

2012 IL App (2d) 101200-U  
No. 2-10-1200  
Order filed June 29, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Winnebago County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 05-CF-535
	)	
SALVADOR RUBIO,	)	Honorable
	)	Steven G. Vecchio,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE BIRKETT delivered the judgment of the court.  
Justices McLaren and Schostok concurred in the judgment.

**ORDER**

*Held:* The trial court erred in summarily dismissing defendant's postconviction petition alleging that his trial counsel was ineffective for unilaterally deciding not to tender an instruction and verdict form on second-degree murder: defendant's claim was not forfeited, as it could not have been raised on direct appeal, and the claim was not frivolous, as counsel was arguably deficient (for thinking that defendant was not eligible for the instruction and that instructions were counsel's prerogative) and defendant was arguably prejudiced (as there was slight evidence to support the instruction and to raise a reasonable probability that defendant would have been convicted of second-degree murder).

¶ 1 Following a jury trial, defendant, Salvador Rubio, was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2004)) and sentenced to 60 years' imprisonment.<sup>1</sup> After this court affirmed on direct appeal, defendant petitioned *pro se* for postconviction relief, arguing that his trial counsel was ineffective for deciding, without input from defendant, not to tender a second-degree murder instruction and verdict form to the jury. The trial court summarily dismissed the petition, finding the issue forfeited. Defendant timely appeals from that dismissal. For the reasons that follow, we reverse and remand.

¶ 2 The facts relevant to resolving this appeal are as follows. At trial, it was revealed that, on the evening of February 6, 2005, which was the night of the Super Bowl, defendant, a teenager, and his 15-year old friend, Zachary Sanders, were walking to defendant's home. Sanders, who had defendant's rusty older-model single-action revolver in the pocket of his jeans, wanted to smoke a cigarette while he walked.<sup>2</sup> However, on the way to defendant's home, Sanders dropped his cigarette lighter in a puddle across the street from the Two Wheel Inn, a bar.

¶ 3 Sanders saw a lighter in an unlocked car parked at The Two Wheel Inn. While Sanders entered that car, which belonged to Russell Welch, to allegedly retrieve the lighter, defendant stood

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<sup>1</sup>The trial court sentenced defendant to 30 years' imprisonment, and, pursuant to section 5-8-1(a)(1)(d)(iii) of the Unified Code of Corrections (730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004)), an additional term of 30 years was added to the 30-year term the trial court imposed, resulting in a sentence of 60 years' imprisonment.

<sup>2</sup>Defendant told the police that the weapon was a "one[-]shot" revolver. However, given the context in which the characteristics of the gun were discussed, we gather that the weapon was, in actuality, a single-action revolver.

outside of the car. As Sanders began taking change that he found in the car, Welch, an adult, exited the Two Wheel Inn with his girlfriend. Seeing that someone was in his car, Welch ran over to the car, jumped on Sanders, and began struggling with him outside of the car, by the front passenger-side door. Welch began choking Sanders, Sanders attempted to remove Welch's hands from around his neck, and, while this was happening, defendant retrieved his gun from the pocket of Sanders' jeans. Welch then pulled Sanders shirts' off while struggling with him, Sanders turned away from Welch and began running, and then Sanders heard a gunshot. Welch was shot in the chest and subsequently died as a result of that shooting.

¶ 4 The statement defendant gave the police was admitted at trial. In that statement, defendant described what happened between Welch and Sanders and how he became involved. Specifically, defendant stated that he saw Welch running toward the car and alerted Sanders to this fact by saying that "dude was coming." Sanders did not hear defendant, and "dude came, was beating up [Sanders], [and defendant] just watched." Later, defendant asserted that "dude was just beating up [Sanders], [and defendant] jumped in." Defendant indicated that he "jumped in" because he "didn't want [his] guy to get beat up in front of [him]."

¶ 5 Once defendant was part of the melee, he indicated that Welch was just "cussing" at him. Later, defendant indicated that Welch said, "I'm going to kill you." After defendant joined in the fight, he said, "I got my ass beat, too." Defendant clarified that "dude was choking [him]" and "punched [him] in [his] face and [his] jaw."

¶ 6 As "[Sanders] was getting his ass beat, [defendant] grabbed the gun from [Sanders]." Defendant stated that he grabbed the gun because, if he did not get ahold of the gun before Welch did, then "[defendant] would have been the one dead." Defendant said he "pulled [the gun] out, [he]

ran back, and [he] just shot it and then [he and Sanders] just ran.” Defendant guessed, with help from the police interrogating him, that he was about eight feet away from Welch when the gun fired.

