny, a defendant raising *pro se* posttrial claims of ineffective assistance of counsel is entitled to have those claims heard by the trial court. However, new counsel is not automatically appointed when a defendant alleges ineffective assistance of counsel. *People v. Jolly*, 2014 IL 117142, ¶ 29. Instead, "the trial court should first examine the factual basis of the defendant's claim." *People v. Moore*, 207 Ill. 2d 68, 77-78, 797 N.E.2d 631, 637 (2003). If, after a preliminary investigation into the allegations, the court concludes defendant's claims are facially insufficient, contradicted by the record, or pertain merely to matters of trial strategy, the court may deny the claim. *Moore*, 207 Ill. 2d at 78, 797

N.E.2d at 637. If the defendant's allegations show possible neglect of the case, the court should appoint new counsel to argue the defendant's claim. *Moore*, 207 Ill. 2d at 78, 797 N.E.2d at 637.

¶ 59 In this case, defendant argues the trial court should have appointed new counsel for him after he filed his *pretrial* motion. However, a trial court is not required to address a defendant's *pretrial* ineffective assistance claims. *People v. Jocko*, 239 Ill. 2d 87, 92-93, 940 N.E.2d 59, 62-63 (2010). That said, the trial court in this case nonetheless conducted an adequate pretrial inquiry into defendant's allegations. During the hearing, the court afforded defendant an opportunity to present his contentions and defendant's trial counsel responded in kind. At the conclusion of the hearing, the court found defendant's complaints regarding his counsel's performance were "without merit" and declined to appoint separate counsel or hold a formal *Krankel* hearing, which again, it was not required to do. The trial court did not err regarding defendant's pretrial claims of ineffective assistance of counsel. Accordingly, defendant's appellate counsel was not ineffective for failing to raise that issue on appeal.

¶ 60 2. *Failure To Present Evidence*

¶ 61 Defendant argues trial counsel was ineffective for failing to obtain a bank surveillance video, gas station receipts, or witnesses from work or church, all of which would have shown he was not present at the first shooting. Defendant also contends appellate counsel was ineffective for not raising the issue in his direct appeal. As stated, appellate counsel is not ineffective for failing to raise a nonmeritorious issue.

¶ 62 In this case, defendant failed to attach any documentation showing the existence of the video, the gas receipts, or affidavits from colleagues or persons who he claimed would have seen him at the church. Defendant did not offer an explanation as to why such information was

not attached. The failure to attach supporting documentation or explain its absence is fatal to a postconviction petition and by itself justifies summary dismissal. *People v. Collins*, 202 Ill. 2d 59, 66, 782 N.E.2d 195, 198 (2002); 725 ILCS 5/122-2 (West 2012). The supreme court recognizes requiring a defendant to attach affidavits, records, or other evidence may place an unreasonable burden on postconviction petitioners. *Collins*, 202 Ill. 2d at 68, 782 N.E.2d at 200. However, "the petitioner who is unable to obtain the necessary 'affidavits, records, or other evidence' must at least explain why such evidence is unobtainable." *Collins*, 202 Ill. 2d at 68, 782 N.E.2d at 200. Defendant has not done so. Thus, no meritorious issue can be raised in this regard.

¶ 63 3. *Witness Testimony*

¶ 64 Defendant argues his trial counsel was ineffective for failing to call Thesis Jones and Brandi Brown to testify. While defendant attached his own affidavit as well as an affidavit for Jones, he did not do so for Brown. As a result, we will only consider defendant's ineffectiveness argument in the context of his counsel's decision not to call Jones. According to defendant, Jones' testimony would show defendant did not know Graves had a gun and the only reason they were in the area where the shooting took place was because they were going to visit Brown.

¶ 65 Decisions concerning which witnesses to call at trial and what evidence to present are for defense counsel to make and, as matters of trial strategy, are generally immune from ineffective-assistance-of-counsel claims. *People v. Deloney*, 341 Ill. App. 3d 621, 634, 793 N.E.2d 189, 200 (2003). Counsel's representation is not rendered incompetent even where a mistake in trial strategy or in judgment is made by counsel. *People v. Palmer*, 162 Ill. 2d 465,

476, 643 N.E.2d 797, 801-02 (1994). "In fact, counsel's strategic choices are virtually unchallengeable." *Palmer*, 162 Ill. 2d at 476, 643 N.E.2d at 802.

