

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).

2011 IL App (4th) 090861-U

Filed 9/22/11

NO. 4-09-0861

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

| | | |
|--------------------------------------|---|------------------------|
| THE PEOPLE OF THE STATE OF ILLINOIS, |) | Appeal from |
| Plaintiff-Appellee, |) | Circuit Court of |
| v. |) | Logan County |
| JOSHUA L. FARNAM, |) | No. 02CF184 |
| Defendant-Appellant. |) | |
| |) | Honorable |
| |) | Thomas M. Harris, Jr., |
| |) | Judge Presiding. |

JUSTICE STEIGMANN delivered the judgment of the court.
Justices Turner and Cook concurred in the judgment.

ORDER

- ¶ 1 *Held:* The appellate court affirmed the trial court's second-stage dismissal of defendant's postconviction petition, concluding that defendant's ineffective-assistance-of-counsel claims were utterly bereft of merit.
- ¶ 2 In the Fall of 2002, the State charged defendant, Joshua L. Farnam, with (1) attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2002)) and (2) armed violence (720 ILCS 5/33A-2(a) (West 2002)). Following the State's case in chief at defendant's February 2003 jury trial, defendant entered into a partially negotiated guilty plea to the armed violence charge. The trial court later accepted that plea.
- ¶ 3 Prior to defendant's April 2003 sentencing hearing, defendant orally moved to withdraw his guilty plea and to discharge his attorney, Michael J. Costello. In response, the trial court appointed the public defender to investigate defendant's allegations that Costello was

ineffective. Following a two-day hearing in May 2003, the court denied defendant's motion to withdraw his guilty plea. Shortly thereafter, the court sentenced defendant to 17 years in prison.

¶ 4 Defendant appealed, and this court affirmed. See *People v. Farnam*, No. 4-03-0540 (April 5, 2005) (unpublished order under Supreme Court Rule 23).

¶ 5 In October 2005, defendant filed a petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2004)), essentially asserting that each of his lawyers was ineffective. In April 2009, the State filed a motion to dismiss defendant's postconviction petition, which the trial court later granted.

¶ 6 Defendant appeals, arguing that the trial court erred by granting the State's motion to dismiss his postconviction petition. We disagree and affirm.

¶ 7 I. BACKGROUND

¶ 8 In September 2002, the State charged defendant with attempt (first degree murder) (720 ILCS 5/8-4(a), 9-1(a)(2) (West 2002)). In October 2002, the State additionally charged defendant with armed violence (720 ILCS 5/33A-2(a) (West 2002)). In January 2003, the State made a written plea offer of 15 years on the armed-robbery charge, which, as the trial court noted, defendant apparently rejected.

¶ 9 Defendant's jury trial commenced in February 2003. Following the State's case in chief, however, defendant entered into a partially negotiated guilty plea to the armed-violence charge. The terms of defendant's plea agreement included a promise by the State to (1) recommend no more than 20 years in prison and (2) forego any further prosecution on the attempt (first degree murder) charge. After finding that defendant's guilty plea was voluntary under Illinois Supreme Court Rule 402(b) (eff. July 1, 1997)—which requires that the court determine whether a

guilty plea has been entered into voluntarily by (1) questioning the defendant in open court, (2) confirming the terms of the agreement, and (3) exploring whether threats or other promises were made to induce the defendant into pleading guilty—the court accepted defendant's guilty plea.

¶ 10 Prior to defendant's April 2003 sentencing hearing, defendant orally moved to withdraw his guilty plea and to discharge Costello. In response, the trial court appointed the public defender to investigate defendant's allegations that Costello was ineffective. Following a two-day hearing in May 2003, at which defendant was represented by Assistant Public Defender Jeff Page, the court denied defendant's motion to withdraw his guilty plea. Shortly thereafter, the court sentenced defendant to 17 years in prison. Defendant responded by filing a second motion in which defendant reiterated the arguments he made at the hearing on his motion to withdraw guilty plea. The court later denied that motion as well.