¶ 7 When describing the incident further, defendant asserted, “Piece of shit went off.” He said, “It’s a gun that could probably go off if you just have it in your pocket.” Defendant was asked, “[a]t what point did [the gun] go off?” Defendant responded, “When I grabbed [the gun] from [Sanders], I was pulling it from [Sanders], I was pointing at dude and dude ran at me and then I was like, damn, this piece of shit.”<sup>3</sup> Defendant was asked whether he intended to shoot Welch, and defendant responded, as he had similarly responded throughout the interview, “No, I didn’t mean to shoot the dude.” Defendant commented that “[i]t’s crazy how [the gun] was just cocked and my finger was on the trigger at the time and it just shot.” Defendant also remarked, “I wish I never did it for real because it’s like, man, I hope you don’t say it was on purpose because it really wasn’t, on everything it wasn’t.”

¶ 8 During trial, the court inquired, based on defense counsel’s submissions, whether defense counsel was going to submit a self-defense instruction. The court asked that, if counsel was going to pursue such a defense, counsel tender a self-defense instruction the next day. Counsel advised the court that he would.

¶ 9 The next day, when the court asked whether counsel would be submitting a self-defense instruction, counsel responded, “I’m not going to submit any.” Counsel explained, “There’s no-I don’t believe there’s sufficient evidence presented at this point to justify that instruction.” The court asked whether counsel was withdrawing the defense of self-defense, and counsel replied, “I don’t know that I can withdraw it as a potential defense simply because of the fact that it would be my

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<sup>3</sup>Earlier, defendant stated that “dude didn’t run at me.”

client's decision as to whether he testifies or not." However, counsel asserted, "But at this point, I would affirm to the Court I do not expect to be presenting any self-defense type of defense in this case." The court cautioned counsel that, "if you think there is even a shred of a possibility," counsel should submit a self-defense instruction.

¶ 10 After the close of the State's case, defense counsel moved for a directed verdict, arguing that the State failed to establish intent. The trial court denied the motion.

¶ 11 Before defendant presented his case, defense counsel was given numerous opportunities to talk with defendant about how to proceed. On the last occasion, after defense counsel had told the court that he would be calling witnesses, counsel advised the court that defendant "has at this moment changed his mind about how he wished for [counsel] to proceed." Counsel informed the court that defendant would not be presenting any testimony.

¶ 12 After defendant rested, a jury instruction conference was held. At no point during this conference did counsel propose that the jury should be instructed on second-degree murder or self-defense. At the end of the jury instruction conference, the court asked defendant whether he was "able to follow along a little bit on the jury instructions[.]" Defendant replied, "Yes." The court then asked defendant whether he was "okay with [the instructions] as [his] attorney has responded on the record[.]" Defendant responded, "Yep." When the jury was instructed, it was not given an instruction on second-degree murder or self-defense.

¶ 13 In a general verdict form, the jury found defendant guilty of first-degree murder.<sup>4</sup> Defendant was sentenced, and he appealed, arguing that his confession should have been suppressed and that his sentence was excessive. This court affirmed. *People v. Rubio*, No. 2-07-0320 (2010) (unpublished order under Supreme Court Rule 23).

¶ 14 Thereafter, defendant petitioned *pro se* for postconviction relief, claiming that his trial attorney was ineffective for unilaterally deciding not to request a jury instruction and verdict form for second-degree murder. Defendant contended that he desired such an instruction and verdict form and that, based on the law and the facts of his case, he was entitled to them. Defendant also asserted that, when he asked counsel about submitting such an instruction and verdict form, counsel told defendant that he could not do so because the evidence supported a charge of felony murder and an instruction for second-degree murder could not be given in a felony-murder case. According to defendant's petition, counsel also told defendant that counsel alone must decide what instructions to give. Defendant indicated in his petition that he did not "inform the judge that [he] disagreed with [counsel's] decision because [defendant] did not understand that he had the right to do so." Defendant claimed that, after he was convicted, counsel admitted to defendant that he made a mistake and that he should have tendered a second-degree murder instruction. Attached to defendant's petition was his affidavit and the affidavits of his father and sister. Defendant, his father,

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<sup>4</sup>Defendant was charged with first-degree murder pursuant to section 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(2) (West 2004) (knowing murder)) and section 9-1(a)(3) (720 ILCS 5/9-1(a)(3) (West 2004) (felony murder)). The jury found defendant guilty of first-degree murder and also found that defendant personally discharged the handgun that proximately caused Welch's death.

and his sister all attested that counsel told them that defendant was not entitled to a second-degree murder instruction.