¶ 66 According to Jones's affidavit, Graves said he was going to shoot and, after Jones told him not to, he shot anyway. Despite being in the car with Jones and Graves, defendant did not testify such statements were made by Graves or Jones. Instead, defendant testified he did not know anyone had a gun or that shots were coming from the car he was in. In the video of the police interview, however, defendant admitted Graves and Jones had guns and Graves shot from the car. Based on the affidavit, defendant's trial counsel could have reasonably inferred Jones might have offered contradictory testimony on direct examination or damaging testimony on cross-examination. A defendant's trial counsel is not ineffective for deciding not to call an alibi witness who would contradict the defendant's testimony. See *Deloney*, 341 Ill. App. 3d at 635, 793 N.E.2d at 201. It would have also been reasonable for counsel to assume Jones, if called, would refuse to testify. (Jones did not testify at his own trial.) Although Jones's affidavit now states he would have testified, the appeal of his own conviction in this case was pending at the time of defendant's trial. As a result, Jones would have had good reason to assert his fifth-amendment right against self-incrimination. A defendant may raise the fifth-amendment privilege until his conviction becomes final. See *People v. Ousley*, 235 Ill. 2d 299, 306-07, 919 N.E.2d 875, 881 (2009) (citing *People v. Hartley*, 22 Ill. App. 3d 108, 110, 317 N.E.2d 57, 58 (1974) (even though the witness had been convicted, he could claim the privilege against self-incrimination at the trial of his codefendant because the time for his own appeal had not yet passed)). We conclude the decision not to call Jones as a witness does not satisfy the deficiency

prong of the *Strickland* test. Thus, there was no arguable legal basis for defendant's ineffective-assistance-of-counsel claim on this issue.

¶ 67 4. *One-Act, One-Crime Argument*

¶ 68 Defendant argues his aggravated-discharge-of-a-firearm conviction must be reversed under the one-act, one-crime doctrine. Under the one-act, one-crime doctrine, a criminal defendant may not be convicted of more than one offense based on a single physical act. *People v. King*, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844 (1977). When a defendant is convicted of multiple offenses based upon the same physical act, a sentence should be imposed on the most serious offense and any conviction entered on a less serious offense must be vacated. *People v. Lee*, 213 Ill. 2d 218, 226-27, 821 N.E.2d 307, 312 (2004).

¶ 69 However, in this case, defendant was not convicted of aggravated discharge of a firearm. He was convicted of first degree murder and his sentence included a mandatory 15-year sentencing enhancement pursuant section 5-8-1(a)(1)(d)(i) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2012)) because a firearm was involved. The supreme court has determined the sentencing enhancement for first degree murder offenders "armed with a firearm" contained in section 5-8-1(a)(1)(d)(i) applies to unarmed first degree murder offenders convicted on an accountability theory. *People v. Rodriguez*, 229 Ill. 2d 285, 295, 891 N.E.2d 854, 860 (2008) (an accountable first degree murder defendant does not have to personally be armed in order to be subject to the 15-year sentencing enhancement). Accordingly, defendant's appellate counsel was not ineffective for failing to raise this issue on direct appeal.

¶ 70 5. *Truth-in-Sentencing Argument*

¶ 71 As stated above, we have found defendant's truth-in-sentencing argument to be without merit. See *supra* ¶¶ 44-48.

¶ 72 6. *Remaining Issues*

¶ 73 Finally, defendant's postconviction petition argues (1) the State's evidence was insufficient to convict him and (2) the trial court erred in admitting Jones's hearsay statement. However, these issues were raised, addressed, and rejected in defendant's direct appeal. See *Lewis*, 2012 IL App (4th) 100140-U. "The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 443, 831 N.E.2d 604, 615 (2005).

¶ 74 Defendant also argues DOC's records incorrectly show a 55-year sentence instead of a 40-year sentence. As correctly noted by the trial court, this issue was also raised and addressed in defendant's direct appeal. In that case, we ordered the trial court to issue an amended sentencing judgment reflecting an aggregate total of 40 years in prison. *Lewis*, 2012 IL App (4th) 100140-U, ¶ 49. We note DOC's website currently reflects a 40-year prison sentence for defendant. See http://www2.illinois.gov/idoc/Offender/Pages/InmateSearch.aspx; *People v. Mitchell*, 403 Ill. App. 3d 707, 709, 936 N.E.2d 659, 661 (2010) (appellate court may take judicial notice of the DOC website because it is an official public record).

¶ 75 Accordingly, the trial court did not err in dismissing defendant's postconviction petition. As defendant's claims are without arguable merit, we grant OSAD's motion to withdraw as counsel in case No. 4-14-0198.

¶ 76 III. CONCLUSION

¶ 77 For the reasons stated, we grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment.

¶ 78 No. 4-13-0631, Affirmed.

¶ 79 No. 4-14-0198, Affirmed.