

NOTICE
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2012 IL App (4th) 100038-U

NO. 4-10-0038

IN THE APPELLATE COURT
OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Vermilion County
KENNETH A. GRAY, JR.,)	No. 05CF554
Defendant-Appellant.)	
)	Honorable
)	Craig H. DeArmond,
)	Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Knecht and Steigmann concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court committed no error in summarily dismissing defendant's postconviction petition as frivolous and patently without merit.
- ¶ 2 Defendant, Kenneth A. Gray, Jr., appeals the trial court's first-stage dismissal of his postconviction petition as frivolous and patently without merit. On appeal, he argues his petition warranted further consideration under the Postconviction Hearing Act (Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) based on the claim that his trial counsel provided ineffective assistance for failing to retain an expert psychiatric witness. Defendant also contends his appellate counsel was ineffective for failing to raise this particular issue on direct appeal. We affirm.
- ¶ 3 In October 2006, a jury found defendant guilty of the first degree murder (720

ILCS 5/9-1(a)(1) (West 2004)) of his wife, Kimberly Gray (Kim), rejecting defendant's claim that he committed second degree murder based on an unreasonable belief in the need for self-defense. At trial, evidence showed defendant and Kim were married in May 1992, and had three children. On September 23, 2005, Kim and the children left the marital home and moved to Kim's parents' home. On September 25, 2005, Kim and the children returned to the marital home so that defendant could see the children and Kim could gather some belongings. Defendant and Kim began arguing and defendant refused to give Kim a list of her day-care clients' names and phone numbers. Kim instructed the couple's children to wait outside the home and an aunt picked them up as they stood in the garage.

¶ 4 After the children left, defendant shot and killed Kim. Kim suffered a total of 16 gunshot wounds. There were seven gunshot wounds to the front side of her body; six wounds to her back side, including five entrance wounds; two graze wounds, one on her left upper abdomen and one on her left thigh; and a gunshot wound to her right hand. Kim was discovered lying face up in the laundry room of the home next to the washer and dryer. Her body was lying partially over the threshold of a doorway that led to the home's attached garage.

¶ 5 Immediately after the shooting, defendant got in his truck and attempted to leave the residence. However, as he was leaving, Kim's parents and younger sister arrived on the scene and blocked his truck with their vehicle. Defendant then ran to the home of his neighbor, Shelia Fletcher. He told Fletcher that he and Kim had gotten into an argument and he asked Fletcher to call 9-1-1. Ultimately, defendant gave Fletcher the gun he used to shoot Kim and stated, "Shelia, I just want you to know that Kim cheated on me."

¶ 6 Approximately two hours after the shooting, police interviewed defendant. He

reported that in the months leading up to the shooting, he and Kim had been doing things to "spice" up their marriage. Defendant encouraged Kim to become involved with another man but, later, became insecure and jealous. Defendant and Kim agreed that Kim would end the extramarital relationship. Nevertheless, the couple's marriage began to deteriorate and Kim and the children moved in with her parents. Defendant stated that, on the day of the shooting, Kim confirmed that she was continuing to see the other man and bragged about their relationship. She also threatened that she would not allow defendant to see the children. Defendant stated he became "so angry" and retrieved a gun from his gun cabinet. He stated he put a clip in the gun and cocked it. Defendant then walked into the kitchen where Kim was standing and holding a clothes basket. He reported to police that he hid the gun by holding it down and out of Kim's sight. According to defendant, Kim cursed at him and pointed her finger. He then raised the gun and pointed it at Kim. Kim screamed and defendant pulled the trigger. He stated he was unsure how many times he fired the gun but he thought the clip had 15 rounds and that he fired until it was empty.

¶ 7 After shooting Kim, defendant got another clip and put the gun to his own head. However, the phone rang and the caller was his mother. Defendant reported that he told his mother he just did something bad. He then left the house.

¶ 8 During his statement, defendant never claimed that he felt a threat of physical harm from Kim. He also never reported that she had previously stood over him clicking a gun or that she had ever threatened him with a knife. Defendant's videotaped statement was played for the jury.

