No. 1-09-1645

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).

FOURTH DIVISION
February 17, 2011

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 2619
	)	
MONTINEZ WILLIAMS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment.

O R D E R

HELD: Where defendant failed to establish an arguable basis in law or fact that he was prejudiced by defense counsel's decision regarding cross-examination of the victim, his postconviction petition was properly dismissed.

Defendant, Montinez Williams, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction

Hearing Act (Act). 725 ILCS 5/122-1 *et seq*. (West 2008). He contends that the circuit court erred in dismissing his petition at the first stage of proceedings where his ineffective assistance of counsel claim had an arguable basis in law and fact.

This court previously affirmed the judgment entered on defendant's conviction of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2006)), but directed the circuit court to amend its fines, fees and costs order. *People v. Williams*, 1-06-3175 (2008) (unpublished order under Supreme Court Rule 23). In that appeal, we rejected defendant's challenges to the sufficiency of the evidence to sustain his conviction, noting that the trial court observed the inconsistencies in the victim’s testimony and chose to believe her rather than defendant. Thereafter, the supreme court denied defendant's petition for leave to appeal. *People v. Williams*, 229 Ill. 2d 655 (2009).

On March 23, 2009, defendant filed the post-conviction petition at bar alleging that defense counsel provided ineffective assistance by failing to adequately cross-examine the victim on her purported motive for fabricating her claim and by failing to interview additional potential witnesses.

On May 11, 2009, the circuit court summarily dismissed defendant's petition as frivolous and patently without merit. In its written order, the circuit court found that defendant's

claims were barred by waiver, and, if not, they lacked the requisite affidavits, and were contradicted by the record.

In this appeal, defendant challenges the circuit court's dismissal of his ineffective assistance of counsel claim on procedural and substantive grounds. He contends that his claim was not procedurally forfeited because it could not have been addressed on direct appeal. He further contends that his claim was substantively valid because it sets forth an arguable basis in law and fact. Our review of a summary dismissal is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 387-88 (1998).

The Act provides a remedy for defendants who claim that a substantial violation of their constitutional rights occurred in the proceedings which resulted in their convictions. 725 ILCS 5/122-1 (West 2008). Where defendant could have raised a claim on direct appeal, but did not do so, that claim is forfeited for the purpose of post-conviction proceedings. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005).

We first address the State's argument that defendant waived his claim.[1] The State contends that defense counsel's failure to cross-examine the victim using defendant's information concerning motive is based in the record, and, therefore, defendant's

[1]Although the circuit court and the State use the term waiver, our supreme court has explained that defendant's failure to raise a claim that could have been raised but was not is forfeited and not waived. *Blair*, 215 Ill. 2d at 443-44. Thus, we address defendant's claim as forfeiture and not waiver.

failure to raise it on direct appeal constitutes forfeiture. Defendant responds that his claim was not forfeited because it was based on facts outside of the record and could not have been raised on direct appeal.

An exception to the doctrine of forfeiture allows otherwise-barred claims to proceed where the reviewing court could not have considered a claim because the evidentiary basis for the claim was *de hors* the record. *People v. Harris*, 206 Ill. 2d 1, 13 (2002).

Here, defendant's claim is based on a private conversation between himself and his counsel, which was outside of the record and could not have been considered on direct appeal. *Blair*, 215 Ill. 2d at 450-51. Therefore, we find that defendant did not forfeit his ineffective assistance of counsel claim, even though, as a practical matter, defendant was aware of his counsel's failure to question the victim on this issue. *People* v. *Newbolds*, 364 Ill. App. 3d 672, 675-76 (2006).

Next, we address the State’s contention that the judgment of the circuit was proper where defendant failed to support his claim with, or explain the absence of, affidavits, as required by the Act. Defendant responds that the affidavit requirement is inapplicable in this case because the only available affidavit would be that of defense counsel.

In his petition, defendant must clearly set forth the respects in which his constitutional rights were violated, and attach thereto affidavits, records, or other evidence supporting the allegations or state why they are not attached. 725 ILCS 5/122-2 (West 2008)); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Defendant's failure to make such attachments or explain their absence is cause for summary dismissal. *Coleman*, 183 Ill. 2d at 380. In the context of an ineffective assistance of counsel claim, this failure may be excused where it is readily apparent from the record that the only affidavit defendant could have provided, other than his own, was that of his attorney. *People v. Hall*, 217 Ill. 2d 324, 332-33 (2005).

Such is the case here. Although defendant verified his petition, he failed to attach any affidavits or other evidence and failed to explain their absence. However, defendant’s claim is factually predicated on a private conversation between him and defense counsel, and our supreme court has long recognized that it would be unjust to require defendant to obtain an affidavit from his attorney in order to proceed with his ineffective assistance of counsel claim. *People v. Williams*, 47 Ill. 2d 1, 4 (1970); *People* v. *Collins*, 202 Ill. 2d 59, 68 (2002). Therefore, we find that dismissal on these grounds would be improper.

Finally, we address the merits of defendant’s ineffective assistance of counsel claim and find it was properly dismissed.

In order to establish ineffective assistance of counsel, defendant must show that (1) trial counsel's representation was deficient, and (2) this deficient performance resulted in prejudice to defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). In the first stage of a postconviction proceeding, defendant must provide an arguable basis in law or fact to support each contention. *People* v. *Hodges*, 234 Ill. 2d 1, 12 (2009). If defendant fails to make a sufficient showing of either prong of the *Strickland* test, this court need not address the remaining prong. *People v. Foster*, 168 Ill. 2d 465, 475 (1995). Generally, matters of cross-examination and impeachment of a witness are regarded as trial strategy, which will not support a claim of ineffective assistance of counsel unless the approach is objectively unreasonable. *People* v. *Ford*, 368 Ill. App. 3d 562, 575 (2006).

Defendant was charged with one court of sexual assault for vaginal penetration with his tongue and one count of sexual assault for vaginal penetration with his penis. Before trial, defendant claims he provided information to defense counsel regarding the victim and her motive for fabricating a sexual assault claim. Accepting that as true, however, we find no indication of ineffective assistance of counsel in the record.

Defense counsel challenged the victim’s account of the sexual assault by exposing inconsistencies in her story and by

highlighting that she did not attempt to summon help, despite multiple opportunities to do so. This strategy was successful, in obtaining an acquittal of one count of sexual assault.

On direct examination, defendant testified that immediately after they had sex the victim asked him, "[I]s that all you came down here for?" and immediately became distant and told him that they could not see each other anymore because they had committed a sin. From this evidence, defendant argues on appeal that his testimony "clearly indicates that [the victim] was aware that [defendant's] ruse of a relationship was untrue," which he contends, "gave [the victim] a motive to fabricate the sexual assault." The record establishes that defense counsel elected to bring that information out during defendant's testimony and not the victim's testimony. However, defendant fails to explain why that decision was objectively unreasonable. We find that it was not an unreasonable trial strategy, given that the trier of fact was made aware of the supposed motive before it found defendant guilty and defense counsel thoroughly cross-examined the victim. *People* v. *Johnson*, 372 Ill. App. 3d 772, 778 (2007).

Therefore, we find that defendant failed to present an arguable basis in law to establish that defense counsel was deficient. Having so found, we need not address whether defendant was prejudiced. *Foster*, 168 Ill. 2d at 475.

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.