¶ 15 In a written order, the trial court summarily dismissed defendant's petition, finding that, because the issue defendant raised could have been raised on direct appeal, his claim was forfeited. Defendant timely appeals from that order.

¶ 16 On appeal defendant contends that the trial court erred in summarily dismissing his petition, because his trial counsel provided ineffective assistance. "The [Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010))] provides a remedy to defendants who have suffered substantial violations of their constitutional rights." *People v. Barcik*, 365 Ill. App. 3d 183, 190 (2006). When the death penalty is not involved, there are three stages to the proceedings. *Id.* This appeal concerns the dismissal of a petition at the first stage.

¶ 17 During the first stage, the trial court determines whether the defendant's allegations sufficiently demonstrate a constitutional violation that would necessitate relief. *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). The trial court may summarily dismiss the petition if it finds that the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition is considered frivolous or patently without merit when the allegations in the petition fail to present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115, 126 (2007); *People v. Little*, 335 Ill. App. 3d 1046, 1050 (2003).

¶ 18 "The 'gist' standard 'is a low threshold.'" *People v. Edwards*, 197 Ill. 2d 239, 244 (2001) (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). Although a 'gist' is something more than a bare allegation of a deprivation of a constitutional right (*People v. Prier*, 245 Ill. App. 3d 1037, 1040 (1993)), it is something less than a completely-pleaded or fully-stated claim (*Edwards*, 197 Ill.

2d at 245). Thus, to set forth the gist of a constitutional claim, the petition need present only a limited amount of detail and need not set forth the claim in its entirety. *Id.* at 244. In resolving whether the petition is frivolous or patently without merit, the court must accept as true all well-pleaded allegations, unless the allegations are positively rebutted by the record. *Little*, 335 Ill. App. 3d at 1050.

¶ 19 We review *de novo* the summary dismissal of a petition. *Id.* at 1051. In doing so, because we review the trial court's judgment and not the reasons the trial court gave for ruling the way it did, we may affirm on any basis the record supports. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 20 Here, the trial court summarily dismissed defendant's petition on the basis of forfeiture. "In an initial postconviction proceeding, \*\*\* [forfeiture] operate[s] to bar the raising of claims that \*\*\* could have been adjudicated on direct appeal." *People v. Blair*, 215 Ill. 2d 427, 443 (2005). However, where a defendant relies on matters outside the record, forfeiture does not apply. *People v. Munson*, 206 Ill. 2d 104, 118 (2002). Defendant claims, and the State agrees, that defendant did not forfeit his claim, because his postconviction allegation of ineffectiveness of counsel is based on information outside the record. Specifically, defendant's claim is based on private conversations he had with counsel about whether to submit a second-degree murder instruction and verdict form. Accordingly, we determine that defendant's claim is not forfeited.

¶ 21 Given that we are not limited to reviewing the basis upon which the trial court summarily disposed of the petition, we now consider whether defendant presented the gist of a claim that defense counsel was ineffective for failing to tender a second-degree murder instruction and verdict form. Defendant contends that counsel was ineffective for deciding, without input from him, not to

submit a second-degree murder instruction and verdict form. Defendant claims that the evidence supported giving a second-degree murder instruction, given the fact that the evidence established that defendant shot Welch while defendant was trying to defend himself and Sanders, but that defendant's belief that deadly force was necessary was unreasonable.

¶ 22 A claim of ineffective assistance of counsel requires a defendant to establish that (1) his attorney's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). At the first stage of postconviction proceedings, a defendant need establish only that it is *arguable* that counsel's performance fell below an objective standard of reasonableness and that it is *arguable* that the defendant was prejudiced. *People v. DuPree*, 397 Ill. App. 3d 719, 737 (2010).

¶ 23 Defendant advances two reasons why his counsel was deficient for failing to tender a second-degree murder instruction and verdict form. Specifically, he claims that counsel erroneously believed that (1) a second-degree murder instruction could not be given because defendant was charged with felony murder and (2) counsel alone must decide what instructions should be proposed. We consider each claim in turn.

