

2012 IL App (2d) 110351-U  
No. 2-11-0351  
Order filed February 23, 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. 08-CF-1191
	)	
WILLIAM SPEARS,	)	Honorable
	)	Ronald J. White,
Defendant-Appellant.	)	Judge, Presiding.

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

**ORDER**

*Held:* (1) The trial court properly dismissed defendant's postconviction claim that his trial and appellate counsel were ineffective for failing to assert that defendant was denied a speedy trial when an extension for DNA testing was procured under the "false" premise that DNA evidence would result from the testing: the State was entitled to the extension because it was awaiting test results, and the extension was not made improper merely because the results produced no evidence; (2) the State could not challenge the trial court's grant of defendant's *Whitfield* claim, as the State agreed to that ruling in the trial court, did not cross-appeal, and did not allege a voidness.

¶ 1 Defendant, William Spears, was convicted of one count of possession with intent to deliver more than 15 but less than 100 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(A))

(West 2008)). He appealed his conviction, arguing that the trial court erred when it granted the State's motion to extend the speedy-trial deadline to complete DNA testing under section 103-5(c) of the Code of Criminal Procedure of 1963 (the speedy-trial statute) (725 ILCS 5/103-5(c) (West 2008)), resulting in his not being brought to trial within 120 days as required by section 103-5(a) of the speedy-trial statute (725 ILCS 5/103-5(a) (West 2008)). This court found that the trial court did not abuse its discretion when it determined that the State exercised due diligence, and we thus affirmed. *People v. Spears*, 395 Ill. App. 3d 889 (2009).

¶ 2 Thereafter, defendant filed a *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant argued that his constitutional rights were violated when the State and defense counsel falsely represented to the court that DNA evidence existed in this case, which resulted in the court's granting of the State's motion to extend the speedy-trial deadline. In an amendment to his petition, he argued that appellate counsel was ineffective for failing to raise the issue of the false DNA evidence on appeal. He also argued that his constitutional rights were violated where the trial court failed to admonish him that a three-year term of mandatory supervised release (MSR) would be added to his sentence. The trial court advanced defendant's petition to the second stage under the Act and appointed counsel. The State moved to dismiss. The trial court granted defendant relief as to the MSR issue, reducing defendant's sentence by three years, but otherwise dismissed the petition. Defendant, acting *pro se*, appeals, arguing that the court erred in failing to advance his petition for third-stage proceedings under the Act. We affirm.

¶ 3

#### I. BACKGROUND

¶ 4 Defendant was taken into custody on April 3, 2008, and charged with delivery of 1 gram or more but less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West

2008)), possession with the intent to deliver 15 grams or more but less than 100 grams of a substance containing cocaine (720 ILCS 570/401(a)(2)(A) (West 2008)), and possession with the intent to deliver more than 500 grams but not more than 2,000 grams of a substance containing cannabis (720 ILCS 550/5(e) (West 2008)).

¶ 5 On May 2, 2008, trial was set for June 9, 2008. During that time, the crime lab was examining bags of narcotics that were found at the crime scene.

¶ 6 On June 6, 2008, trial was continued over defendant's objection until June 23, 2008, because crime lab reports had not been completed. On June 16, 2008, the State again asked to continue trial, because the lab analysis was still not complete. The trial court asked if the State had any idea when the tests would be completed, and the State responded that it would inform the lab of the next court date and ask that the tests be done ahead of that date. The court set July 1, 2008, as the date for the reports to be completed and set trial for July 14, 2008.

¶ 7 On June 27, 2008, the State prepared a discovery response, referring to reports dated June 19 and 20, 2008. On July 8, 2008, a stand-in prosecutor requested a continuance for additional time to prepare for trial and was unable to address whether all discovery had been completed. Trial was reset for July 28, 2008. On July 22, 2008, the State provided a supplemental discovery response, referring to a lab report prepared by Kea Brown, dated July 8, 2008.

¶ 8 On July 23, 2008, the State moved to compel defendant to submit to withdrawal of saliva, because the lab had requested a DNA standard in order to conduct a confirmatory test against swabs taken from the bags of narcotics. The State also sought authorization to test, because the sample from the swabs might be consumed. The court inquired about the late receipt of the July 8 report from Brown. The assistant State's Attorney responded that she had been on vacation until July 14

and received the report after her return. The report was included in a discovery response that she asked a staff member to prepare on July 16, 2008. She then did not see that discovery response right away because it was under papers on her desk. In regard to the additional testing, she said that she would speak to the lab, ask about the time frame, and request that the testing be expedited. The State expressed its belief that the lab was proceeding as quickly as possible and that it needed the additional samples in order to complete its analysis. Defendant's counsel and the court each expressed concerns about delays in the testing.

