

2013 IL App (1st) 112867-U

FOURTH DIVISION
August 29, 2013

No. 1-11-2867

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 01 CR 16043
)	
LARRY COLEMAN,)	Honorable
)	Angela Munari Petrone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* Court erred in dismissing post-conviction petition at second stage where claim – that trial counsel was ineffective for not allowing defendant to testify – was both *dehors* the trial record and not contradicted by it.

¶ 2 Following a bench trial, defendant Larry Coleman was convicted of first degree murder and aggravated battery with a firearm and sentenced to consecutive prison terms of 25 and 6 years respectively. We affirmed on direct appeal, in a case where appellate counsel moved to withdraw under *Anders v. California*, 386 U.S. 738 (1967), and defendant responded to that motion. *People v. Coleman*, No. 1-05-1060 (2006)(unpublished order under Supreme Court

Rule 23). Defendant now appeals from an order of the circuit court dismissing, upon State motion, his post-conviction petition. He contends that the court erred in finding that he forfeited, by not raising in his *Anders* response, his claim that trial counsel was ineffective for not allowing him to testify at trial. For the reasons stated below, we vacate the dismissal and remand for further proceedings.

¶ 3 Defendant was charged with first degree murder, attempted first degree murder, and aggravated battery with a firearm for allegedly shooting to death Joseph Brown and wounding his brother Christopher Brown on or about October 11, 1998. The trial evidence was that a birthday party was held at a nightclub on the night of October 10-11, attended by the Browns with Carl Clark, by defendant with his brother Sidney Coleman, Darren Carter, and Cary Holoman, and by others including Maurice Cosby and Lauren Mainor. During the party, Christopher and Sidney argued, and others including defendant and Joseph joined the argument. Nightclub staff told "everyone" but the Browns to leave immediately; they were still milling around outside when the Browns left several minutes later. Christopher testified that he was shot in the back as he and Joseph walked towards a nearby restaurant. Joseph helped him to his feet and the Browns started to run towards the restaurant, but Christopher fell unconscious in the restaurant parking lot. The parties stipulated to the effect that Joseph died of a single gunshot wound to the back.

¶ 4 Maurice Cosby testified that the argument or fight flared up again outside the nightclub. Defendant said that he was "tired of this shit" and walked to his car and reached inside; Cosby's attention was then occupied by the fight so she did not see what defendant did next. However, Cosby had testified at Carter's trial that she saw defendant and Carter go to defendant's car, then saw defendant retrieve a gun from his car, point it in the direction of the restaurant, and fire twice; she also saw Carter run past her with a gun in hand, heard a loud "pow," and saw Christopher fall to the ground. Carl Clark testified to seeing defendant pull out a gun and point

it; he initially testified to fleeing before he could tell where the gun was pointed but then, when confronted with his grand jury testimony, testified that he saw before fleeing that defendant's gun was aimed at Joseph. Lauren Mainor testified to seeing defendant, during the fight outside the nightclub, run towards the restaurant then hearing gunshots as she ran towards the restaurant; when she arrived, she saw that both Browns had been shot. Cary Holoman testified to hearing two gunshots during the fight outside.

¶ 5 Cynthia Jones testified to arriving late to the party, by which time the argument outside the nightclub had begun. (However, Christopher testified that she was at the party.) The Browns walked away from the argument towards the restaurant, then the argument turned into a fight. Defendant said "I'm sick of this shit" or similar words, went to his car, retrieved a gun, and fired towards the restaurant. The Browns ran on towards the restaurant when the shots began, and defendant fired towards Joseph; Joseph fell to the ground and defendant fled. Jones admitted to prior convictions and to pending felony charges but denied receiving any promises regarding those charges and her trial testimony. The parties stipulated that a police officer who canvassed the scene for witnesses on the night of the shooting did not list Jones as a witness in his report.

¶ 6 Defendant's motion for a directed finding was denied, defendant rested after presenting the latter stipulation, and the State presented no rebuttal evidence. The court asked defense counsel if he "discussed with your client his right to testify," and counsel replied "Yes." After an off-record discussion and closing arguments, the court found defendant guilty of first degree murder and aggravated battery with a firearm but not guilty of attempted first degree murder.