¶ 24 First, we address whether defense counsel was incorrect in believing that, because defendant was charged with felony murder in addition to knowing murder, a second-degree murder instruction could not be tendered to the jury. It is well settled that, when a defendant is charged solely with felony murder, a jury may not be instructed on both first-degree murder and second-degree murder. *People v. Lockett*, 339 Ill. App. 3d 93, 104 (2003) (noting that "second[-]degree murder cannot be based on felony murder"). Here, however, defendant was charged with both knowing murder and

felony murder. Because defendant was charged with knowing murder in addition to felony murder, instructing the jury on second-degree murder would not have been improper. *Id.* at 108-09 (when the evidence supports both knowing murder and felony murder, the jury may be instructed on both first-degree murder and second-degree murder). Thus, to the extent that defendant claims that defense counsel erred in thinking that a second-degree murder instruction could not be given because defendant was charged with felony murder, we find that counsel's performance arguably fell below an objective standard of reasonableness.

¶ 25 Likewise, we believe that counsel's performance arguably fell below an objective standard of reasonableness when counsel allegedly believed that he unilaterally could decide not to tender a second-degree murder instruction and verdict form. The decision about whether to submit instructions on a lesser charge is a defendant's to make.<sup>5</sup> *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). Although a defendant must make that decision, a defendant does not need to affirmatively state on the record that he does not wish to submit a lesser included offense instruction. See *People v. Medina*, 221 Ill. 2d 394, 410 (2006). Rather, when a lesser included offense instruction is not tendered, "it may be assumed that the decision not to tender was defendant's, after due consultation with counsel." *Id.* And indeed, two exchanges in the record could be read to refute defendant's assertion that he did not, at a minimum, approve of counsel's decision not to tender a second-degree murder instruction and verdict form.

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<sup>5</sup>Even though, technically, second-degree murder is not a lesser included offense of first-degree murder, the considerations that apply in deciding whether to tender a lesser included offense instruction apply in determining whether to tender a second-degree murder instruction in addition to a first-degree murder instruction. *DuPree*, 397 Ill. App. 3d at 734-35.

¶ 26 First, the record contains an exchange between defense counsel and the trial court about whether counsel would be submitting a self-defense instruction. In that conversation, the court asked defense counsel whether he would be withdrawing a self-defense claim. Counsel responded that he did not believe that he could withdraw the claim, based on the fact that defendant had to decide whether he wished to testify or not. See *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009) (“The decision whether to testify on one’s own behalf belongs to the defendant [citation] [.]”). A fair reading of this statement reflects that counsel would not be withdrawing a self-defense claim until defendant decided whether to testify, and, if defendant testified that he acted in self-defense, counsel would propose a self-defense instruction. That has no bearing on whether counsel believed that defendant had to decide whether to propose a second-degree murder instruction. Accordingly, we believe that, even in light of this exchange, it is arguable that counsel believed he alone could decide whether to tender a second-degree murder instruction.

¶ 27 Second, the record contains the conversation that the trial court and defendant had during the jury instruction conference.<sup>6</sup> In that exchange, the court asked defendant whether he was “okay with [the instructions] as [his] attorney ha[d] responded on the record.” Defendant replied that he was. We do not believe that this conversation indicates that defendant wished that a second-degree murder instruction and verdict form not be given. Rather, in light of the court’s question, it is arguable that defendant was “okay with” counsel’s view on the instructions that were tendered, which is markedly different from being “okay with” counsel’s failure to tender a second-degree murder instruction.

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<sup>6</sup>We note, tangentially, that defendant had no right to be present during the jury instruction conference. *DuPree*, 397 Ill. App. 3d at 731-32.

¶ 28 Given the above, we determine that the record does not refute defendant's claim in his petition and on appeal that his attorney alone made the decision not to tender a second-degree murder instruction. Because defendant, and not counsel, had the right to decide whether to tender that instruction, we find that counsel's performance in this regard arguably fell below an objective standard of reasonableness.

¶ 29 This is not to say, however, that, based solely on counsel's performance, the summary dismissal of defendant's petition must be reversed and this cause remanded for proceedings under stage two of the Act. Rather, as noted above, defendant is entitled to second-stage proceedings only if he establishes the second prong of the *Strickland* test. That is, defendant must show that, but for the failure to tender a second-degree murder instruction and verdict form to the jury, it is arguable the outcome of his trial would have been different. See *DuPree*, 397 Ill. App. 3d at 737. Thus, we turn now to whether defendant was arguably prejudiced by the fact that a second-degree murder instruction and verdict form were not tendered. *Id.*

¶ 30 A defendant is guilty of second-degree murder if the elements of first-degree murder are established in addition to a statutory mitigating factor. See 720 ILCS 5/9-2(a) (West 2004). One of those mitigating factors, which applies in this case, is that defendant was acting in defense of himself or others when the victim was killed, but defendant's belief that deadly force was necessary was unreasonable. See *id.*; 720 ILCS 5/7-1(a) (West 2004).