¶ 9 On July 24, 2008, the State moved to delay trial by 120 days under section 103-5(c) of the speedy-trial statute, alleging that evidence suitable for DNA analysis had been sent for testing and that, on July 8, 2008, the lab requested a sample from defendant for comparison and sought authorization to test because of possible consumption of the swabs. The State added that the Crime Lab indicated that for a case with a small sample size where the sample may be consumed in testing, the testing does take longer and may need to be sent to a different crime lab for more sensitive chemistry testing. At a hearing that same day, the State told the court that the lab reported that it would need 120 days to complete the testing. The State also said that it had informed the lab that it would let the lab know when a trial date was set and that the lab would have to "move along on that." The trial court continued the trial over defendant's objection, stating that there had been due diligence. Trial was then set for October 14, 2008.

¶ 10 On October 3, 2008, defendant moved to dismiss because he was not brought to trial within 120 days as required by section 103-5(a) of the speedy-trial statute. Defendant argued that "[w]hen the trial was continued to obtain the results of the DNA analysis, there had been no determination made that such evidence existed. In fact, no DNA evidence exists in this case, and no valid reason

existed to continue trial.” A hearing took place on October 14, 2008. At the hearing, Brown testified that the evidence for testing arrived at the crime lab on April 24, 2008. She testified that she did not receive the evidence for her testing purposes until June 30, 2008. She explained that she was unable to examine the items until chemistry and fingerprint testing had first been done by other analysts. On July 8, 2008, after her initial analysis of the evidence, Brown issued a lab report, which indicated that she had swabbed various knots on the plastic bags that were submitted to the lab on April 24, 2008. She also requested a buccal swab from defendant and authorization to consume the evidence during testing. Brown was not able to begin the actual testing until August 4, 2008, after receiving the buccal swab and permission from the court to consume the evidence during testing. After testing, she found that there was no DNA suitable for comparison. Brown testified that, prior to conducting her analysis, there was no way to tell if DNA was available. The court denied the motion, finding that based on the evidence as of July 24, 2008, when the trial was continued under section 103-5(c), the State had exercised due diligence.

¶ 11 On October 17, 2008, defendant waived his right to a jury and agreed to proceed on one count by way of stipulated bench trial. The State agreed to dismiss the remaining counts. In addition, the parties agreed to a sentence of 15 years in prison, if the court were to find defendant guilty. After hearing the stipulated facts, the court found defendant guilty of possession with intent to deliver more than 15 but less than 100 grams of a controlled substance (720 ILCS 570/401(a)(2)(A) (West 2008)) and sentenced defendant to 15 years in prison followed by a three-year MSR term.

¶ 12 Defendant’s motion for a new trial was denied, and he appealed. On appeal, he argued that the trial court erred when it granted the State’s motion to extend the speedy-trial deadline in order to complete DNA testing under section 103-5(c) of the speedy-trial statute, resulting in his not being

brought to trial within 120 days as required by section 103-5(a) of the speedy-trial statute. We affirmed. We stated:

“Looking to the circumstances here, when the State moved to continue, the trial court did not abuse its discretion when it determined that the State acted with due diligence. The case involved the testing of materials that initially were examined for fingerprints. Thus, it was late in the testing process when the possibility of DNA evidence came to light. During that time, the assistant State’s Attorney was on vacation. Although there was a slight delay in addressing the report on her return, it was turned over to the defense just over a week after that. She then promptly sought to extend the speedy-trial period when the lab informed her that up to 120 days were needed to complete the analysis.” *Spears*, 395 Ill. App. 3d at 895-96.

¶ 13 On June 8, 2010, defendant filed a *pro se* petition for relief under the Act (725 ILCS 5/122-1 *et seq.* (West 2008)). Defendant argued that the court erred in granting, on July 24, 2008, the State’s motion to continue defendant’s trial date past the 120-day speedy-trial deadline. The crux of defendant’s argument was that the court was “mislead [*sic*] and given false information” by the State, as well as by defense counsel, about the existence of DNA evidence. According to defendant, “it was impossible for the State Crime Lab to have any DNA evidence on July 23, 24 and 28[,] 2008, because the Lab did not start testing to see if there were DNA evidence until August 4, 2008.” Therefore, he maintained that his constitutional rights were violated when he was not brought to trial within 120 days. In a *pro se* amendment to his postconviction petition, filed on November 7, 2010, defendant argued that his constitutional rights to due process and fundamental fairness were violated, where the trial court failed to admonish him about the three-year MSR term. He also argued that he

received ineffective assistance of appellate counsel, where counsel failed to raise the issue of the “false” DNA evidence on direct appeal.

