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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 McHenry County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 08-CF-405
	)	
ISHAMAL C. BAILEY,	)	Honorable
	)	Joseph P. Condon,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE HUDSON delivered the judgment of the court.  
Justices Hutchinson and Schostok concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to object to drug-dealer profile evidence and that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness: defendant's claim as to trial counsel was forfeited; appellate counsel's failure was neither unreasonable nor prejudicial, as the evidence was admissible for its relevance to whether the drugs were for sale by defendant (as the charges required) rather than for use by the many drug users residing in the house.

¶ 2 At issue in this appeal is whether the second-stage dismissal of the postconviction petition filed by defendant, Ishamal C. Bailey, was proper. More specifically, we are asked to consider whether defendant made a substantial showing that he received ineffective assistance of counsel

when his (1) trial counsel failed to object at trial when a police officer gave drug dealer profiling testimony and (2) appellate counsel failed to challenge trial counsel's failure to object. For the reasons that follow, we determine that (1) defendant forfeited review of his claim that trial counsel was ineffective and (2) his appellate counsel was not ineffective for failing to challenge trial counsel's conduct, because objecting to such evidence in this case would have been fruitless. Accordingly, we affirm.

¶ 3 The facts relevant to resolving the issues raised in this appeal are as follows. At defendant's bench trial, it was revealed that defendant lived in a home in Woodstock with several other people. All of the adults who lived in the home used drugs, and defendant and another man, who were not employed, sold them. Some of the residents were aware of the fact that defendant and the other man sold drugs out of the house. One resident indicated that, on many occasions, she saw defendant sell drugs. She based this in part on the fact that she saw defendant a couple of times engage in a sneaky, sly, and closed-handed passing of something.

¶ 4 Residents of the home stated that they saw defendant and the other man mixing powder and putting it in foil packets or opening capsules for over-the-counter drugs and mixing the capsules' contents with heroin. The instruments defendant and the other man would use to prepare the drugs were kept in a black bag in another resident's bedroom closet. Defendant and the other man would use this bedroom, which belonged to the woman who rented the house, when she was not at home.

¶ 5 Officer Daniel Thomas, who, without objection, was found to be an expert in the purchase and distribution of cannabis and controlled substances, testified about what was found in the Woodstock home and how some of the items were consistent with selling versus using drugs. For example, Officer Thomas testified that, when he examined the dresser that was in the bedroom of

the woman who rented the house, he found in one of the drawer wells a plastic bag that contained a bag of cannabis and a bag of 23 individually wrapped baggies of cocaine. Officer Thomas estimated that each baggie of cocaine was worth between \$50 and \$100 and that the cannabis was worth \$20 per gram. Officer Thomas indicated that the quantity of cocaine, in addition to the fact that another type of drug was found along with it, was consistent with selling drugs. Moreover, Officer Thomas stated that, if drug users live with drug sellers, a drug seller will usually hide his supply.

¶ 6 In the closet of this bedroom, Officer Thomas found a black bag that contained an electric grinder with a white powdery residue on it, a sifter, a spoon, a plastic card, a digital scale, a toothbrush, over-the-counter pills, and numerous equally sized precut and unused aluminum foil squares. Similar objects were found on the first floor of the home, which is where defendant stayed. For example, Officer Thomas found on the first floor one resident's identification card; a plastic card with a magnetic strip that was identical to the card found in the upstairs bedroom; money that consisted of small bills; cannabis stems and residue; a smoking pipe, plate, spoon, and syringe; and squares of aluminum foil. Officer Thomas detailed how some of these items are used to prepare drugs to sell. For example, Officer Thomas testified that plastic cards are used to finely dice or scrape and measure chunky and powdery substances, digital scales are used to weigh drugs so that they can be packaged in equal amounts, and over-the-counter pills are used to dilute the purity of drugs sold.

¶ 7 In addition to finding these items, Officer Thomas found, in a search of a first floor bedroom, \$518 and seven foil packages of heroin, which Officer Thomas estimated were worth \$20 each.

Officer Thomas testified that the quantity of heroin packets found was consistent with possession with the intent to deliver, not personal use.

¶ 8 In a hallway on the first floor, Officer Thomas found a white plastic bag that contained six one-ounce baggies of cannabis. The estimated value of the cannabis recovered was \$20 per gram. Also found on the first floor were two cell phones. One of the cell phones contained numerous contacts that appeared to be nicknames. Of these, Officer Thomas made note of three contacts in particular. Those were “red weed,” possibly “Matt weed,” and “China white.” Officer Thomas testified that “weed” refers to cannabis and that “China white” is slang for heroin. A text message on the phone stated “Call me, Ishy. I need 20.” Officer Thomas testified that this was an order for narcotics.