¶ 7 In denying defendant's post-trial motion arguing only insufficiency of the evidence, the court found that the "contradictory or confusing" testimony was the understandable result of the chaos of the night in question but Jones' testimony "really went right to the heart of this case" and was "unambiguous and concise." During sentencing, defendant addressed the court to the effect

that he was innocent and "didn't commit the crime that they say I did," but "didn't get a chance to explain my side of the story" though "I want to explain my side of the story."

¶ 8 On direct appeal, appellate counsel moved to withdraw pursuant to *Anders* and filed the requisite brief addressing issues of potential or arguable merit. Defendant responded to the *Anders* motion, raising various claims including ineffective assistance of trial counsel. In affirming the conviction and sentence, we found sufficient evidence to convict defendant of shooting Joseph and on an accountability basis for Carter shooting Christopher, and we affirmed the consecutive sentencing. We addressed in detail the ineffectiveness claims in defendant's response: that counsel (1) promised in his opening statement to present alibi witnesses but then did not do so, (2) did not properly cross-examine Jones, Clark and Cosby, and (3) failed to object to Jones being called as a State witness when she was allegedly not disclosed in discovery.

¶ 9 Defendant filed this *pro se* post-conviction petition in September 2006 raising various claims including that trial counsel "inhibited" him from testifying at trial. He alleged that he told counsel that he wanted to testify but counsel told him that "his testimony would not be needed" and that "this is my case and I'm not putting you on." He also alleged that he subsequently and repeatedly raised the topic of testifying and that counsel "would get angry and start hollering 'you're not testifying' and would walk away." He alleged that counsel failed to advise him of his right to testify and that he was unaware of that right. He alleged that his testimony would have shown that he was not involved in the Brown shootings and would have impeached the "inconsistent and unbelievable" State witnesses. The petition was supported by defendant's affidavit that he "requested repeatedly of my attorney *** that I testify," that counsel told him that his testimony was not needed, that "this is my case and I'm not putting you on the stand" and then told him repeatedly that "you're not testifying," that counsel "never told me that I had a fundamental right to testify," and that he "didn't know that I had a fundamental right to testify at

my trial nor did I know that could have spoken to the judge about [trial counsel's] actions and ask that I be allowed to testify."

¶ 10 Post-conviction counsel filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Feb. 6, 2013) averring that he concluded – after consulting with defendant, reviewing the record, and sending a letter to trial counsel inviting him to discuss the allegations – that no amended or supplemental petition was necessary to raise defendant's claims.

¶ 11 The State moved to dismiss the petition, arguing that the right-to-testify issue was forfeited as "an appellate issue," was supported only by defendant's self-serving affidavit, and did not prejudice him as there were already trial witnesses who did not see him hold or fire a gun.

¶ 12 Defendant responded to the motion to dismiss, arguing that defendant's petition raised factual issues that could be resolved only in an evidentiary hearing and that claims *dehors* the trial record are not forfeited by not raising them on direct appeal.

¶ 13 On August 31, 2011, the circuit court granted the State's motion to dismiss. In relevant part, the court found that defendant claimed ineffective assistance of trial counsel on direct appeal so that any other ineffectiveness claims in his petition "could have been raised on direct review so are now *** forfeited." The court also found that, when the trial court mentioned in defendant's presence his right to testify, he "easily could have addressed the court or spoken with his attorney if he had desired to testify." This appeal timely followed.

¶ 14 On appeal, defendant contends that the circuit court erred in dismissing his petition, and in particular by finding that he forfeited his claim – that trial counsel was ineffective for not allowing him to testify at trial – by not raising it in his *Anders* response.