¶ 14 Postconviction counsel was appointed on December 1, 2010.

¶ 15 The petition advanced to the second stage under the Act and the State moved to dismiss it, with one exception. The State expressly conceded the issue concerning the court’s failure to admonish defendant about the three-year MSR term, stating: “The State has reviewed the record of [defendant’s] sentencing and concedes that [defendant] was not admonished about his MSR term as required by *People v. Whitfield*, 217 Ill. 2d 177 (Ill. 2005). Therefore, [defendant’s] 15 year sentence will be reduced by three years because his MSR term was to be three years.” The State argued that defendant’s speedy-trial claim should be rejected because it was barred by *res judicata* and, moreover, rebutted by the record.

¶ 16 A hearing took place on March 11, 2011. The State again conceded the MSR issue. When the court inquired as to whether he should advance the petition to the third stage on the MSR issue, the State responded that there was no reason to have a hearing and that the mittimus could simply be corrected. Defendant agreed. The parties then argued the speedy-trial issue and whether, when the trial court granted the continuance, it did so only because it had been given “false information” by the State and by defense counsel that “the Crime Lab had DNA evidence when they never did.” The court agreed that the issue would be barred by *res judicata* but for defendant’s claim that appellate counsel was ineffective for failing to raise the issue on direct appeal. The court continued the matter so that it could review the appellate brief prepared by appellate counsel for defendant’s direct appeal.

¶ 17 On April 8, 2011, the trial court, after considering the appellate brief filed in defendant's direct appeal, found that defendant did not make a substantial showing of ineffective counsel (either trial or appellate) and that any claim concerning the court's ruling on the speedy-trial issue was barred by *res judicata*. The court ordered that the mittimus be corrected, sentencing defendant to 12 years in prison, followed by a three-year MSR term. The court's order was entered on April 11, 2011.

¶ 18 Defendant timely appealed.

¶ 19

## II. ANALYSIS

¶ 20 Defendant contends that his petition should be advanced for a third-stage evidentiary hearing. According to defendant, he made a substantial showing that the State violated his right to a speedy trial "by presenting false DNA evidence to the court," that defense counsel was ineffective for failing to bring this to the court's attention, and that appellate counsel was ineffective for failing to raise the issue of the "false" DNA evidence on appeal.

¶ 21 The Act (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there was a substantial denial of a federal or state constitutional right in the proceeding that resulted in his or her conviction. 725 ILCS 5/122-1(a) (West 2008); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Proceedings are commenced by the filing of a petition, verified by affidavit, in the trial court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2008). A postconviction proceeding is limited to constitutional issues that have not been, and could not have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124. All issues decided on direct appeal are barred by the doctrine of *res judicata*, and all issues that could

have been raised in the original proceeding, but were not, are procedurally forfeited. *People v. Taylor*, 237 Ill. 2d 356, 372 (2010).

¶ 22 Postconviction proceedings may consist of up to three stages in cases that do not involve the death penalty. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the trial court reviews the petition to determine whether the petition is frivolous or patently without merit. *Harris*, 224 Ill. 2d at 125-26. A petition must present the gist of a constitutional claim to survive beyond the first stage. *Id.* at 126. At stage two, the trial court may appoint counsel for the defendant and the State may move to dismiss the petition. *Id.* At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Id.* The trial court does not engage in fact-finding or credibility determinations at the dismissal stage; rather, such determinations are made at the evidentiary stage. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). A petition that is not dismissed at the second stage proceeds to the third stage, where the trial court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2008); *Pendleton*, 223 Ill. 2d at 472-73. At an evidentiary hearing, the trial court “may receive proof by affidavits, depositions, oral testimony, or other evidence” and “may order the petitioner brought before the court.” 725 ILCS 5/122-6 (West 2008). When a trial court grants the State’s motion to dismiss or otherwise dismisses the petition, “we generally review the circuit court’s decision using a *de novo* standard.” *Pendleton*, 223 Ill. 2d at 473. When a trial court grants or denies postconviction relief following the conclusion of a third-stage evidentiary hearing, we review the decision of the trial court using a “manifestly erroneous” standard. *Coleman*, 183 Ill. 2d at 385.

