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2013 IL App (3d) 120395-U

Order filed August 2, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0395
)	Circuit No. 06-CF-381
)	
DONALD MOTLEY,)	Honorable
)	Carla Alessio-Policandriotes,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Wright and Justice Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant's postconviction petition was properly dismissed as frivolous and patently without merit.
- ¶ 2 Following a jury trial, defendant, Donald Motley, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2006)). He was sentenced to 45 years of imprisonment. Defendant appealed. This court affirmed the trial court's judgment. *People v. Motley*, No. 3-09-0237 (2011) (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant filed a postconviction petition, alleging: (1) in light of the State's evidence that the victim was unarmed, defense counsel was ineffective for failing to interview and procure the attendance at trial of a witness that saw the victim with two guns earlier in the evening; and (2) defendant's conviction was procured through "knowing" use of perjured testimony. The circuit court dismissed defendant's petition as meritless. Defendant appeals.

¶ 4 **FACTS**

¶ 5 Defendant was charged with the first degree murder of Steve Jenkins that occurred on February 11, 2006. Prior to trial, the State filed a motion *in limine* to bar defendant from arguing self-defense. The State argued that defendant failed to produce sufficient evidence during discovery to support a theory of self-defense. The court reserved its ruling until evidence was presented at trial.

¶ 6 The evidence at trial showed that on the evening of February 10, 2006, defendant and his roommates, Jerod Milian and Kevin Mitzelfelt, had a party at their house in Joliet. Defendant, Milian, and Mitzelfelt attended the University of St. Francis in Joliet. Approximately 250 people attended their party.

¶ 7 Mitzelfelt testified that during the party he was at the door collecting money and patting guests down before they entered the house. He did not find a weapon on Jenkins. As the party was ending he heard gunshots outside, and he went upstairs to his room. Jenkins entered his room waving a gun. Mitzelfelt asked Jenkins to leave. Jenkins left for a few moments and returned, informing Mitzelfelt that he left the gun in an upstairs room. Later, Mitzelfelt told defendant where Jenkins had hidden the gun. Defendant did not want the gun to be returned to Jenkins out of concern for what Jenkins might do with it. When Jenkins returned to the house to retrieve his gun, defendant told Jenkins he did not know anything about the gun. Fifteen minutes later, Mitzelfelt heard five

gunshots outside.

¶ 8 Jenkins' best friend, Marcus Edwards, testified that he and Jenkins attended the party at defendant's home. When the party ended, an altercation broke out on the street among some party-goers. Jenkins fired a gun into the air seven times, and the crowd dispersed. Jenkins went inside the house where he left the gun. Police arrived. Jenkins and Edwards left in Edwards' car. Later, they returned so Jenkins could go back to the house to retrieve his gun. Jenkins went into the house, and Edwards remained in the car. Defendant and Milian came out of the house. Edwards observed defendant being handed a gun. Defendant loaded and cocked the gun and placed it in his jacket pocket. Jenkins came out of the house with his phone in his hand. He asked if defendant wanted the phone numbers of the people involved in the earlier altercation. Defendant pointed the gun at Jenkins. Jenkins turned and ran. Defendant shot Jenkins about five times. As Jenkins was lying in the street, defendant shot him again at point-blank range. Edwards identified a cellular telephone found on the scene as belonging to Jenkins.

¶ 9 Charles Bolden testified that he was in the house when he heard defendant and Milian discussing harming Jenkins when Jenkins returned to the house to get his gun. Bolden left the house briefly and, when he returned, defendant and Milian were outside. Milian handed a gun to defendant. Defendant cocked the gun and put it to his side. Defendant indicated he was going to shoot Jenkins. Jenkins came out of the house. Defendant and Milian argued with Jenkins. Jenkins walked away, with nothing in his hands, and defendant shot Jenkins four times. Jenkins fell to the ground. Defendant stood over Jenkins and shot him again at point-blank range.

¶ 10 James Marshall testified that defendant told Milian that he wanted the gun because he was going to shoot Jenkins in the back of his head when he came out of the house. Milian handed the

gun to defendant. Defendant cocked the gun and put it in his pocket. Jenkins came out of the house. Milian told Jenkins that they did not want to associate with him anymore. Jenkins threw his hands in the air and walked away. Defendant shot Jenkins five times, and Jenkins fell to the ground. Defendant shot Jenkins again. Defendant gave Bolden the gun and got into Marshall's car. Defendant told Marshall he had to shoot Jenkins before Jenkins could do it to somebody else. As they drove, defendant threw another gun out of the window.

