

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF)	Appeal from the Circuit
ILLINOIS,)	Court of Lake County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 01—CF—3007
)	
WILLIE L. GIBSON,)	Honorable
)	George Bridges,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: The trial court properly granted the State's motion to dismiss defendant's postconviction petition without an evidentiary hearing because defendant failed to make a substantial showing that appellate counsel on direct appeal was ineffective and that his fourth amendments rights were violated. We affirmed the judgment of the trial court with respect to defendant's postconviction petition and his section 2—1401 petition for relief from judgment.

Following his 2003 conviction of unlawful possession with the intent to deliver between 100 and 400 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(B) (West 2000)), defendant, Willie L. Gibson, timely appealed. On direct appeal, defendant challenged the trial court's denial of his motion to suppress evidence. This court affirmed defendant's conviction and

sentence. *People v. Gibson*, No. 02—03—0755 (July 29, 2005) (unpublished order pursuant to Supreme Court Rule 23).

Thereafter, on June 11, 2004, defendant filed a *pro se* petition for relief from judgment pursuant to section 2—1401 of the Code of Civil Procedure (the Code) (735 ILCS 5/2—1401 (West 2002)). The trial court granted the State's dismissal motion, and defendant appealed. This court concluded that the trial court abused its discretion when it failed to conduct an evidentiary hearing on the validity of a former witness's recanted testimony. See *People v. Gibson*, No. 02—04—1083 (August 23, 2006) (unpublished order pursuant to Supreme Court Rule 23). On remand, the trial court conducted an evidentiary hearing, and on December 18, 2007, it denied defendant's section 2—1401 petition. Defendant moved to reconsider, and on May 21, 2009, the trial court denied defendant's motion. Defendant filed a timely notice of appeal on June 11, 2009.

During the pendency of the above proceedings, on December 28, 2005, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122—1 *et seq.* (West 2004)). The trial court summarily dismissed the petition; defendant appealed; and this court reversed and remanded. See *Gibson v. People*, 377 Ill. App. 3d 748 (2007). On remand, defendant was subsequently appointed an attorney, who filed a supplemental petition. Defendant filed a *pro se* notice, indicating that he did not believe the amended postconviction petition was sufficient. The State filed a motion to dismiss, and on May 21, 2009, the trial court granted the State's dismissal motion. Defendant filed a timely notice of appeal on June 11, 2009.

On August 4, 2009, this court granted defendant leave to amend the notice of appeal, and on August 12, 2009, defendant filed an amended notice of appeal, reflecting that he was appealing both the denial of his section 2—1401 petition and his postconviction petition for relief.

In his brief on appeal now, defendant challenges only the trial court's second-stage dismissal of his petition for postconviction relief. Although defendant uses testimony gathered from the hearing on his section 2—1401 petition, he does not challenge the trial court's ruling on his petition. We, therefore, affirm the trial court's judgment with respect to its denial of defendant's section 2—1401 petition. With respect to defendant's contention that the trial court erred when it granted the State's dismissal motion of his postconviction petition without an evidentiary hearing, we affirm.

Defendant contends that remand for an evidentiary hearing is required to determine whether appellate counsel was ineffective on direct appeal and whether the police violated his fourth amendment right to be free from unreasonable search and seizure. Defendant argues, first, that appellate counsel failed to present the argument on direct appeal that the evidence seized from defendant's vehicle was inadmissible in his trial on the cocaine found in the hotel room. Defendant argues, second, that the testimony presented at the hearing on his section 2—1401 motion reflects that no one told Detective Heidler about the contents of the black bag prior to his seizure of it and that Detective Smith's testimony was suspect.