¶ 23 As an initial matter, we note that, while defendant contends that this was a second-stage dismissal (and thus requests that we remand for an evidentiary hearing), the State argues that the

petition was at the third stage of the proceedings because the motion to dismiss did not terminate the proceedings. We disagree. When the parties were before the court on the State's motion to dismiss, the State expressly conceded the MSR issue. When the court inquired as to whether it should advance the petition to the third stage on the MSR issue, the State responded that there was no reason to have a hearing and agreed that the mittimus could simply be corrected. Defendant agreed. The court went on to address defendant's other claims and, while doing so, noted several times that the petition was at the second stage. Accordingly, we review the dismissal *de novo*. See *Pendleton*, 223 Ill. 2d at 473.

¶ 24 Turning to the merits, defendant argues that the State violated his right to a speedy trial "by presenting false DNA evidence to the court," that defense counsel was ineffective for failing to bring this to the court's attention, and that appellate counsel was ineffective for failing to raise the issue of the "false DNA evidence" on appeal. First, we note that the trial court found this issue to be barred by *res judicata*, because defendant challenged the court's speedy-trial ruling on appeal. However, although defendant challenged the ruling on appeal, he did not raise the specific issue of the "false DNA evidence," and he argued in his petition that appellate counsel was ineffective for failing to raise that issue. By alleging appellate counsel's ineffectiveness, defendant avoids the bar of forfeiture. See *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005) (postconviction claim will not be held forfeited where the alleged forfeiture resulted from the incompetence of appellate counsel). Thus, we address his claim.

¶ 25 Defendant's argument seems to be that the trial court granted the speedy-trial extension on July 24, 2008, only because it was under the false belief that the crime lab had DNA evidence. According to defendant, the court's belief was "false" because it was not until August 4, 2008, that

Brown began testing. Defendant's claim fails, because the record rebuts his argument concerning "false DNA evidence" and, in any event, it has no legal support. According to Brown's testimony, the evidence for testing arrived at the crime lab on April 24, 2008, and was undergoing various tests prior to her June 30, 2008, receipt of the evidence. Brown was not able to begin the actual testing until August 4, 2008, after receiving the buccal swab from defendant and the court's permission to consume the evidence during testing. After testing, she found that there was no DNA suitable for comparison. Contrary to defendant's claim, the fact that the materials tested by the lab ultimately revealed no DNA evidence does not contradict the fact that, when the court granted, on July 24, 2008, the State's motion to continue the trial past the speedy-trial deadline, the State had potential DNA evidence at the lab. Indeed, section 103-5(c) of the speedy-trial statute provides in relevant part:

"If the court determines that the State has exercised without success due diligence to obtain *results* of DNA testing that is material to the case and that there are reasonable grounds to believe that such *results* may be obtained at a later day, the court may continue the cause on application of the State for not more than an additional 120 days." (Emphasis added.) 725 ILCS 5/103-5(c) (West 2008).

Thus, the State seeks a continuance under this provision because DNA testing is in progress and the State is awaiting results. The fact that the results of the testing ultimately show that there was no DNA evidence to be obtained is irrelevant. When the court granted the extension, testing was in progress. Therefore, defendant's argument concerning the ineffectiveness of trial counsel on this issue fails. It follows then that defendant's claim of ineffective assistance of appellate counsel for failing to raise the issue on appeal also fails. Appellate counsel cannot be considered ineffective for

failing to raise a nonmeritorious claim on appeal. See *People v. Johnson*, 205 Ill. 2d 381, 407 (2002).

¶ 26 Last, we note that the State asks this court in its response brief to reverse the court's order granting defendant a reduction of his prison term based on the court's failure to admonish defendant about the three-year MSR term. Defendant sought and received a three-year reduction in his prison sentence under *People v. Whitfield*, 217 Ill. 2d 177 (2005). The State argues that *Whitfield* applies only to defendants who plead guilty, not to defendants who are found guilty after a stipulated bench trial. We find that the State is precluded from raising this issue. The State agreed to the reduction in the trial court, and it did not file a notice of cross-appeal. Further the State makes no argument that the court's order is void. See *People v. Arna*, 168 Ill. 2d 107, 113 (1995).

¶ 27

### III. CONCLUSION

¶ 28 In light of the foregoing, we affirm the April 11, 2011, order of the circuit court of Winnebago County, which ordered that defendant's sentence be reduced from 15 to 12 years, followed by a 3-year term of MSR, and which dismissed defendant's remaining postconviction claims.

¶ 29 Affirmed.