¶ 9 At trial, defendant testified on his own behalf. He described two incidents of

threatening behavior by Kim that he alleged occurred in the two weeks prior to the shooting. Defendant asserted that, on one occasion, Kim threatened him with a knife and, on the second, he woke to a "clicking sound" and saw Kim standing over him with a gun. Defendant testified that, on the day of the shooting, he thwarted two attempts by Kim to retrieve a gun from the couple's gun cabinet. Following the second attempt, defendant picked up the gun and took it with him to find keys to lock the gun cabinet. Kim continued to argue with defendant. She then cursed at him, pointed her finger, and came at him with a knife. Defendant testified he "just reacted" and started firing the gun. Defendant acknowledged that, when interviewed by police on the day of the shooting, he never mentioned Kim coming at him with a knife or any prior instance of threatening behavior. Instead, he testified, that in November 2005, information regarding the shooting began coming back to him in flashbacks.

¶ 10 Evidence at trial showed that law-enforcement officers who processed the crime scene on the day of the shooting denied finding a knife. Rod Kaag, an investigator with the sheriff's department, testified officers went through the entire laundry room where Kim's body was located. Although he did not move the washer and dryer out from the wall, he removed a stepladder that was positioned between the dryer and a wall and used it to look over and behind the appliances. He testified no knife was found behind, around, or under the washer and dryer.

¶ 11 Jerry Lee Davis, also an investigator with the sheriff's department, testified he was present when the area around the washer and dryer was searched. He and Kaag looked underneath, at the side, behind, on the top, and on the floor around the washer and dryer. He never found a knife in that area.

¶ 12 Additionally, Kim's aunt, Brenda Pellman, testified she and another relative were

the individuals who cleaned up blood in the laundry room on the day after the shooting. While cleaning, Pellman knocked over a bucket of water that spilled all over the floor. Some of the water ran under the washer and dryer. Pellman and the other relative had to move the washer and dryer around to get up all of the water. She denied finding anything under the washer and dryer.

¶ 13 Defendant presented the testimony of his own aunt, Terrie Vaughn, who stated she went to defendant and Kim's home on either the day after the shooting or two days after the shooting to get some clothes for defendant. While in the laundry room, she dropped a sock between the dryer and the wall. When she went to retrieve the sock, she found a knife "at the side and toward the back." She picked up both the sock and the knife and placed the knife in the kitchen on the center island. Vaughn did not report to police that she found a knife. Instead, on June 16, 2006, she reported her find to defendant's attorney after learning from relatives that it had significance to defendant's case.

¶ 14 At trial, defendant's counsel attempted to introduce testimony regarding the state of defendant's mental health after the shooting to corroborate his testimony regarding flashbacks and to show he exhibited symptoms consistent with post-traumatic stress disorder (PTSD). Specifically, he sought to present the testimony of Randall Cunningham, a crisis-intervention counselor, and Bryan Manion, an outpatient mental-health therapist. Both Cunningham and Manion worked for Crosspoint Human Services (Crosspoint). While incarcerated following the shooting, the sheriff's department referred defendant to Crosspoint for mental-health services.

¶ 15 The State objected to testimony from Cunningham and Manion and defendant submitted an offer of proof. The offer of proof showed both individuals had come into contact with defendant. Although Manion believed defendant exhibited symptoms of PTSD, neither

individual was qualified to render a diagnosis of that condition. Additionally, while receiving services from Crosspoint, defendant was under the care of Dr. Gary Teigland, a psychiatrist. Dr. Teigland diagnosed claimant with major depression, recurrent. He did not diagnose defendant with PTSD. The trial court sustained the State's objections to testimony from both Cunningham and Manion.

¶ 16 As stated, the jury found defendant guilty of first degree murder, rejecting his claim of second degree murder based upon an unreasonable belief in the need for self-defense. In March 2007, the trial court sentenced defendant to 56 years in prison. On direct appeal, this court affirmed his conviction and sentence. *People v. Gray*, No. 4-07-0233 (2008) (unpublished order under Supreme Court Rule 23).

¶ 17 On September 28, 2009, defendant filed a postconviction petition. Relevant to this appeal, he argued his trial counsel was ineffective for failing to retain an expert psychiatric witness to examine him and provide testimony regarding PTSD. He further argued his appellate counsel was ineffective for failing to raise the issue on direct appeal. On December 17, 2009, the trial court dismissed defendant's petition as frivolous and patently without merit.

¶ 18 This appeal followed.