The Act creates a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the petition's allegations, liberally construed and taken as true, need to present only "the gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). With regard to this requirement, a defendant at the first stage need only present a limited amount of detail (*People v. Ligon*, 239 Ill. 2d 94, 104 (2010) (citing *People v. Hodges*, 234 Ill. 2d 1, 9 (2009))), and the defendant need not make legal arguments or cite to legal authority (*Ligon*, 239 Ill. 2d at 104 (citing *People v. Gaultney*, 174 Ill.2d 410, 418 (1996))). At the second stage, an indigent defendant is entitled to appointed counsel,

the petition may be amended, and the State may answer or move to dismiss the petition. *Gaultney*, 174 Ill. 2d at 418. At the third stage, the trial court conducts an evidentiary hearing on the petition. *Gaultney*, 174 Ill. 2d at 418. A defendant is not entitled to an evidentiary hearing on her or his petition as a matter of right. *People v. Lucas*, 203 Ill. 2d 410, 418 (2002). “Rather, a defendant is only entitled to an evidentiary hearing where the allegations contained in the petition, supported by the trial record and any accompanying affidavits, make a substantial showing of a constitutional violation.” *Lucas*, 203 Ill. 2d at 418. We review *de novo* the dismissal of a postconviction petition at the second stage. *People v. Whitfield*, 217 Ill. 2d 177, 182-83 (2005) (citing *People v. Munson*, 206 Ill. 2d 104, 115 (2002)) .

A defendant has a constitutional right to the effective assistance of counsel during the defendant’s appeal as of right. *People v. Robinson*, 217 Ill. 2d 43, 47 (2005), citing *People v. Flores*, 153 Ill. 2d 264, 277 (1992). However, appellate counsel is not required to argue every conceivable issue on direct appeal. *People v. Williams*, 209 Ill. 2d 227, 243 (2004). Rather, counsel must exercise professional judgment to select from the many potential claims of error that might be asserted on appeal. *Williams*, 209 Ill. 2d at 243, citing *People v. Tenner*, 175 Ill. 2d 372, 387-88 (1997). Therefore, we judge a claim that appellate counsel was ineffective for failing to argue a particular issue, not on the basis of what the defendant might have preferred, but under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Williams*, 209 Ill. 2d at 243. To succeed on this claim, defendant here must show both that appellate counsel’s failure to raise the other crimes issue relating to the cocaine found in his vehicle was objectively unreasonable and that, absent this failure, his conviction or sentence would have been reversed on direct appeal. See *Williams*, 209 Ill. 2d at 243, citing *People v. Richardson*, 189 Ill. 2d 401, 412 (2000).

In the present case, defendant's claims fail for a number of reasons. Counsel's failure to challenge the seizure of the evidence in the vehicle in his trial on the cocaine found in the hotel room was not objectively unreasonable. At the February 2002 suppression hearing, defendant's witness, Detective Smith, testified that "he knew from the police transmission that defendant and Bell were in possession of contraband, so he was watching the windows of defendant's vehicle in case anything was thrown outside." *People v. Gibson*, No. 2—03—0755, slip op at 2 (July 29, 2005) (unpublished order pursuant to Supreme Court Rule 23). Smith further testified that, "when Bell exited defendant's vehicle, Bell informed him that in the center console of the vehicle was a black travel bag containing cocaine." *Id.* at 3. Smith further testified that "he told the other officers about the black bag and the contraband." *Id.* at 3. Smith testified that "the officers had defendant's verbal consent to search the residence and two other locations" *Id.* at 3.

Courts recognize that evidence of other crimes in which a defendant may have participated is not admissible to show the defendant's propensity for criminal activity. *People v. Coleman*, 158 Ill. 2d 319, 333 (1994). Evidence of other crimes is admissible if it is relevant for any legitimate trial purpose, such as identification, *modus operandi*, proof of motive, intent or absence of mistake. *Id.* at 333. Other-crimes evidence may also be presented as part of the steps in the investigation of a crime and the events leading up to it, so long as the evidence is relevant to specifically connect defendant with the crimes for which he is being tried. See *People v. Nieves*, 193 Ill. 2d 513, 530 (2000) (citing *People v. Lewis*, 165 Ill. 2d 305, 346 (1995)). The admissibility of other-crimes evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Wilson*, 214 Ill. 2d 127, 136 (2005).

