NOTICE
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2012 IL App (4th) 100842-U

Filed 5/7/12

NO. 4-10-0842

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Adams County
GREGORY L. MEYER,	)	No. 06CF743
Defendant-Appellant.	)	
	)	Honorable
	)	Scott H. Walden,
	)	Judge Presiding.

JUSTICE MCCULLOUGH delivered the judgment of the court.
Justices Steigmann and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in dismissing defendant's postconviction petition at the second stage because defendant cannot satisfy the prejudice prong of *Strickland*.

¶ 2 In February 2007, the State charged defendant, Gregory L. Meyer, by indictment with one count alleging that defendant was a convicted felon in possession of a 9-millimeter handgun and one count alleging that defendant was a convicted felon in possession of 9-millimeter ammunition. 720 ILCS 5/24-1.1(a) (West 2006). The State also charged defendant with three counts of unlawful delivery of a controlled substance and one count of unlawful possession of controlled substance. 720 ILCS 570/401(d) (West 2006). The indictments superceded the information originally filed in December 2006. The drug and weapons charges were severed.

¶ 3 During defendant's June 2007 jury trial on the weapons charges, a digital video disc (DVD) that showed defendant holding pills and a firearm inside his home was played for the jury. This video had been obtained by a confidential informant who agreed to wear a buttonhole camera during the controlled purchase of narcotics from defendant. On June 11, 2007, the jury found defendant guilty on both weapons counts. On June 15, 2007, defendant entered a negotiated guilty plea to one count of unlawful delivery of hydrocodone and the remaining counts of unlawful delivery and unlawful possession were dismissed by the State. In August 2007, the trial court sentenced defendant to three years' imprisonment on each weapons count and four years on the unlawful delivery count, with all sentences to be served concurrently.

¶ 4 Defendant appealed and this court affirmed his convictions in August 2010. *People v. Meyer*, 402 Ill. App. 3d 1089, 1097, 931 N.E.2d 1274, 1283 (2010). On direct appeal, defendant argued, in pertinent part, "that article I, section 6 of the Illinois Constitution of 1970 *** bars the State from having an informant record activities otherwise hidden from the general public without the suspect's permission." *Meyer*, 402 Ill. App. 3d at 1093, 931 N.E.2d at 1280. In response to defendant's argument, we stated as follows:

> "Absent persuasive reasoning to the contrary, Illinois courts follow the lockstep doctrine and interpret article I, section 6, of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 6) to provide privacy protections equal to those of the fourth amendment. *** Defendant has failed to provide any citation to authority or argument as to how this court could interpret article I, section 6, in a manner contrary to the fourth amendment in this situation. For

> that reason, defendant's contentions [that the State is barred from secretly recording activities inside a private home] are forfeited." *Meyer*, 402 Ill. App. 3d at 1093, 931 N.E.2d at 1280.

¶ 5 In December 2008, while his appeal was pending, defendant filed the instant *pro se* postconviction petition. In September 2010, counsel filed an amended postconviction petition on defendant's behalf, alleging that (1) trial counsel was ineffective for failing to challenge the admission of the video under the separate right to privacy conferred by the Illinois Constitution and (2) appellate counsel was ineffective for failing to cite any Illinois law to support the argument that the Illinois Constitution provides greater privacy protections than the United States Constitution, resulting in this court's finding that the issue was forfeited.

¶ 6 On October 1, 2010, the State filed a motion to dismiss defendant's postconviction petition, asserting (1) the issue of whether trial counsel was ineffective was addressed in defendant's direct appeal and, thus, was barred by *res judicata* and (2) defendant's argument regarding appellate counsel was nothing more than a bare-bones allegation, unsupported by argument or case law, and failed to show defendant was prejudiced by appellate counsel's alleged shortcomings or that the result of the appeal would have been different. Defendant filed a response, arguing (1) whether trial counsel was ineffective was never addressed on the merits and, thus, was not *res judicata*, and (2) the State did not cite any legal authority, nor does any such requirement exist, for the proposition that a counsel-prepared postconviction petition must cite supporting legal authority to survive a motion to dismiss. On October 22, 2010, after hearing arguments on the State's motion to dismiss, the trial court granted the motion.