¶ 11 Marshall testified that the State gave him immunity "in exchange for [his] truthful, honest and complete testimony regarding this matter." Marshall understood the immunity agreement to mean that everything he said under oath "ha[d] to be the truth." He also testified that prior to entering into the immunity agreement he had informed the State of everything that he knew.

¶ 12 Detective Stephen Diehl testified that upon arriving on the scene he saw four or five men standing over Jenkins' body. Jenkins was lying facedown. On cross-examination, Diehl testified that he did not know if the men standing around Jenkins' body took anything from him prior to Diehl's arrival, including any possible handguns. Paramedic John Ciarlette testified that when he responded to the scene he saw Jenkins lying facedown in the road with people standing around him.

¶ 13 Sergeant Brad Dubs testified that he was employed as an evidence technician with the police department at the time of the shooting. He arrived on the scene after Jenkins had been transported to the hospital. Dubs recovered multiple items from the scene, including a Motorola cellular telephone, a .25-caliber shell casing, and six nine-millimeter shell casings.

¶ 14 Bryan Mitchell testified that he conducted an autopsy on Jenkins. Jenkins had five gunshot wounds. Four of the gunshots had entered from behind Jenkins, striking his shoulder, elbow, buttocks, and back. One bullet grazed the back of Jenkins' left wrist. The fatal gunshot had entered

the middle of Jenkins' back, fractured his spine, passed through his lung, penetrated his heart, and exited the middle of his chest.

¶ 15 Officer John Stefanski testified that he responded to the call of the first round of gunshots being fired. Stefanski made a report about Jenkins approaching and offering to assist police "in locating a couple of weapons involved in a shots fired call." In exchange, Jenkins wanted a signed agreement that his driver's license would be reinstated and \$700 in previous fines cleared. Jenkins told Stefanski that the guns were "very close, closer than [he] knew." Stefanski could not meet Jenkins' demand. Jenkins left the scene, and Stefanski continued to break up the crowd of approximately 100 people.

¶ 16 Defendant testified that prior to the party on February 10, 2006, he and his roommates agreed that they did not want Jenkins at the party. Jenkins was already at the party when defendant arrived at 11:30 p.m. At 1:30 a.m., Milian decided to end the party, and some people became upset that the party was being terminated. Defendant and Milian went outside. The crowd broke into two groups: one group made up of Jenkins' friends, and the other of St. Francis University students. An altercation occurred. Jenkins fired a gun into the air several times and then ran away. Milian had a .22-caliber gun in his hand, which belonged to another roommate. Defendant took the gun from Milian, who had been injured in the altercation. When defendant heard police sirens, he handed the gun to Mitzelfelt. When police left, Mitzelfelt gave the .22-caliber gun back to defendant, and defendant put it in his pocket. Mitzelfelt told defendant that Jenkins had hidden a gun upstairs. Defendant retrieved Jenkins' gun and gave it to Milian. Defendant had no intention of returning the gun to Jenkins because he did not know what Jenkins would do with the gun.

¶ 17 Jenkins returned to the house looking for his gun. Defendant told him that he did not have

the gun. Jenkins said that if did not get his gun, then nobody in the house would be living. Defendant and Milian went outside. Milian handed Jenkins' gun to defendant. Defendant denied that he cocked the gun before placing it in his pocket. Jenkins came outside and said, "[w]hat's up." Marshall and Milian told Jenkins, "we ain't dealing with you no more." Jenkins started yelling and pointing at everyone in a threatening manner. Jenkins said, "I'm going to F you up" three times, pointing at two others and then defendant. Jenkins stepped toward defendant, and defendant took out the gun from his pocket. Jenkins saw the gun. Jenkins dipped "as if he was making a move." Defendant clarified on cross-examination that Jenkins dipped and turned away from defendant. Defendant raised the gun and pulled the trigger a few times because he was scared and did not know what Jenkins was going to do. The shooting happened within seconds of Jenkins' threatening defendant. Defendant felt scared when Jenkins threatened to "F" him up. Defendant denied standing over Jenkins and shooting him at point-blank range.

