

NOTICE
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2019 IL App (5th) 150497-U

NO. 5-15-0497

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

JOEY RAGUSA,

Defendant-Appellant.

) Appeal from the
) Circuit Court of
) Madison County.

) No. 04-CF-2819

) Honorable
) Ronald R. Slemmer,
) Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Presiding Justice Overstreet and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court properly dismissed in part and denied in part the defendant's postconviction petition.

¶ 2 The defendant, Joey Ragusa, appeals the circuit court's denial of his postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other

document supporting his appeal. The defendant filed a response. We considered OSAD's motion to withdraw as counsel on appeal and the defendant's response. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Madison County.

¶ 3

BACKGROUND

¶ 4 A jury found the defendant guilty of first-degree murder for covering a man with gasoline and lighting him on fire—killing him.

¶ 5 Prior to the trial, a number of pretrial motions were argued. A lengthy trial was held where the defendant was vigorously represented in all facets of the trial: jury selection, opening and closing statement, cross-examination, and presenting of testimony. The defendant's conviction was affirmed on appeal. *People v. Ragusa*, 2012 IL App (5th) 100524-U.

¶ 6 The defendant filed a *pro se* postconviction petition raising the following claims: he is actually innocent; the State presented perjured testimony; his counsel did not let him testify; his counsel failed to call important witnesses; his counsel failed to investigate a possible alternative suspect; hearsay was improperly allowed under the excited utterance exception; use of excessively graphic autopsy images resulted in an unfair trial; and the trial court erred by failing to remove two sleeping jurors. The court assigned counsel to represent the defendant on his postconviction petition.

¶ 7 Postconviction counsel filed an amended postconviction petition that raised the following issues: (1) trial counsel failed to discuss trial strategy and did not visit the

defendant enough; (2) trial counsel did not share discovery with the defendant; (3) trial counsel did not show the defendant the videos, CDs, photos, and reports of the investigation; (4) trial counsel did not allow the defendant to have police reports and the pathology report; (5) trial counsel did not advise the defendant that he could testify; (6) the defendant should have testified because he could not have been impeached by previous crimes; (7) trial counsel failed to have any investigation or investigator other than the fire investigator; (8) trial counsel and the court erred by allowing photos of the scene and decedent to be shown to the jury; (9) trial counsel provided ineffective cross-examination; (10) the defendant was innocent; (11) the State used perjured testimony; (12) trial counsel failed to investigate an alternative suspect; (13) the court improperly allowed hearsay testimony based on an excited utterance exception; (14) the State presented graphic photos notably of the autopsy; and finally, (15) the trial court failed to remove jurors that were asleep.

¶ 8 Following a second-stage hearing on the State's motion to dismiss the amended petition, the circuit court dismissed all of the allegations except for the allegations of ineffective assistance of trial counsel. The matter proceeded to a third-stage hearing at which the State called the defendant's trial counsel to testify. In opposition to the defendant's testimony in support of his claims, the State presented evidence that trial counsel did show the discovery to the defendant when he visited him. The State pointed out that the jail does not allow the defendant to keep discovery and it is against Illinois Supreme Court Rule 415(c) (eff. Oct. 1, 1971) to leave discovery with the defendant. Trial counsel testified that he met with the defendant numerous times at the jail and at the

courthouse. Trial counsel also testified that they discussed whether the defendant should testify and they decided he would not testify in part because the jury had heard the defendant's lengthy statements that he did not commit the murder when the recording of his interview with the police was played. The State presented evidence that the cause of death was not contested at trial, nor could it have realistically been, so there would have been no need to hire a pathologist. The defense tried to find the witness that the defendant wanted them to call. Unfortunately, the investigator was never able to find him. Trial counsel testified that he described each of the DVDs with the defendant and showed him all of the photos. Another witness, an inmate of the Department of Corrections, changed his mind the day he was to be called and refused to testify.

¶ 9 The circuit court denied the postconviction petition, and the defendant appeals.

¶ 10 ANALYSIS

¶ 11 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) allows a person convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Claims of error which have previously been decided by a reviewing court are barred by the doctrine of *res judicata* and claims which could have been reviewed on direct appeal, but were not, are forfeited. *People v. Whitfield*, 217 Ill. 2d 179, 183 (2005). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions.

People v. Tate, 2012 IL 112214, ¶ 9. At the first stage the court determines whether the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the court does not dismiss the petition at this stage, the petition moves to second stage proceedings. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). At the second stage of the proceeding, the State files an answer to the petition or a motion to dismiss. *Id.* at 10-11. When confronted with a motion to dismiss a postconviction petition, "the circuit court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *Coleman*, 183 Ill. 2d at 380. At this stage of the proceedings the circuit court is not to engage in any fact finding. *Id.* at 380-81. All facts not rebutted by the record are accepted as true. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). A third-stage "hearing is required whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Coleman*, 183 Ill. 2d at 381. We review the second-stage dismissal of a postconviction petition *de novo*. *Id.* at 387-89. The circuit court's denial of a postconviction petition following a third-stage evidentiary hearing will not be disturbed on review unless it is manifestly erroneous. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 12 The following claims raised in the amended postconviction petition were properly dismissed at the second stage because they were raised and reviewed on direct appeal and are therefore barred by *res judicata*: allowing hearsay testimony based on the excited utterance exception and the State's presentation of the autopsy photographs. See *Ragusa*, 2012 IL App (5th) 100524-U, ¶ 10. The circuit court also dismissed the following claims at the second stage—that the defendant was actually innocent, that the State knowingly used

perjured testimony, and that the trial court failed to remove several jurors who were sleeping during the trial. We examine each in turn.