¶ 11 Defendant appealed, and this court affirmed. See *Farnam*, No. 4-03-0540 (April 5, 2005) (unpublished order under Supreme Court Rule 23) (rejecting defendant's claims that the trial court erred by denying his motion to withdraw his guilty plea because (1) his plea was involuntary, in that it had been coerced, and (2) he received ineffective assistance of counsel).

¶ 12 In October 2005, defendant *pro se* filed a petition under the Act, asserting, in pertinent part, that (1) Costello provided ineffective assistance by failing to properly investigate his case and interview witnesses; (2) Page provided ineffective assistance of counsel at the sentencing hearing by failing to secure an expert to testify about defendant's cystic fibrosis or point out that defendant had not been previously convicted of a felony; and (3) appellate counsel provided ineffective assistance of counsel by failing to pursue additional claims of ineffectiveness on direct appeal. In April 2009, the State filed a motion to dismiss defendant's

postconviction petition, asserting, among other things, that (1) the doctrine of *res judicata* barred several of defendant's claims and (2) defendant's other claims should be rejected on the merits.

In October 2009, the trial court granted the State's motion to dismiss.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 Defendant argues that the trial court erred by granting the State's motion to dismiss his postconviction petition. Specifically, defendant contends that he made a sufficient showing that (1) his claims were not barred by the doctrine of *res judicata*; (2) Costello's representation was sufficiently ineffective to render his guilty plea involuntary; (3) Page's representation at the sentencing hearing was ineffective; and (4) his appellate counsel was ineffective for failing to allege additional claims of ineffectiveness. We address defendant's contentions in turn.

¶ 16 A. Postconviction Proceedings and the Standard of Review

¶ 17 This court recently outlined the postconviction proceedings under the Act, as follows:

"A defendant may proceed under the Act by alleging that 'in the proceedings which resulted in his or her conviction[,] there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both.' 725 ILCS 5/122-1(a)(1) (West 2006). In noncapital cases, the Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1 through 122-8 (West 2006); *People v.*

Jones, 213 Ill. 2d 498, 503, 821 N.E.2d 1093, 1096 (2004). At the first stage, 'the trial court, without input from the State, examines the petition *only* to determine if [it alleges] a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit.' (Emphasis in original.)

People v. Phyfiher, 361 Ill. App. 3d 881, 883, 838 N.E.2d 181, 184 (2005). 'Section 122-2.1 [of the Act] directs that if the defendant is sentenced to imprisonment (rather than death) and the circuit court determines that the petition is frivolous or patently without merit, it shall be dismissed in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2004).' *People v. Torres*, 228 Ill. 2d 382, 394, 888 N.E.2d 91, 99-100 (2008).

If a petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed. 725 ILCS 5/122-4 (West 2006). At the second stage, the State has the opportunity to answer or move to dismiss the petition. 725 ILCS 5/122-5 (West 2006). If the trial court does not grant the State's motion to dismiss or if the State has filed an answer, the petition proceeds to the third stage, where the defendant may present evidence in support of his petition. 725 ILCS 5/122-5, 122-6 (West 2006)." (Alteration in original.) *People v.*

Andrews, 403 Ill. App. 3d 654, 658-59, 936 N.E.2d 648, 652-53 (2010).

¶ 18 In this case, defendant's *pro se* petition for postconviction relief survived the first stage when the trial court appointed counsel to represent defendant. Defendant's petition did not survive the second stage of the proceedings, given that the court granted the State's motion to dismiss. Accordingly, we turn to whether the court erred by dismissing defendant's postconviction petition at the second stage of postconviction proceedings.

¶ 19 Our review of a second-stage dismissal is *de novo*. *People v. Alberts*, 383 Ill. App. 3d 374, 376, 890 N.E.2d 1208, 1211 (2008).