In the present case, at the November 18, 2002, hearing, the trial court revisited the motion to suppress and ruled that the evidence was admissible to show defendant's intent or knowledge with regard to possession of the contraband. The trial court specifically discussed the probative value of the evidence and whether the evidence exceeded its prejudicial effect. The evidence was clearly admissible. The events of the stop of defendant's vehicle, including the seizure of the contraband in the vehicle, led to the offense for contraband found in the hotel room and connected defendant with the crimes for which he was tried. See *People v. McKibbons*, 96 Ill. 2d 176, 183 (1983) (stating that evidence of other crimes may be admissible to show the context of a defendant's arrest). The evidence was also admissible to help establish defendant's possession of cocaine, his specific intent to distribute, and his ongoing business of selling cocaine, which tended to remove any doubt that the evidence of cocaine in the hotel room was inadvertent or innocent. See generally *People v. LeCour*, 273 Ill. App. 3d 1003 (1995).

Because defendant's underlying claim lacks merit, it therefore follows that appellate counsel did not render objectively unreasonable performance. Accordingly, defendant suffered no prejudice from appellate counsel's decision not to bring forth the claim of error that the other crimes evidence was improperly admitted.

Because appellate counsel's decision was not objectively unreasonable, defendant cannot establish that, absent this failure, his conviction or sentence would have been reversed on direct appeal. See *Robinson*, 217 Ill. 2d at 47-48, citing *Flores*, 153 Ill. 2d at 283 (stating that appellate counsel's error was prejudicial if a reasonable probability exists that the result of the appeal would have been different but for the error). Appellate counsel's failure to raise the other-crimes issue was not an error and did not prejudice defendant. Accordingly, we conclude that defendant has failed

to demonstrate that he was denied the effective assistance of appellate counsel, and the trial court's second-stage dismissal of defendant's postconviction petition on this basis was proper.

Defendant's other claim that the police violated his fourth amendment right to be free from unreasonable search and seizure likewise fails. Defendant discusses the testimony presented at the hearing on his motion to suppress and the testimony presented at the hearing on his section 2—1401 petition. Defendant asserts that Detective Heidler's testimony at the motion to suppress hearing reflected that, prior to seizing the bag, he was unaware that the bag contained illegal drugs. Defendant then focuses on the discrepancies in Detective Smith's testimony and Heidler's testimony, and then claims that "Detective Smith's testimony becomes very suspect." Defendant concludes that, if Smith's testimony was discredited, Heidler would not have had probable cause to search the black bag.

We decline to find the purported discrepancies in Smith's testimony or Heidler's testimony would have rendered the search of the black bag unconstitutional, insofar as this court has already affirmed the denial of defendant's motion to suppress in his direct appeal. See *Gibson*, slip op. at 13-25. Because an action for postconviction relief is a collateral attack upon a prior conviction and sentence, rather than a surrogate for a direct appeal, any issues that were decided on direct appeal are barred by *res judicata*; any issues which could have been raised on direct appeal are defaulted. *People v. Tenner*, 206 Ill. 2d 381, 392 (2002). In the present case, Smith was a witness for the defense's case in chief at the February 20, 2002, hearing on defendant's motion to suppress; therefore, defendant had every opportunity to ask Smith to clarify any fact or information. Contrary to defendant's assertion, defendant could have asked Smith that the co-worker he "told about his conversation with *** Bell concerning drugs in the black bag was, in fact, Detective Heidler and not

just a ‘co-worker.’ ” See *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007) (stating that “evidence is not ‘newly discovered’ when it presents facts already known to the defendant at or prior to trial, though the source of those facts may have been unknown, unavailable, or uncooperative”). On our review of the record, we conclude that defendant’s claim is barred by *res judicata*.

Because defendant’s petition and accompanying documentation fail to make a substantial showing of a constitutional violation (see *Lucas*, 203 Ill. 2d at 418), we hold the trial court’s dismissal of defendant’s postconviction petition at the second stage was proper. See *Munson*, 206 Ill. 2d 104.

For the foregoing reasons, we affirm the judgment of the circuit court of Lake County.

Affirmed.