No. 122307

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-14-1013.
Plaintiff-Appellee,	)	
v.	)	There on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake County, Illinois, No. 10 CF 1138.
TORRENCE D. DUPREE,	)	The Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge Presiding.

BRIEF OF PLAINTIFF-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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E-FILED
4/10/2018 9:17 AM
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SUPREME COURT CLERK

ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT 7

I. Defendant's Ineffective Assistance Claim Was Properly Dismissed Because He Failed to Attach an Affidavit from Morrison 7

725 ILCS 5/122-2 7

People v. Enis, 194 Ill. 2d 361 (2000) 8

People v. Johnson, 183 Ill. 2d 176 (1998) 7-8

People v. Guest, 166 Ill. 2d 381 (1995) 7-8

People v. Thompkins, 161 Ill. 2d 148 (1994) 8

People v. Spivey, 2017 IL App (2d) 140941 8

People v. Brown, 371 Ill. App. 3d 972 (1st Dist. 2007) 9-10

People v. Brown, 303 Ill. App. 3d 949 (1st Dist. 1999) 9

II. In the Alternative, Defendant Has Failed to Make a Substantial Showing that Trial Counsel Was Ineffective 10

People v. Hughes, 2012 IL 112817 10

People v. Enis, 194 Ill. 2d 361 (2000) 10-11

People v. Brown, 371 Ill. App. 3d 972 (1st Dist. 2007) 10

NATURE OF THE CASE

Following convictions for armed robbery and aggravated robbery, defendant-appellant Torrence Dupree filed a postconviction petition alleging that trial counsel was ineffective for failing to call eyewitness Matthew Morrison. The circuit court granted the People's motion to dismiss, and the appellate court affirmed, holding that defendant failed to make a substantial showing of the denial of a constitutional right because he had failed to submit an affidavit from Morrison, as required by Illinois law. An issue is raised concerning the sufficiency of defendant's postconviction pleading.

ISSUES PRESENTED

1. Whether the appellate court correctly held that when a postconviction petition alleges that trial counsel should have called a particular witness, the defendant must attach an affidavit from that witness.

2. In the alternative, whether the trial court correctly dismissed the petition because defendant failed to make a substantial showing that trial counsel was ineffective.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 651. This Court allowed defendant's petition for leave to appeal on September 27, 2017.

STATEMENT OF FACTS

Trial and Direct Appeal

A Lake County jury found that defendant robbed Matthew Morrison and Kiernan Collins at gunpoint.

Collins testified that on February 16, 2010, he and Morrison picked up Morrison's acquaintance Steven Nowell in Grayslake, Illinois, planning to sell him marijuana. R480-83.[1] Instead, a man pushed Nowell into the car, displayed a revolver, and demanded Collins's and Morrison's money and belongings. R488-89.

The gunman was on top of Nowell, and both the gunman and Nowell were only partially in the car. R488, R540. At some point, the gunman pushed Nowell out of the car and kneeled on the front seat. R491. He took money from Collins and Morrison, and he took Morrison's backpack. R489-90, R495-96.

The gunman was wearing a black hooded sweatshirt with the hood pulled tightly around his face. Collins believed that the gunman was taller than himself, perhaps six feet one inch or six feet two inches tall. R527. Defendant's cousin testified that defendant was five feet seven or five feet eight inches tall. R794. During a photo lineup, Collins expressed seventy percent confidence that defendant was the gunman. R504.

Before trial, defendant tried to contact Collins, but Collins refused his call. R510-11; *see also* PX 26 (defendant, in a recorded phone call, stating that he had called "one of the white boys" who "didn't accept the call").

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[1] "Def. Br. _" refers to defendant's brief, "A_" to defendant's appendix, "R_" to the report of proceedings, "C_" to the common law record, and "PX _" to the People's trial exhibits.

Nowell testified that he had been charged with armed robbery, aggravated robbery, and simple robbery for his role in the crime. R543. As part of a deal to reduce his charges, he testified at defendant's trial. R543-44.

Nowell further testified that he was with his girlfriend, Kenyatta Whiteside, at her apartment shortly before the robbery. R547. Defendant arrived and borrowed Whiteside's phone (which Nowell often used, too). R547-49. Defendant stepped outside to complete his call; then he returned and asked whether Nowell intended to buy marijuana from "Matt [Morrison]." R549-50. Nowell replied that he had no such plan, and defendant left. R549.