¶ 19 On appeal, defendant argues the trial court erred by summarily dismissing his postconviction petition. Specifically, he argues his petition was sufficient to warrant further consideration under the Act because he sufficiently set forth the gist of a constitutional claim that his trial counsel was ineffective for failing to retain an expert psychiatric witness. He maintained such an expert would have supported his theory of defense by showing that he suffered from PTSD, which caused him to lose, and then later recover, memories about the shooting, including

that Kim had come at him with a knife. He also asserts his appellate counsel was ineffective for failing to raise the issue on direct appeal.

¶ 20 The Act "provides a method by which persons under criminal sentence can assert that their convictions were the result of a substantial denial of their rights under the United States or the Illinois Constitution or both." *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). "A postconviction proceeding is civil in nature [citation] and is a collateral attack on the prior conviction or sentence that does not relitigate a defendant's innocence or guilt [citation]." *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073. At the first stage of postconviction proceedings, the circuit court may summarily dismiss a petition "if it determines that the petition is 'frivolous or is patently without merit.'" *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073, quoting 725 ILCS 5/122-2.1(a)(2) (West 2006).

¶ 21 "[A] petition is frivolous or patently without merit only if it has no 'arguable basis either in law or in fact.' [Citation]." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1202 (2010). "A petition lacks an arguable basis in law if it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record." *Petrenko*, 237 Ill. 2d at 496, 931 N.E.2d at 1202. Further, "[a] petition lacks an arguable basis in fact if it is based upon a fanciful factual allegation, such as one that is clearly baseless, fantastic or delusional." *Petrenko*, 237 Ill. 2d at 496, 931 N.E.2d at 1202.

¶ 22 To survive a first-stage dismissal, "a *pro se* litigant need only present the gist of a constitutional claim." *Ligon*, 239 Ill. 2d at 104, 940 N.E.2d at 1073. "The summary dismissal of a postconviction petition poses a legal question that is subject to *de novo* review." *Ligon*, 239 Ill. 2d at 104, 940 N.E.2d at 1074.

¶ 23 Generally, in the context of postconviction proceedings, "any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been considered on direct appeal are deemed procedurally defaulted." *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073. Here, defendant failed to argue on direct appeal that his trial counsel was ineffective for failing to retain an expert psychiatric witness. As a result, the issue has been forfeited.

¶ 24 However, defendant also argues that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on the issue of retaining an expert psychiatric witness. This claim is not forfeited and we will address the merits. Whether defendant's appellate counsel was ineffective for failing to raise issues of trial counsel's ineffectiveness necessarily requires a consideration of trial counsel's performance.

¶ 25 Ineffective-assistance-of-counsel claims are evaluated under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984), requiring a defendant to show "(1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Ramsey*, 239 Ill. 2d 342, 433, 942 N.E.2d 1168, 1218 (2010). "The defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy" and "counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable." *Ramsey*, 239 Ill. 2d at 433, 942 N.E.2d at 1218. In particular, "[t]he decision whether to call particular witnesses and the manner and extent of cross-examination are matters of trial strategy and thus will not ordinarily support an ineffective-assistance-of-counsel claim." *People v. Patterson*, 347 Ill. App. 3d 1044, 1054, 808 N.E.2d

1159, 1167 (2004). "In determining whether an attorney's performance is deficient, every effort must 'be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' " *People v. Bailey*, 232 Ill. 2d 285, 296, 903 N.E.2d 409, 416 (2009), quoting *Strickland*, 466 U.S. at 689.

¶ 26 "The failure to satisfy either prong of the *Strickland* test will preclude a finding of ineffective assistance of counsel." *People v. Harris*, 225 Ill. 2d 1, 20, 866 N.E.2d 162, 173 (2007). At the first stage of postconviction proceedings, summary dismissal is inappropriate if (1) it is arguable that counsel's performance was deficient and (2) it is arguable that the defendant suffered prejudice. *Petrenko*, 237 Ill. 2d at 497, 931 N.E.2d at 1203.

¶ 27 At trial, defendant claimed he was guilty of second degree murder based on an unreasonable belief in the need for self-defense and testified he shot Kim after she came at him with a knife. He acknowledged that, during his statement to police shortly after the shooting, he failed to provide that information. However, defendant asserted he had not remembered Kim's attack until he experienced a flashback approximately 1 1/2 months after the shooting.