¶ 15 As a threshold matter, we note that the issue of forfeiture depends on whether the facts supporting the defendant's claim are contained in the trial record, not on whether the defendant failed to raise the claim in his *Anders* response. See *People v. Jones*, 364 Ill. App. 3d 1, 4-5

(2005). Neither a "defendant's failure to respond to his appellate counsel's *Anders* motion to withdraw" nor his "failure to include all grounds for relief in such a response" effects a forfeiture. *People v. Thomas*, 364 Ill. App. 3d 91, 106 (2006), citing *Jones*, 364 Ill. App. 3d at 5.

¶ 16 Under the Post Conviction Hearing Act (Act), 725 ILCS 5/122-1 *et seq.* (West 2010), a petition may be summarily dismissed within 90 days of its filing and docketing if it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A petition that is not summarily dismissed must be "docketed for further consideration in accordance with Sections 122-4 through 122-6" of the Act (725 ILCS 5/122-2.1(b) (West 2010)), and section 122-5 provides that the "State shall answer or move to dismiss" the petition. 725 ILCS 5/122-5 (West 2010). Under a motion to dismiss, the allegations in the petition are taken as true unless affirmatively refuted by the record, and the issue for the circuit court is whether those allegations make a substantial showing of a constitutional violation that, if proven at an evidentiary hearing, would entitle the defendant to relief. *People v. Domagala*, 2013 IL 113688, ¶ 35. Unless an evidentiary hearing was held involving fact-finding and credibility determinations, we review *de novo* the disposition of a petition under the Act. *People v. English*, 2013 IL 112890, ¶ 23; *People v. Brown*, 2013 IL App (1st) 091009, ¶ 52.

¶ 17 The purpose of a proceeding under the Act is to inquire into constitutional issues with the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal. *English*, ¶ 22. The doctrine of *res judicata* bars issues raised and decided on direct appeal, while issues that could have been presented on direct appeal but were not are forfeited. *Id.* However, *res judicata* and forfeiture are set aside when the forfeiture stems from the ineffective assistance of appellate counsel, the facts underlying the claim do not appear on the face of the original appellate record, or fundamental fairness otherwise requires. *Id.*

¶ 18 In general, for a successful claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient – that is, objectively unreasonable under prevailing professional norms – and that said performance prejudiced him; that is, that there is a reasonable probability that the result of the proceeding would have been different absent the alleged error. *Domagala*, ¶ 36.

¶ 19 Certain rights of criminal defendants involve decisions that belong to the defendant personally after consultation with counsel: what plea to enter, whether to waive a jury trial, whether defendant will testify, whether to tender a lesser-included-offense instruction, and whether to appeal. Other decisions, though they also concern constitutional rights such as confronting and cross-examining witnesses, are made by trial counsel, including what defense to present, which witnesses to call, and whether and how to conduct cross-examination. *People v. Phillips*, 217 Ill. 2d 270, 281 (2005); *People v. Johnson*, 2012 IL App (5th) 070573, ¶ 15, citing *People v. Clendenin*, 238 Ill. 2d 302, 318–19 (2010). When a criminal defendant is represented by counsel, the trial court has no duty to inform him of his right to testify because counsel bears the responsibility of advising the defendant of his right to testify and explaining the advantages or disadvantages of invoking that right. *In re Joshua B.*, 406 Ill. App. 3d 513, 516 (2011).

¶ 20 Here, defendant's right-to-testify claim is not forfeited as it is based on allegations of fact not contained in the trial record, including off-record discussions between defendant and trial counsel, and thus not cognizable on direct appeal. Moreover, his allegations – that he repeatedly asked trial counsel if he could testify, that counsel repeatedly refused, that counsel did not inform him of his right to testify, and that he was unaware of the right – are not affirmatively refuted by the trial record and must be considered as true at this stage of proceedings. While the trial court mentioned in defendant's presence his right to testify, that does not by itself inform him that the decision to exercise that right rested with himself rather than counsel. In light of the trial

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testimony, described by the trial court as "contradictory or confusing" but for the key witness Jones, we find that defendant has made a substantial showing of ineffective assistance by trial counsel so that an evidentiary hearing must be held.

¶ 21 Accordingly, the judgment of the circuit court is vacated and this cause is remanded for further proceedings.

¶ 22 Vacated and remanded.