¶ 20 B. Defendant's Claim That His Arguments Were Not Barred by the Doctrine of *Res Judicata*

¶ 21 Defendant first contends that the trial court erred by determining that many of his postconviction claims were barred by the doctrine of *res judicata*. The State concedes that to the extent that his claims are based on affidavits that were not part of the record on direct appeal, they are not barred by the doctrine of *res judicata*. The State further points out, however, that because we review the court's judgments rather than its rationale (*People v. Reed*, 361 Ill. App. 3d 995, 1000, 838 N.E.2d 328, 332 (2005)), we should affirm "on grounds other than the doctrine of *res judicata*." We accept the State's concession *only* to the extent that defendant's claims are based upon evidence that was not previously presented. To that end, we turn to defendant's substantive claims of ineffective assistance of counsel.

¶ 22 C. Defendant's Claims of Ineffective Assistance of Counsel

¶ 23 1. *Ineffective Assistance of Counsel*

¶ 24 Ineffective assistance of counsel claims are governed by the standard set forth in

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), and adopted by the Supreme Court of Illinois in *People v. Albanese*, 104 Ill. 2d 504, 473 N.E.2d 1246 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Put another way, the defendant must show that counsel's performance was "objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Petrenko*, 237 Ill. 2d 490, 496-97, 931 N.E.2d 1198, 1203 (2010) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068). "The *Strickland* standard applies equally to claims of ineffective appellate counsel, and a defendant raising such a claim must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203.

¶ 25 2. *Defendant's Claim That Costello's Representation Was Ineffective*

¶ 26 Defendant contends that Costello's representation was sufficiently ineffective to render his guilty plea involuntary. Specifically, defendant asserts that Costello failed to (1) reasonably investigate a number of witnesses, "all of which were brought to Costello's attention by [defendant]" and (2) prepare for trial. For the reasons that follow, we deem defendant's assertions forfeited and barred by the doctrine of *res judicata*.

¶ 27 Initially, we note that this is defendant's fourth "bite at the apple" to convince this court or the trial court that Costello was ineffective. As previously explained, the trial court conducted a two-day hearing into Costello's representation when defendant attempted to

withdraw his guilty plea and the court found his guilty plea to be knowing and voluntary. On direct appeal, this court addressed and rejected defendant's assertions that Costello was ineffective. On collateral attack, the trial court again evaluated defendant's postconviction claims of Costello's ineffectiveness—which were reviewed and not amended by appointed counsel—and rejected them. And now, defendant has appealed that court's denial of his postconviction petition. Each time, defendant has come up with "new and improved" reasons why Costello failed to provide effective assistance of counsel. We are not impressed.

¶ 28 Here, as defendant acknowledges, the witnesses he now claims should have been investigated were "brought to Costello's attention" pretrial. However, despite previous opportunities to do so—such as the two-day hearing on his motion to withdraw his guilty plea—defendant pointed to these witnesses for the first time in his postconviction petition. In light of defendant's failure to previously assert that Costello did not interview those witnesses, knowing that they were available as demonstrated by his assertion that he brought them to Costello's attention, we deem his argument in this regard forfeited. See *Petrenko*, 237 Ill. 2d at 499, 931 N.E.2d at 1204 (claims that could have been raised on direct appeal but were not are forfeited).

¶ 29 As for defendant's assertion that Costello failed to prepare for trial, defendant bases his claim on the fact that Costello (1) failed to investigate certain witnesses—which we have already rejected as forfeited—and (2) inadequately consulted with him leading up to trial. First, the tenor of defendant's testimony during the hearing on (1) his motion to withdraw and (2) arguments on direct appeal was that Costello failed sufficiently to consult with him in order to properly present his case. Thus, his assertion that Costello was ineffective for failing sufficiently to consult with him is barred by the doctrine of *res judicata*. See *People v. Simmons*, 388 Ill.