¶ 31 A defendant is entitled to a second-degree murder instruction when “ ‘slight’ ” evidence that the jury could believe supports it. *People v. Everette*, 141 Ill. 2d 147, 156 (1990). This is true “[e]ven if inconsistencies exist in the defendant's testimony” (*Luckett*, 339 Ill. App. 3d at 103) or the giving of such an instruction would contradict the defendant's own statements, such as the

defendant's statement that the victim was killed accidentally (*Everette*, 141 Ill. 2d at 156-57). Factors to consider is deciding whether a defendant is entitled to a second-degree murder instruction based on slight evidence include, but are not limited to, "the defendant's testimony, intent or motive, the type of wound suffered by the victim, any previous history of violence between [the] defendant and [the] victim, any physical contact between the defendant and [the] victim, and the circumstances surrounding the incident." *Luckett*, 339 Ill. App. 3d at 100.

¶ 32 With these principles in mind and in light of those factors delineated above, we determine that it is at least arguable that defendant was prejudiced when a second-degree murder instruction was not tendered to the jury. That is, we determine that, even though some of the evidence indicated that Welch was shot accidentally, there was slight evidence that supported the giving of a second-degree murder instruction and arguably a reasonable probability that defendant would have been convicted of that offense.

¶ 33 Specifically, the evidence revealed that defendant, a teenager, and his teenaged friend were outside a bar on the night of the Super Bowl. Because Sanders wanted to light a cigarette and he did not have a functioning lighter, he decided to enter Welch's car and use a lighter he saw in that car. As Sanders was in Welch's car, he began taking change he found in the car. Welch, an adult whom neither Sanders nor defendant knew, came running toward his car when he saw that someone was in it. Once at his car, Welch began fighting with Sanders. During that fight, Welch pulled Sanders' shirts off, beat Sanders, and attempted to choke Sanders. Defendant intervened, and Welch began fighting with defendant. As with Sanders, Welch attempted to choke defendant, and he punched defendant in the face and jaw. Welch also swore at defendant and, possibly, threatened to kill defendant. Defendant retrieved his gun from Sanders, wanting to get the gun before Welch did

because defendant was afraid that Welch would use the gun to kill him. Although defendant indicated repeatedly that he did not intend to shoot Welch, the evidence revealed that the gun was cocked, defendant had his finger on the trigger, and, while standing eight feet away from Welch with the gun pointed at Welch, defendant fired one shot in the direction of Welch. That one shot, which hit Welch in the chest, killed Welch.

¶ 34 Citing *People v. Salas*, 2011 IL App (1st) 091880, the State claims that defendant was not entitled to a second-degree murder instruction because defendant repeatedly denied having an intent to shoot Welch. We disagree. First, as noted above, intent is but one factor to consider in deciding whether there was slight evidence presented warranting a second-degree murder instruction. *Luckett*, 339 Ill. App. 3d at 100.

¶ 35 Second, *Salas* is readily distinguishable. There, the defendant denied killing the victim. *Id.* ¶ 85. The defendant testified at trial that he “never touched the trigger,” “never shot the gun,” and “did not shoot anyone.” *Id.* ¶ 39. Because of these denials and in the absence of other evidence indicating that the defendant acted in the unreasonable belief that he needed to use deadly force to protect himself, the reviewing court found that the trial court did not abuse its discretion in not giving the jury a second-degree murder instruction. *Id.* ¶ 87.

¶ 36 Here, in contrast to *Salas*, defendant did not deny that he fired the gun that shot Welch. Indeed, defendant admitted to the police that his finger was on the trigger, he pointed the gun at Welch, the gun fired while he was holding it, and Welch was struck by the bullet that he shot from the gun. Because of these differences, we find that the State’s reliance on *Salas* is unpersuasive here.

¶ 37 Given the above, we determine that defendant has presented the gist of a constitutional claim that his trial counsel was ineffective for unilaterally deciding not to tender a second-degree murder

instruction and verdict form to the jury. Accordingly, we reverse the trial court's order summarily dismissing defendant's petition and remand for second-stage proceedings. See 725 ILCS 5/122-2.1(b) (West 2010).

¶ 38 The judgment of the circuit court of Winnebago County is reversed, and the cause is remanded.

¶ 39 Reversed and remanded.