In fact, Nowell did plan to buy marijuana from Morrison, and he met Morrison in the parking lot about fifteen minutes later. R553. Morrison and Nowell drove away in Morrison's car, but they returned when Nowell claimed that he'd forgotten to bring money. R555. Nowell fetched the money and returned. *Id*. Shortly thereafter, defendant arrived, opened the car door, displayed a gun, and demanded money. R556-57. Morrison and Collins immediately complied with defendant's demands, and then Nowell took Morrison's cell phone (per defendant's instructions). R557. Defendant also took Morrison's backpack before leaving. R558. Defendant tried to follow Nowell back to Whiteside's apartment, but Nowell did not have a key to the apartment, so defendant drove away in a van. R559.

Nowell claimed that he never saw defendant's face during the robbery, but he identified defendant by voice. R560. On cross-examination, Nowell acknowledged that, when first questioned by police, he repeatedly denied that defendant was involved. R590-94. But Nowell told Whiteside immediately after the robbery that defendant had "robbed somebody." R654 (Whiteside's testimony).

The State presented a recording of a phone call that defendant made from jail; in the call, defendant told his cousin that he saw the person who was going to testify against him [Nowell] leave jail as part of a deal. PX 24. Defendant then ordered, "[L]et everybody know, man, I want his head on a platter." *Id*.

Morrison did not testify, but Officer Joe Manges testified on cross-examination that Morrison described the gunman as being six feet three inches tall. R699. Ostensibly, Morrison's description was to be used only to evaluate Officer Manges's testimony. *See* R696-97. But defense counsel emphasized it at the beginning of closing argument, and the State did not object. R860 ("Morrison went to the Grayslake Police Department. He made a report . . . [The gunman] was 6'3". That was the first description given . . . [Defendant] is not 6'3".").

Defense counsel also stressed in closing that the State had not called Morrison:

- "Now you have not heard from Matt Morrison. You have not seen him." R860.

- "Why was [Nowell] a suspect? . . . We don't know. Matt Morrison is not here to tell us." R862.
- "We didn't get here today [because] of anything Matt Morrison said." R867.
- "Nowell is so critical to the State's case. He is so critical they don't want to bring Matt Morrison to talk about this." R871.

In response, the State began its rebuttal by impugning Morrison's character. *See* R881 ("We know [Morrison] was a drug dealer."), R882 ("So Matt Morrison what we do know about him is he is a liar.").

The jury found defendant guilty of two counts of aggravated robbery and two counts of armed robbery with a firearm. R914. The trial court ultimately sentenced him to two concurrent fifteen-year prison terms, one for each count of armed robbery. C258. The appellate court affirmed. A37.

Postconviction Review

Defendant then sought postconviction relief, *see* 725 ILCS 5/122-1, *et seq.*, in the Circuit Court of Lake County. In his third amended petition, he argued, among other things, that trial counsel was ineffective for failing to call Morrison at trial. C362-65. He did not attach an affidavit from Morrison attesting that he would have testified or the nature of his testimony. Indeed, defendant did not even *allege* how Morrison would have testified. Instead, he attached reports of Morrison's statements to police and briefly summarized them in his petition. C429-39 (police reports); *see also* C362.

Morrison quickly reported the robbery to the local police, but he omitted the potential drug sale and falsely stated that the robbery happened

outside of his car. C429A-430. He described the gunman as six feet three inches tall. C429A. He further reported that the gunman's accomplice warned Morrison to "listen to [the gunman] because he just got out of jail." C429B. Morrison gave two more statements to police, eventually acknowledging that he was in the car during the robbery and that he "was there to help [Nowell] out with cannabis." C434A.

Morrison viewed four photographic lineups before the police had identified defendant as a potential suspect. The first included a photograph of Nowell, whom Morrison immediately identified. C435A. The second included "an older [photograph]" of defendant, but Morrison did not identify him (or anyone else). C435A, C436A. The third and fourth lineups did not include photographs of defendant. C436A. Morrison did not identify anyone in the third lineup, but in the fourth one, he identified a photograph of Terrell Christor, saying he was "almost 100% sure" Christor was the gunman. *Id*. Police ruled out Christor based on their investigation and knowledge of Christor. *Id*. Morrison declined to view a fifth photographic lineup, stating that he was no longer confident about his ability to identify the gunman. C437A.

The trial court dismissed the petition at the second stage, C485-512, and the appellate court affirmed. Regarding defendant's claim of ineffective assistance for failure to call Morrison, the appellate court held that *People v. Enis*, 194 Ill. 2d 361 (2000), required dismissal of the claim because

defendant failed to attach an affidavit from Morrison stating how he would have testified. A36-37.