App. 3d 599, 606, 903 N.E.2d 437, 445 (2009) ("Postconviction petitions are subject to the doctrine of *res judicata*, so that all issues raised and decided on direct appeal or in the original postconviction petition are barred from being relitigated in future pleadings or any successive postconviction petitions"). Moreover, to the extent that defendant is now asserting directly that counsel failed to sufficiently meet with him pretrial by not spending a specified amount of time talking to him, we deem that argument forfeited, given that such an argument could have been raised at trial or on direct appeal but was not. See *Petrenko*, 237 Ill. 2d at 499, 931 N.E.2d at 1204 (arguments that could have been raised but were not are deemed forfeited).

¶ 30 3. *Defendant's Claim That Page's Representation Was Ineffective*

¶ 31 Defendant next contends that Page's representation at the sentencing hearing was ineffective. Specifically, defendant asserts that Page was ineffective for failing to (1) properly investigate evidence in mitigation, including testimony regarding (a) "mutual combat" or (b) defendant's cystic fibrosis, and (2) correct the trial court's "mistaken belief" that he had been convicted of a prior felony. We disagree.

¶ 32 The trial court addressed defendant's claim that Page provided ineffective assistance at the sentencing hearing in its October 2009 written order, as follows:

"[I]t is difficult to determine what prejudice defendant suffered by not having an expert testify [about his cystic fibrosis] at his sentencing. The letters of family members accompanying the [presentence investigation report (PSI)] informed the court of defendant's condition as well as his prognosis as explained to them by physicians. Further, *** Page conveyed to the court the opin-

ions of a 'Dr. Gray' who apparently had previously suggested defendant's condition would progressively worsen. *** The court specifically referred to defendant's medical condition as a mitigating factor in considering its sentence.

As for defendant's claim that *** Page was ineffective by failing to bring to the court's attention that defendant had not previously been convicted of a felony, given this court's ruling [that the sentencing court's reference to defendant's conviction for a Class A misdemeanor, which was charged as a felony, pertained more to defendant's conduct than to the classification of the offense], this claim of ineffective assistance is also rejected. Additionally, the court agrees with the State that defendant suffered no prejudice as a result and so he fails to satisfy the second prong of the *Strickland* analysis.

* * *

Defendant's claim that *** Page was ineffective by failing to interview witnesses who could have established provocation is invalid given that defendant's version of the incident (including facts suggesting provocation) is set forth in the PSI which was reviewed by the court prior to sentencing ***. ***

*** Page's decision to call only two of defendant's family members to testify at sentencing was a decision concerning tactics.

Ample information regarding *** defendant's upbringing and social background was brought to the court's attention by way of letters to the court written by family and *** defendant. It is doubtful that additional or wholly cumulative testimony would have aided defendant in securing a lesser sentence."

¶ 33 Based on our review of the record, we conclude that the trial court's assessment as quoted above is sound, and we agree with it.

¶ 34 *4. Defendant's Claim That His Appellate Counsel Was Ineffective*

¶ 35 Defendant also contends, without any analysis or explanation, that his appellate counsel was ineffective "[t]o the extent that this Court finds any issues raised on post[conviction] were meritorious and supported by the record on direct appeal, and *** appellate counsel failed to raise them." We reject this contention.

¶ 36 On direct appeal, defendant's appellate counsel throughly briefed and argued that Costello was ineffective for failing to (1) exclude a juror who had been discharged from serving on defendant's jury from testifying at defendant's trial and (2) properly question that same juror during *voir dire*. See *Farnam*, No. 4-03-0540 (April 5, 2005) (unpublished order under Supreme Court Rule 23) (rejecting defendant's claims in that regard). Notably, appellate counsel did not make any of the arguments defendant made in his postconviction petition related to the effective assistance of trial counsel. This is almost assuredly because counsel knew what we have just explained—namely, that defendant's postconviction claims of ineffective assistance of counsel are utterly bereft of merit.

¶ 37 Accordingly, we reject defendant's contention that his appellate counsel was

ineffective.

¶ 38 In closing, we commend the trial court for its thorough written order, which this court found most helpful.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its \$75 statutory assessment against defendant as costs of this appeal.

¶ 41 Affirmed.