¶ 18 During defendant's direct examination, the trial court sustained the State's objection to defendant's testimony that at the time of the shooting defendant thought Jenkins may have had a gun in his possession. During defendant's redirect examination, defendant testified that at the time Jenkins threatened to "F" him up, defendant thought Jenkins may possibly have had another firearm.

¶ 19 Defense counsel argued in closing that defendant did not see a gun on Jenkins but that Jenkins either had a gun in his pocket or in Edwards' car. Defense counsel contended that defendant was scared because Jenkins threatened him and Jenkins was acting like he had another gun. Defense counsel argued that Jenkins had something in his hand that defendant could have reasonably mistaken for a gun.

¶ 20 The jury found defendant guilty of first degree murder, and he was sentenced to 45 years of

imprisonment. Defendant appealed, arguing, *inter alia*, that the trial court erred in barring his direct examination testimony that he thought the victim had a gun at the time of the shooting. This court affirmed the trial court's judgment, holding that any error in the court excluding testimony of the victim having a gun during defendant's direct testimony was harmless because defendant was able to present the testimony on redirect examination and argue it during closing arguments. *People v. Motley*, No. 3-09-0237.

¶ 21 Defendant filed a postconviction petition, claiming: (1) in light of the State's evidence that Jenkins was unarmed at the time of the shooting, defense counsel was ineffective for failing to interview and procure the attendance at trial of Tranel Simms, a witness that saw Jenkins with a gun minutes before the shooting; and (2) defendant's conviction was procured through "knowing" use of perjured testimony. Defendant's petition alleged that, in 2010, Reginald Davis visited defendant at the Menard Correctional Center and told him that Marshall recanted his testimony. Marshall indicated that he testified falsely due to (1) pressure from Jenkins' family and Jenkins' fellow gang members and (2) to receive immunity from the State. Davis repeated this information to defendant's sister. Davis cut off communication with defendant and would not cooperate with defendant's postconviction counsel due to his entering the police academy. As a result, defendant could not obtain an affidavit from Davis.

¶ 22 The petition also alleged that Marshall told defendant's postconviction investigator that prior to defendant's trial, he had been pressured and intimidated by Jenkins' family and associates of the Gangster Disciples street gang. Marshall indicated that Jenkins' family and his gang associates attempted to burn down his house. Marshall left Joliet as a result of this intimidation. Marshall refused to provide an affidavit due to being distraught over the intimidation.

¶ 23 The petition further alleged that Simms was a material witness who should have testified at trial. Simms went to the party at defendant's house with Jenkins. He was with Jenkins when he returned to the house to retrieve his gun. Simms saw that Jenkins had a second gun on his person in addition to the gun that he left in defendant's house. Upon arriving at the house for Jenkins to retrieve his gun, Simms left the scene to avoid involvement in any type of trouble.

¶ 24 In support of his petition, defendant attached affidavits from himself, his sister, and his postconviction investigator. The trial court summarily dismissed defendant's petition. Defendant appeals.

¶ 25 ANALYSIS

¶ 26 On appeal, defendant alleges the trial court erred in dismissing his postconviction petition because the allegations stated the gist of a constitutional claim. The Post-Conviction Hearing Act (Act) provides a mechanism by which individuals under a criminal sentence can assert that they were convicted as a result of a substantial violation of their constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2008). The Act provides for a three-stage review process of the petition. *Id.*; *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, a postconviction petition may be summarily dismissed if the claims in the petition are frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous or patently without merit if its allegations, when taken as true, fail to present the gist of constitutional claim. *People v. Brooks*, 233 Ill. 2d 146 (2009). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 27 I. Ineffective Assistance of Counsel

¶ 28 In his petition, defendant alleged that he was denied his right to effective assistance of

counsel because his trial counsel failed to interview Simms and procure Simms' attendance at trial. Defendant claims that Simms could have testified that, on the evening of the shooting, the victim was in possession of two guns. Defendant states in his brief on appeal that defendant's counsel "had the discovery relating to Simms and considered him a material witness, [but] never even attempted to contact Simms until trial had been commenced and continued."