STANDARDS OF REVIEW

When a postconviction petition has been dismissed during second-stage proceedings, this Court reviews the appellate court's judgment *de novo*. *People v. Johnson*, 2017 IL 120310, ¶ 14. To advance to the third stage of postconviction proceedings, defendant's petition and accompanying materials must make a substantial showing of a constitutional violation. *People v. Brown*, 2017 IL 121681, ¶ 1.

ARGUMENT

I. Defendant's Ineffective Assistance Claim Was Properly Dismissed Because He Failed to Attach an Affidavit from Morrison.

When a postconviction petitioner alleges that trial counsel was ineffective for failing to call a witness, he "must introduce affidavits from those individuals who would have testified." *People v. Guest*, 166 Ill. 2d 381, 402 (1995). To be sure, an affidavit is not required to support every type of postconviction claim. *See* 725 ILCS 5/122-2 (requiring that a postconviction petition "shall have attached thereto affidavits, records, *or other evidence* supporting its allegations or shall state why the same are not attached" (emphasis added)). But when a defendant asserts that counsel was ineffective for failing to call a witness, only an affidavit will inform the trial court (1) whether the proposed witness would have been willing to testify and

(2) whether the witness would have provided any useful information or testimony. *People v. Johnson*, 183 Ill. 2d 176, 192 (1998).

This Court has announced the affidavit requirement repeatedly and clearly. *See, e.g.*, *Guest*, 166 Ill. 2d at 402 ("To support a claim of failure to investigate and call witnesses, a defendant must introduce affidavits from those individuals who would have testified."); *People v. Enis*, 194 Ill. 2d 361, 380 (2000) ("A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness."); *People v. Thompkins*, 161 Ill. 2d 148, 192 (1994) (where defendant failed to submit affidavits from proposed witnesses, Court was "precluded from considering this issue further").

Nevertheless, defendant argues that this Court did not mean what it said in *Guest*, *Enis*, and *Thompkins*. Instead, he argues that the defendants in those cases simply did not present enough "other evidence." Def. Br. 26-32. But if this Court intended to allow "other evidence" to substitute for a proposed witness's affidavit, surely it would have said so in *Enis*, *Guest*, *Thompkins*, or any of the other cases applying the affidavit requirement. *See People v. Spivey*, 2017 IL App (2d) 140941, ¶ 15 ("[T]he *Enis* court did not equivocate about the necessity for affidavits from proposed witnesses."). Yet defendant points to no case — and the People are aware of none — in which this Court has held that a postconviction claim of ineffective assistance for

failure to call a witness can survive second stage proceedings without an affidavit from the proposed witness.

In any event, this case illustrates the wisdom requiring an affidavit where a defendant has alleged ineffective assistance of counsel for failing to call a witness. Without an affidavit, defendant could not allege the substance of Morrison's proposed testimony. *See* C362-63. Defendant now assures this Court that "Morrison would have testified that [defendant] was not the gunman." Def. Br. 39. But this assertion was not included in the postconviction petition, and rightly so: without an affidavit from Morrison, it is mere wishful thinking, not a well-pleaded fact.

Indeed, Morrison may have refused to testify and instead invoked his Fifth Amendment right against self-incrimination. A witness may invoke the Fifth Amendment unless "it is perfectly clear . . . that the answers sought cannot possibly have a tendency to incriminate." *People v. Brown*, 303 Ill. App. 3d 949, 962-63 (1st Dist. 1999). Here, Morrison was attempting to sell marijuana to Nowell when the robbery occurred. So any testimony Morrison would have given — even admitting that he was present at the scene of the crime — would have potentially implicated him in a crime. Accordingly, he had a colorable right to assert a Fifth Amendment privilege. Without an affidavit, the Court cannot know whether Morrison would have waived that privilege to testify on defendant's behalf. *See People v. Brown*, 371 Ill. App. 3d 972, 982 (1st Dist. 2007) (rejecting ineffective assistance claim based on

failure to call witness because witness did not aver that he would have testified to contents of affidavit).

In short, when a defendant alleges that trial counsel was ineffective for failing to call a witness, the affidavit requirement allows a postconviction court to evaluate (1) whether and (2) how the proposed witness would have testified. It's a sound rule, and this case presents no reason to abandon it.