¶ 9 In addition to the search of the home, officers recovered from defendant \$935. The \$935 consisted of 55 bills, 45 of which were 20-dollar bills. Officer Thomas testified that possessing large amounts of money consisting of bills of the same denomination is consistent with being a drug dealer, as it indicates that the drugs are being sold for that amount. In contrast, Officer Thomas explained that drug users usually do not carry much money.

¶ 10 Based on this and all the other evidence presented, the court found defendant guilty of unlawful possession with the intent to deliver a controlled substance within 1,000 feet of a park (720 ILCS 570/407(b)(1) (West 2008)), unlawful possession with the intent to deliver a controlled substance (720 ILCS 570/401(c)(2) (West 2008)), unlawful possession with the intent to deliver cannabis within 1,000 feet of a park, unlawful possession with the intent to deliver cannabis (720 ILCS 550/5(d) (West 2008)), unlawful possession of cannabis (720 ILCS 550/4(d) (West 2008)), and obstructing justice (720 ILCS 5/31-4(a) (West 2008)). Defendant was sentenced to concurrent prison

sentences of eight years for unlawful possession with the intent to deliver a controlled substance within 1,000 feet of a park, eight years for unlawful possession with the intent to deliver cannabis within 1,000 feet of a park, and three years for obstructing justice.

¶ 11 Defendant appealed, arguing that his conviction of unlawful possession with the intent to deliver cannabis within 1,000 feet of a park must be reduced to unlawful possession with the intent to deliver cannabis. This court agreed and remanded the cause for resentencing. See *People v. Bailey*, No. 2-09-0296 (2010) (unpublished order under Supreme Court Rule 23). On remand, the court again sentenced defendant to concurrent prison terms, imposing a sentence of two years for unlawful possession with the intent to deliver cannabis and keeping the other sentences the same.

¶ 12 Soon thereafter, defendant petitioned *pro se* for postconviction relief. In his petition, he claimed, among other things, that he was denied his right to a fair trial when the trial court allowed Officer Thomas to testify about the common practices of drug users and dealers. The trial court advanced defendant's petition to the second stage of postconviction proceedings and appointed counsel for defendant.

¶ 13 Postconviction counsel filed an amended petition, contending, among other things, that defendant's trial counsel was ineffective for failing to object to Officer Thomas's testimony concerning the general habits of drug dealers and substance abusers. Postconviction counsel also asserted that defendant's appellate counsel was ineffective for failing to raise this claim on direct appeal. The State moved to dismiss the amended petition, arguing, among other things, that defendant forfeited his claim as to trial counsel and that defendant failed to make a substantial showing that appellate counsel was ineffective for failing to challenge trial counsel's conduct. Specifically, because an officer may offer expert testimony about drug sales as long as such evidence

is related to the issues raised in the case, the State claimed that trial counsel was not ineffective for failing to object to Officer Thomas's "profile testimony," and, as a result, appellate counsel was not ineffective for failing to challenge trial counsel's decision not to object to the testimony. The trial court granted the State's motion to dismiss, and this timely appeal followed.

¶ 14 At issue in this appeal is whether the second-stage dismissal of defendant's petition was proper. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions and permits a defendant to mount a collateral attack on his conviction and sentence based on violations of his constitutional rights. *People v. Erickson*, 183 Ill. 2d 213, 222 (1998). If a petition survives first-stage review, it proceeds to the second stage, at which an indigent defendant is entitled to appointed counsel, the petition may be amended, and the State may answer or move to dismiss the petition. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996).

¶ 15 Defendant's petition was dismissed at stage two. An appeal from a second-stage dismissal is reviewed *de novo*. *People v. Adams*, 373 Ill. App. 3d 991, 993 (2007). At the second stage, a defendant must make a "substantial showing" of a constitutional violation. *People v. Addison*, 371 Ill. App. 3d 941, 946 (2007). In determining whether a defendant has made a substantial showing of a constitutional violation, "all well-pleaded facts in the petition and affidavits are to be taken as true, but nonfactual and nonspecific assertions which merely amount to conclusions are not sufficient." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 16 As noted, defendant alleged in his petition that his trial attorney was ineffective for failing to object to Officer Thomas's testimony about the habits of drug dealers. The State argues that defendant has forfeited this claim, as the claim was based entirely on facts contained in the trial

record and was not raised on direct appeal. We agree with the State. A defendant forfeits review of issues that could have been raised on direct appeal but were not. See *People v. Scott*, 194 Ill.2d 268, 274 (2000). Here, because appellate counsel had the record upon which to raise a claim that trial counsel was ineffective for failing to object to Officer Thomas's profile testimony, defendant's claim now concerning trial counsel's ineffectiveness is forfeited.