¶ 29 In considering defendant's allegations, we may refer to the record. See *People v. Little*, 335 Ill. App. 3d 1046 (2003). According to the record, a police report showed that police had interviewed Simms at the hospital where Jenkins was brought after the shooting. Simms told police that he was in the car with Edwards when Jenkins went to put his gun in the house after firing it in the air. When Jenkins entered the vehicle, he had an unknown type of handgun on his person. Simms could not provide police with a video statement at that time because he needed to remain at the hospital and console Jenkins' mother.

¶ 30 Prior to trial, the State had a subpoena served on Simms to testify at trial. Mid-trial, defense counsel informed the court of his attempt to go Simms' residence but there was no answer at the door. Defense counsel stated that Simms was a "material witness" to Motley's case and requested the court's assistance in procuring him to testify at trial. The trial court indicated that it would use the resources of the Will County sheriff's office. The sheriff's office was unable to serve Simms but informed the court that there was an outstanding warrant for Simms' arrest for failure to appear for another matter. In his postconviction petition, defendant argued that his counsel was ineffective for failing to interview Simms and procure Simms' attendance at trial.

¶ 31 A. Forfeiture

¶ 32 Initially, the State argues that defendant forfeited this issue on appeal because defendant did

not raise the issue in a posttrial motion or on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002) (providing postconviction proceedings allow inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal so that issues which could have been raised, but were not, are considered waived). Generally, issues not raised on direct appeal are considered waived or forfeited for purposes of postconviction proceedings. *People v. Blair*, 215 Ill. 2d 427 (2005). Issues that are barred by res judicata or forfeiture are frivolous and patently without merit. *Id.* However, when the evidentiary basis for a claim raised in a postconviction petition lies outside the record so that it could not be raised before the reviewing court, the waiver rule may be relaxed, and the claim allowed to be presented in a postconviction petition. *People v. Harris*, 206 Ill. 2d 1 (2002).

¶ 33 Here, defendant's claim of ineffective assistance of counsel is frivolous and patently without merit because it was forfeited. Defendant's claim of ineffective assistance of counsel for failing to call Simms as a witness was not based on matters outside the record, and defendant failed to raise the issue on direct appeal. Therefore, the issue has been forfeited and cannot be asserted in defendant's postconviction petition.

¶ 34 B. Ineffective Assistance

¶ 35 Furthermore, the claim of ineffective assistance of counsel is meritless. To prevail on a claim of ineffective assistance of counsel, defendant must establish that: (1) counsel's performance was so deficient that it 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. *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 36 Here, there is no indication that defendant was prejudiced by his trial counsel's failure to procure Simms' attendance at trial. First, other than defendant's speculative testimony that Jenkins may have had another firearm, there was no evidence at trial that defendant saw the victim with a gun at the time of the shooting or knew of a second gun. Second, defendant was not prejudiced by the lack of Simms' testimony because the evidence was overwhelming that defendant shot Jenkins multiple times in the back as Jenkins was walking away. Therefore, defendant's petition failed to allege the gist of a constitutional claim of ineffective of counsel because he cannot show that he was prejudiced by his counsel's failure to present Simms as a witness at trial.

¶ 37 II. Conviction Through "Knowing" Use of Perjured Testimony

¶ 38 Defendant's petition also alleged that he was denied due process because the State knew or should have known that Marshall testified falsely. The State's knowing use of perjured testimony to obtain a conviction violates a criminal defendant's due process rights. *People v. Barrow*, 195 Ill. 2d 506 (2001). The State has an obligation to correct false testimony. *People v. Lucas*, 203 Ill. 2d 410 (2002). Where the State obtained a conviction by the "knowing" use of perjured testimony, a reviewing court must overturn the conviction if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury, which is equivalent to the harmless error standard. *Id.*

¶ 39 Here, even assuming Marshall's testimony was false, it is not likely that the testimony affected the judgment of the jury in light of the overwhelming evidence against defendant. See *Barrow*, 195 Ill. 2d 506 (assuming testimony was false, error was harmless where evidence against defendant was overwhelming). Regardless of Marshall's testimony, Edwards and Bolden testified that defendant shot an unarmed Jenkins in the back as Jenkins was either walking or running away

from defendant. The autopsy confirmed that all the shots fired at Jenkins were shot when his back was to the shooter. Therefore, defendant's petition does not allege the gist of a valid constitutional claim that he was denied due process through the State's knowing use of perjured testimony at his trial.

¶ 40

CONCLUSION

¶ 41 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 42 Affirmed.