¶ 7 This appeal followed.

¶ 8 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2010)) provides a remedy for defendants who have suffered a substantial violation of constitutional rights at trial. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). A postconviction proceeding is a "collateral attack on a prior conviction and sentence, and the scope of such a proceeding is generally limited to constitutional matters that have not been, or could not have been, previously adjudicated." *People v. Cummings*, 375 Ill. App. 3d 513, 518, 873 N.E.2d 996, 1001 (2007). Any issues that could have been raised on direct appeal are procedurally defaulted and any issues raised on direct appeal are barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010).

¶ 9 In cases that do not involve the death penalty, the Postconviction Act establishes a three-stage process for adjudicating a postconviction petition. *Pendleton*, 223 Ill. 2d at 471-72, 861 N.E.2d at 1007. "The relevant question raised during a second-stage postconviction hearing is whether the allegations in the petition, supported by the trial record and accompanying affidavits, demonstrate a substantial showing of a constitutional deprivation, which mandates a stage-three evidentiary hearing." *People v. Goodwin*, 2012 IL App (4th) 100513, ¶ 32, 2012 WL 273148, *4 (citing *People v. Chears*, 389 Ill. App. 3d 1016, 1024, 907 N.E.2d 37, 44 (2009)). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89, 701 N.E.2d 1063, 1075 (1998). "[T]his court may affirm the trial court's judgment on any basis supported by the record." *People v. Little*, 335 Ill. App. 3d 1046, 1051, 782 N.E.2d 957, 962 (2003).

¶ 10 On appeal, defendant's sole argument is that the trial court erred in dismissing his amended postconviction petition at the second stage because he made a substantial showing of a

violation of his constitutional right to effective assistance of counsel, where trial counsel failed to challenge the invasion into defendant's home with a "spy video" under the Illinois Constitution. We disagree.

¶ 11 Defendant first asserts whether trial counsel was ineffective for failing to challenge the invasion into his private home with a "spy video" under the Illinois Constitution is not barred by *res judicata* because this court refused to consider its merits on direct appeal. See *Meyer*, 402 Ill. App. 3d at 1093, 931 N.E.2d at 1280. We agree.

¶ 12 However, the trial court did not dismiss defendant's postconviction petition on *res judicata* grounds as defendant leads us to believe in his brief. Rather, the court dismissed the petition finding as follows:

> "[T]he conduct of late trial counsel [and] appellate counsel did not fall below an objective standard of reasonableness because if trial counsel and/or appellate counsel had acted differently, there is no reasonable probability that it would have changed the result under either Federal or Illinois Constitutions."

¶ 13 Claims of ineffective assistance of counsel are determined under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (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." *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). To establish deficient performance, the defendant must show his attorney's performance fell below an objective standard of reasonableness. *People v. Evans*, 209 Ill. 2d 194, 219-20, 808 N.E.2d 939, 953 (2004) (citing *Strickland*, 466 U.S. at 687).

Prejudice is established when a reasonable probability is shown that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Evans*, 209 Ill. 2d at 219-20, 808 N.E.2d at 953 (citing *Strickland*, 466 U.S. at 694). A defendant must satisfy both prongs of the *Strickland* standard, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Clendenin*, 238 Ill. 2d 302, 317-18, 939 N.E.2d 310, 319 (2010). Therefore, we may resolve this issue " ' "solely on the ground that the defendant did not suffer prejudice without deciding whether counsel's performance was constitutionally deficient." ' " *Goodwin*, 2012 Il App (4th) 100513, ¶ 36, 2012 WL 273148, *4 (quoting *People v. Rinehart*, 406 Ill. App. 3d 272, 278, 943 N.E.2d 698, 704 (2010) (quoting *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003))).

¶ 14 In this case, defendant's amended postconviction petition alleged that trial counsel was ineffective for failing to challenge the video under the Illinois Constitution. According to defendant, this video "was the lynchpin of the State's case against [defendant]" and had counsel challenged its admission, there would have been a "reasonable probability trial counsel could have succeeded [in suppressing it], and a reasonable probability that the outcome of the trial would have been different as a result." We are not convinced.