¶ 13 The defendant's claim of actual innocence fails because the defendant did not present any new evidence tending to show his innocence. In fact, his petition states that he wants to depose numerous individuals and present what would be hearsay evidence. "Substantively, in order to succeed on a claim of actual innocence, the defendant must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96. The defendant does not meet the *Coleman* standard: he failed to allege the existence of any admissible evidence that is new or that is in any way near changing the result.

¶ 14 The defendant's claim that the State used perjured testimony also fails. In support of this claim, the defendant pointed to the discrepancies between statements and conflicts in the evidence to show that the State used perjured testimony. "[I]nconsistencies in testimony cannot be equated with perjury, nor does it establish or show that the State knowingly used perjured testimony." *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002). "But in order for the testimony to constitute perjury which is reversible error, the testimony must be shown 'by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given.' [Citation.]" *People v. Bounds*, 36 Ill. App. 3d 330, 337 (1976). The defendant's allegations fall far short of this standard. He only alleged inconsistencies and that some of the witnesses were jailhouse informants. The trial court properly dismissed this claim.

¶ 15 The defendant's claim that there were jurors asleep during the trial is unsubstantiated. A careful review of the record finds no discussion of any sleeping jurors. Likewise, the defendant's petition is void of any evidence or affidavits explaining the absence thereof on the subject of sleeping jurors. Nonfactual and nonspecific conclusions are insufficient to warrant a third-stage hearing on that allegation. *Coleman*, 183 Ill. 2d at 381. The circuit court properly dismissed this claim.

¶ 16 The remaining claims raised by the defendant are all based on ineffective assistance of counsel and were rejected following an evidentiary hearing. An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois by *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Albanese*, 104 Ill. 2d at 525. Second, defendant must show "that there is a reasonable probability that but, for counsel's unprofessional errors, the result of the proceeding would have been different." (Internal quotation marks omitted.) *Id.* In *People v. Tate*, 2012 IL 112214, the Illinois Supreme Court stated that at the second stage of postconviction proceedings the petitioner must " 'demonstrate' or 'prove' ineffective assistance by 'showing' that

counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670. Where allegations of ineffective assistance of counsel survive to a third-stage hearing, we review the trial court's decision as a mixed question of fact and law. *Id.* at 698; *People v. Coleman*, 2015 IL App (4th) 131045, ¶ 66. We accept the trial court's findings of fact so long as they are not against the manifest weight of the evidence. But we review whether the facts found by the trial court prove ineffective assistance of counsel *de novo*. *Coleman*, 2015 IL App (4th) 131045, ¶ 66.

¶ 17 The defendant's claim that trial counsel failed to visit the defendant enough and discuss trial strategy with the defendant fails. At the evidentiary hearing, trial counsel testified that he visited the defendant numerous times in the jail and also talked to him at his many court appearances. Whether trial counsel sufficiently visited with the defendant is a factual inquiry. The trial court believed the testimony of trial counsel more than that of the defendant, and nothing in the record suggests that the trial court's decision in this regard was against the manifest weight of the evidence.

¶ 18 Issues two, three, and four above are variations on the idea that trial counsel failed to share the myriad pieces of discovery with the defendant and additionally did not let the defendant retain pieces of discovery at the jail. We are again presented with issues that

depend nearly entirely on the resolution of conflicting testimony. Trial counsel testified that he showed or described all of the discovery to the defendant, and the defendant claimed the opposite. Again, the court found the testimony of trial counsel more persuasive and concluded that trial counsel provided effective assistance of counsel with regard to sharing of the discovery. Our review of the record demonstrates this was not against the manifest weight of the evidence. Finally, we note that trial counsel was forbidden by Rule 415(c) and jail rules from leaving the discovery with the defendant.

¶ 19 Issues five and six relate to defendant not testifying at trial. He argued that trial counsel did not inform him that he could testify. Further, he claims that there was no reason for him not to testify because he did not have any felony convictions recent enough to allow him to be impeached with them had he testified. Trial counsel testified that he and the defendant had discussed whether or not the defendant should testify and they decided that the defendant should not testify because the jury had seen the video of an interview he gave to a detective wherein he denied having committed the crime and because it would be better for him to avoid cross-examination. Again, the trial court found that trial counsel's testimony was more believable. This finding was not against the manifest weight of the evidence.

¶ 20 The defendant also argued that trial counsel was ineffective because he did not obtain an expert pathologist to testify. The trial record and trial counsel's testimony make clear that the issue of how the victim died could not have been plausibly challenged. The treating physicians, coroner, and photos leave no doubt that the victim died of burns. The

theory of the defendant's case was not that the victim did not die by fire but that the defendant could not have been present.

¶ 21 Finally, the defendant argued that trial counsel failed to investigate an alternative suspect. Trial counsel testified that he had an investigator search for this third person, but the investigator was unable to find them. Again, the trial court gave more credence to this testimony than to that of the defendant. We find no error in that decision.

¶ 22 **CONCLUSION**

¶ 23 The trial court properly dismissed each of the defendant's claims that were not based on ineffective assistance of counsel. Further, the trial court properly denied each of the defendant's claims based on ineffective assistance of counsel. Therefore, we grant OSAD's motion to withdraw and affirm the decision of the circuit court of Madison County.

¶ 24 Motion granted; judgment affirmed.