¶ 17 This does not mean, however, that defendant's claim that his appellate counsel was ineffective is likewise forfeited. See *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Rather, because defendant advanced this claim in his petition, we can consider whether defendant's appellate counsel was ineffective for not challenging trial counsel's conduct. *Id.*

¶ 18 Analyzing whether appellate counsel was ineffective requires this court to consider the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). Under *Strickland*, a defendant who alleges that his counsel was ineffective must 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. *People v. Wendt*, 283 Ill. App. 3d 947, 951 (1996). In order to succeed on a claim that counsel was ineffective, both prongs of the *Strickland* test must be established. *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 19 Ineffective assistance of appellate counsel does not arise merely because a defendant pinpoints something that trial counsel did or did not do and that appellate counsel did not raise on direct appeal. "Appellate counsel is not obligated to raise 'every conceivable issue on appeal,' but rather is expected to 'exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.'" *People v. English*, 2013 IL 112890, ¶ 33 (quoting *People*

*v. Williams*, 209 Ill. 2d 227, 243 (2004)). Thus, for example, “[trial c]ounsel is not required to make losing objections in order to provide effective representation” (*People v. Lewis*, 88 Ill. 2d 129, 156 (1981)), and appellate counsel cannot be deemed ineffective for failing to raise issues related to losing objections that trial counsel did not make (see *People v. Enis*, 194 Ill. 2d 361, 397 (2000) (court found that trial counsel was not ineffective for withdrawing objection to witness’s identification testimony, and, because trial counsel was not ineffective for withdrawing the objection, appellate counsel could not be deemed ineffective for failing to raise on direct appeal an issue related to withdrawing the objection)).

¶ 20 Turning to the issue presented here, admission of expert testimony is proper if that testimony is probative and relevant to the issues presented in the case. *People v. Reatherford*, 345 Ill. App. 3d 327, 342 (2003); *People v. Holloman*, 304 Ill. App. 3d 177, 184-85 (1999); *People v. Brown*, 232 Ill. App. 3d 885, 898 (1992). “[E]vidence is relevant where the fact[s] or circumstances offered tend to prove or disprove a disputed fact or to render the matter in issue more or less probable.” *Brown*, 232 Ill. App. 3d at 898. Nevertheless, “[t]he probative weight of the evidence must be balanced against any possible prejudice which might result from its introduction, and evidence should be allowed only where its probative value outweighs the danger of unfair prejudice.” *Id.*

¶ 21 In this case, the State had the burden of proving that defendant possessed the drugs with the intent to sell them. Proving that defendant intended to sell the drugs required evidence that the drugs were not merely being used in the house by the many drug users who lived there. Thus, Officer Thomas’s testimony concerning the materials found in the home that were used in manufacturing and packaging the drugs for sale, in addition to the evidence about the likely proceeds of those sales, was highly relevant to and probative of what the State needed to establish. Likewise, because, as

noted, defendant was found living with several drug users, Officer Thomas's testimony about the habits of drug dealers (as opposed to drug users) was relevant and probative. Although defendant is correct in his assertion that extensive "profile" evidence that is not related to the issues raised in a case can prejudice a defendant and, thus, should not be admitted, we cannot conclude that Officer Thomas's testimony rose to that level here.

¶ 22 In *Brown*, the case on which defendant relies in making his argument, the officer who provided extensive drug dealer profiling evidence was called to testify about the street value of the cocaine and marijuana seized from the defendant after the defendant exited the car he was driving. *Brown*, 232 Ill. App. 3d at 887-88. Instead of limiting his testimony to the value of the drugs, the officer testified extensively about, among other things, how various forms of cocaine are consumed, the fact that drug dealers (as opposed to drug users) carry more than a couple of grams of cocaine, and the fact that "[t]he narcotics world is a very violent place to be and \*\*\* [m]ost cocaine dealers deal in a real volatile environment and most of them carry weapons." *Id.* at 889-90. Because the officer's testimony went far beyond the value of the drugs recovered from the defendant and was not "in any way connected to the defendant or the circumstances surrounding his arrest," the court determined that the officer's profile evidence should have been excluded. *Id.* at 898.

¶ 23 Here, unlike the circumstances in *Brown*, defendant was found living with many drug users in a house where materials used to manufacture, package, and sell drugs were found. Officer Thomas's testimony concerned how the various items found would be used by drug dealers and how the evidence was significant in determining whether defendant was a drug dealer. In this way, unlike the situation in *Brown*, Officer Thomas's testimony was connected to defendant and the

circumstances of defendant's arrest and did not, as defendant claims, present "a hypothetical model of a dealer." As a result, unlike in *Brown*, Officer Thomas's profile evidence was admissible.

¶ 24 Because the testimony was admissible, defendant's claim that his appellate counsel was ineffective for failing to raise on direct appeal a claim about Officer Thomas's testimony is unfounded, as we cannot conclude that appellate counsel's decision not to raise the issue was either unreasonable or prejudicial. Thus, because a defendant must establish both prongs of the *Strickland* test in order to establish a viable claim of ineffective assistance of counsel, we determine that defendant has not made a "substantial showing" of a constitutional violation. Accordingly, we conclude that defendant's petition was properly dismissed.

¶ 25 For these reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 26 Affirmed.