¶ 15 Even if the video that showed defendant in physical possession of the firearm had been suppressed, the State still produced sufficient evidence to show defendant's possession of the firearm. See *People v. Jackson*, 232 Ill. 2d 246, 280, 903 N.E.2d 388, 406 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)) ("the relevant question is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' "

(Emphasis in original.)).

¶ 16 At defendant's trial, Officer Bryan Martin testified that he assisted in executing a search warrant at defendant's residence on December 21, 2006. During the search, Office Martin stated that the following were seized from defendant's home: a lockbox (State's exhibit No.1) containing an orange case (State's exhibit No. 2) that held a 9-millimeter handgun (State's exhibit No. 3) and a magazine (State's exhibit No. 4) that contained ammunition (State's exhibit No. 5). All of these exhibits were admitted into evidence. Officer Lee Mueller also testified that he saw the lockbox, the orange case, and the 9-millimeter handgun at defendant's residence while executing the search warrant. Additionally, defendant's felony burglary conviction was admitted into evidence as State's exhibit No. 6.

¶ 17 Defendant testified that he had a prior felony conviction for burglary. Defendant admitted that his cousin, David Winters, gave him the handgun so defendant could show and potentially sell the gun to his brother-in-law. According to defendant, Winters asked him to put the gun in his lockbox over the Christmas holidays. Defendant testified the key to the lockbox was on the key ring for his vehicle. On cross-examination, defendant stated he allowed Winters to bring the gun to his home and put it in his lockbox. Defendant admitted he did not have a firearm owner's identification (FOID) card and stated he had applied for one in the last few months but did not receive one. When the State asked if this was because defendant was a convicted felon, defendant responded "I guess." On redirect examination, defendant stated he had never applied for a FOID card.

¶ 18 Winters also testified for the defense and claimed ownership of the gun. He testified that he stored the gun at defendant's home in defendant's lockbox during the holidays to

ensure the grandchildren, nieces, and nephews running around his parents' house, where he was residing, were safe. Winters stated he personally delivered the gun to defendant's home and watched as defendant placed the gun in the lockbox.

¶ 19 At the close of evidence, the trial court instructed the jury that "[p]ossession may be actual or constructive." See Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (hereinafter, IPI Criminal 4th). The court also gave an instruction on circumstantial evidence. See IPI Criminal 4th No. 3.02. Additionally, the court informed the jury "A person commits the offense of unlawful possession of a weapon by a felon when he, having been previously convicted of the offense of burglary, knowingly possesses a firearm" and "A person commits the offense of unlawful possession of firearm ammunition by a felon when he, having been previously convicted of the offense of burglary, knowingly possesses firearm ammunition." See IPI Criminal 4th No. 18.07.

¶ 20 Even without defendant's testimony, the State provided sufficient evidence to prove defendant's possession of the gun and ammunition because both items were seized from defendant's home during the execution of the search warrant. Defense witness Winters's testimony also supports the State's case because Winters stated he observed defendant put the gun in his lockbox at his home. Defendant was in fact a convicted felon and defendant knew he possessed the gun because he personally placed it in the lockbox and had control over the key. As such, suppression of the video would not have changed the outcome of the trial and, therefore, defendant did not suffer prejudice by trial counsel's failure to challenge the video.

¶ 21 As we have determined that defendant did not suffer prejudice, he cannot prevail on his ineffective-assistance-of-trial-counsel claim and we need not determine whether the

Illinois Constitution provides greater privacy protections than the United States Constitution. See *Beahringer v. Page*, 204 Ill. 2d 363, 370, 789 N.E.2d 1216, 1221 (2003) (" 'A court will consider a constitutional question only where essential to the disposition of a case, *i.e.*, where the case cannot be determined on other grounds.' "); *In re E.H.*, 224 Ill. 2d 172, 180, 863 N.E.2d 231, 235 (2006) ("courts must avoid considering constitutional questions where the case can be decided on nonconstitutional grounds"). The trial court did not err in dismissing defendant's amended postconviction petition at the second stage because it lacked merit.

¶ 22 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 23 Affirmed.