Defendant now argues his counsel was ineffective for failing to have him evaluated by an expert psychiatrist who could have testified regarding PTSD. He argues expert testimony about PTSD would have been valuable in explaining and supporting his claims of memory loss following the shooting. Defendant further asserts that counsel's attempt to rely on Cunningham and Manion, unqualified mental-health experts, was not attributable to a legitimate trial strategy. Defendant supports his own position with reports prepared by Manion in which Manion opined defendant suffered from PTSD, resulting in the possibility that he blocked memories of the shooting.

¶ 28 Here, the record shows defense counsel investigated a defense based upon PTSD and made strategic choices based upon that investigation. At the time of trial, defense counsel was faced with evidence showing defendant had been under the care of a psychiatrist, Dr. Teigland, who had never diagnosed him with PTSD. Given Dr. Teigland's failure to diagnose defendant with PTSD, it is unlikely that counsel's presentation of Dr. Teigland's expert testimony would have been helpful to defendant. Additionally, the State would likely have rebutted the testimony of a different expert psychiatric witness with evidence that defendant was under the care of a psychiatrist who and never made a PTSD diagnosis. (We note that during a December 2006 hearing on defendant's posttrial motions, Dr. Teigland testified that he had never diagnosed defendant with PTSD nor had he seen symptoms of PTSD in defendant.)

¶ 29 In the face of these circumstances, counsel attempted to present the testimony of Cunningham and Manion, two mental-health professionals who, although not qualified to diagnose PTSD, were familiar with defendant. The record shows Manion, had worked with a number of individuals with the disorder and believed defendant exhibited several of the disorder's symptoms. While counsel's trial strategy was unsuccessful, it was not deficient. The record supports the conclusion the he vigorously represented defendant. The cases defendant cites in support of his position are factually distinguishable from the present case.

¶ 30 Moreover, defendant cannot show he was even arguably prejudiced by a lack of expert psychiatric testimony. Importantly, the record shows the physical evidence did not support defendant's claim that Kim attacked him with a knife. No knife was found at the scene. The State presented testimony of law-enforcement officers who searched under, behind, on top and to the side of the washer and dryer on the day of the shooting and found nothing of eviden-

tiary value, including a knife. Kim's aunt also testified that she cleaned the laundry room the day after the shooting, including in the area of the washer and dryer, and never found a knife.

Defendant points out that his own aunt testified she discovered a knife between the dryer and the wall that was "at the side and toward the back" on either the day after the shooting or two days after the shooting. Not only was her testimony rebutted by the State's three witnesses, the record shows defendant's aunt did not turn the knife over to police and did not report finding a knife until several months after the shooting.

¶ 31 Additionally, coupled with the lack of physical evidence supporting defendant's trial testimony, the remaining evidence overwhelmingly supports defendant's first-degree-murder conviction. The record shows defendant provided a statement to police shortly after the shooting, during which he provided a clear and detailed account of the events that led to the shooting. Defendant reported that he and Kim were arguing. According to defendant, Kim confirmed that she was continuing her extramarital relationship with another man and bragged about that relationship. She also threatened to prevent defendant from seeing the couple's three children. Defendant reported that he became "so angry." He stated he retrieved the gun from the couple's gun cabinet and then loaded and cocked the gun. Defendant returned to the kitchen where Kim was standing and holding a clothes basket. Defendant hid the gun from Kim's view. When Kim cursed at him and pointed her finger, he raised the gun. Kim screamed and defendant pulled the trigger. At no time during his statement did defendant ever report being physically threatened by Kim either before or at the time of the shooting. Evidence at trial also showed Kim suffered a total of 16 gunshot wounds, including five entrance wounds to her back. Finally, immediately after the shooting, defendant ran to the home of a neighbor. Before being taken into

police custody, he told the neighbor that he wanted her to know Kim had cheated on him.

¶ 32 Here, the record does not support a conclusion that trial counsel was ineffective for failing to retain an expert psychiatric witness. Counsel's performance was not arguably deficient nor was defendant arguably prejudiced. As a result, appellate counsel was also not ineffective for failing to raise the issue on direct appeal.

¶ 33 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we grant the State's request that defendant be assessed \$50 as costs for this appeal.

¶ 34 Affirmed.