II. In the Alternative, Defendant Has Failed to Make a Substantial Showing that Trial Counsel Was Ineffective.

Setting aside defendant's failure to submit an affidavit from Morrison, he still has failed to make a substantial showing that trial counsel was ineffective. To prove ineffective assistance of counsel, defendant must show that counsel's performance was both deficient and prejudicial. *People v. Hughes*, 2012 IL 112817, ¶ 44. Defendant here can show neither.

The decision whether to call a witness is a matter of trial strategy left to counsel's discretion. *Enis*, 194 Ill. 2d at 378. This Court employs a "strong presumption" that counsel's strategic decisions are reasonable. *Id*. That presumption is rebutted only where counsel's strategy was "so unsound that no meaningful adversarial testing was conducted." *Id*.

The record here reinforces the presumption that counsel made a reasonable strategic decision not to call Morrison.[2] Counsel elicited

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[2] This argument presumes, despite defendant's lack of evidence, that Morrison would have waived any Fifth Amendment privilege and testified on defendant's behalf. If Morrison refused to testify, counsel could not have been ineffective for failing to call him. *Brown*, 371 Ill. App. 3d at 982.

testimony about Morrison's statement that the gunman was six feet three inches tall. R699. And counsel intimated in closing that the State did not want the jury to hear from Morrison. R871 ("Nowell is so critical to the State's case. He is so critical they don't want to bring Matt Morrison to talk about this."). Counsel's actions at trial demonstrate that he made a strategic choice to rely on Morrison's absence instead of calling him to testify.

And that strategic choice was reasonable. During the robbery, Nowell warned Morrison that the gunman "just got out of jail." C429B. Counsel, not surprisingly, wanted to keep this information from the jury. *See* R727-28 (counsel objecting to expected testimony about Nowell's statement to police that gunman had just gotten out of jail). And Morrison's description of the gunman was consistent with Collins's description at trial. *Compare* R501-02, R529 (Collins describing the gunman as a tall, thin, dark-skinned, African-American male wearing "something of a mustache"), *with* C431A (Morrison describing the gunman as tall, thin, and wearing a goatee[3]).

Given the risks of calling Morrison, defendant cannot rebut the "strong presumption" that counsel reasonably choose not to do so. *Enis*, 194 Ill. 2d at 378. Without an affidavit from Morrison, defendant can assert only that Morrison would have testified that (1) he told officers the gunman was six

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[3] Collins responded "No" when asked whether the gunman wore a goatee, R529, but he also testified that he could see only "the central part of [the gunman's] face" because the gunman's hood was pulled tight, R495.

feet three inches tall; (2) he failed to identify "an older [photograph]" of defendant in a photo lineup; and (3) he identified someone else in a photo lineup that did not include defendant. Counsel elicited the height description from Officer Manges. R699; *see also* R860. And counsel reasonably could have decided that the identifications were not so beneficial as to outweigh Morrison's potentially harmful testimony.

For similar reasons, defendant was not prejudiced by the absence of Morrison's testimony. Defendant's prejudice analysis hinges on his assertion that "Morrison would have testified that [defendant] was not the gunman." Def. Br. 39.[4] But that assertion is mere conjecture. Defendant did not plead it in his postconviction petition. *See* C362-63, C365. And the police reports attached to the petition do not show whether Morrison would have testified at all, let alone whether he would have testified that defendant was not the gunman. C429-39.

Based on the evidence attached to the petition, defendant failed to make a substantial showing of either deficient performance or prejudice, and

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[4] *See also id*. at 40 ("Morrison's testimony that [defendant] was not the gunman . . . would have been the only exculpatory evidence defense counsel presented at trial."); *id*. at 42 ("Morrison's testimony would have provided affirmative evidence from one of the victims of the robbery that [defendant] was *not* the gunman." (emphasis in original)); *id*. at 45 ("Morrison's testimony that [defendant] was not the gunman . . . would have been the most powerful exculpatory evidence the defense could have presented.").

the appellate court therefore properly affirmed the circuit court's judgment of dismissal.

CONCLUSION

The appellate court's judgment should be affirmed.

April 10, 2018

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is thirteen pages.

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CERTIFICATE OF FILING AND SERVICE

Under penalty of law as provided in 735 ILCS 5/1-109, the undersigned certifies that the statements set forth in this instrument are true and correct, including that the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and was served by transmitting a copy from my email address to all email addresses of record designated by the persons named below on April 10, 2018.

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Additionally, upon acceptance of the document by the court's electronic filing system, the undersigned will mail an original and twelve copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

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