SIXTH DIVISION
NOVEMBER 20, 2015

No. 1-13-1008

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. 02 CR 24870
	)	
BARRY MORRIS,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice ROCHFORD and Justice DELORT concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's postconviction petition did not substantially show that trial counsel was constitutionally ineffective for failing to present an affirmative defense of insanity where there was no indication that counsel knew or should have known of potentially exonerating evidence.

¶ 2 Following a bench trial, defendant Barry Morris was found guilty of first-degree murder, home invasion, and aggravated unlawful restraint and sentenced to an aggregate term of 71 years' incarceration. We affirmed the judgment on appeal. *People v. Morris*, No. 1-06-0652 (2008) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a

postconviction petition, which was dismissed on the State's motion. In this appeal from that judgment, defendant contends that his petition set forth a substantial showing that trial counsel was ineffective for failing to investigate and present an affirmative defense of insanity. We affirm.

¶ 3 Defendant was charged with several counts of first-degree murder, attempted first-degree murder, aggravated discharge of a firearm, home invasion, and aggravated unlawful restraint. The charges stemmed from an altercation between defendant, his wife, and her boyfriend on August 27, 2002.

¶ 4 At trial, Tywana Watts Morris testified that she had married defendant in 1993, but left him in July 2002. A month later, Tywana moved in with her boyfriend, Ricky Pierce. As Tywana and Pierce left their apartment to go to work early in the morning on August 27, 2002, they noticed defendant lying, face down, in the front yard. When Tywana called defendant's name, he jumped up with a rifle and ran at the couple. They ran back towards the apartment as defendant began to fire. At some point, Pierce grabbed for defendant's rifle and fell to the ground. Tywana jumped between the men, but defendant pushed her aside. Pierce ran around the building and defendant followed. While Tywana followed the men, she heard more gunshots and called 9-1-1. When she reached the front of the apartment building, defendant emerged from a gangway across the street. He chased her, but she eventually escaped into a neighbor's apartment when another neighbor intervened. After defendant fled and police officers arrived, Tywana found Pierce "slumped over to the side" against a wall in the gangway. There was "blood everywhere," and he did not move or respond.

¶ 5 Edna Pillar testified that she heard a loud noise from the apartment above her early in the morning on August 27, 2002. She opened the door to investigate and saw defendant running down the stairs towards her. Pillar tried to close the door, but defendant forced it open, knocking her to the ground. He carried a "tall gun" and led her into the bedroom. He told her that he had shot his wife's boyfriend. Ten minutes later, police officers knocked on the door. Defendant told them that he would kill Pillar if they entered. For the next four hours, defendant held Pillar in her apartment. During that time he made several phone calls, including calls to his mother-in-law and his cousin. He informed his cousin that he was planning to commit suicide and discussed funeral arrangements. Eventually, the police officers convinced defendant to throw his rifle out of the window, release Pillar, and surrender.

¶ 6 Defendant testified that he became distraught after his wife left him. He constantly called her and asked her to reconcile. He sought out multiple counselors to deal with his grief and was unable to continue working. On August 27, 2002, he went to the apartment with a loaded rifle to "scare the hell out of" Pierce. He did not intend to shoot anyone, but "snapped" when he saw Pierce and Morris walking together.

¶ 7 During closing arguments, trial counsel argued that Morris's adultery was serious provocation and asked the trial court to find defendant guilty of second-degree murder, rather than first-degree murder as charged.

¶ 8 The trial court found defendant guilty on six counts of first-degree murder, two counts of home invasion, and one count of aggravated unlawful restraint and acquitted him of the remaining counts.

¶ 9 At the sentencing hearing, trial counsel filed a mitigation report prepared by a licensed clinical social worker. The report indicated that defendant had experienced a number of "traumatic experiences and significant losses that appear to have created a severe degree of posttraumatic stress." The social worker opined, "[I]t is possible that [posttraumatic stress disorder] played a significant outcome of this situation."

¶ 10 The trial court sentenced defendant to an aggregate term of 71 year's incarceration. Defendant filed a direct appeal arguing solely that his convictions for home invasion and unlawful restraint violated one-act, one-crime principles and this court affirmed his conviction. *People v. Morris*, No. 1-06-0652 (2008) (unpublished order under Supreme Court Rule 23).

¶ 11 Subsequently, defendant filed a *pro se* post-conviction petition alleging, *inter alia*, that his trial counsel was constitutionally ineffective for failing to raise his fitness to stand trial. Defendant attached affidavits from his two brothers and another from a friend. Ethan Morris averred that he witnessed defendant talking to himself and "break[ing] in and out of lucidity" sometime between July and August 2002. He also volunteered to testify about defendant's "unstable mental state," but trial counsel never called him. Derrick Morris averred that defendant "was talking to himself and appeared to be hallucinating" in August 2002. Michele Lee averred that defendant "said he was hearing voices, and would speak to himself" Defendant indicated that the voices wanted him to "deal with the man his wife had left him for."

¶ 12 The trial court appointed postconviction counsel, and counsel filed an amended petition with the additional claim that trial counsel was ineffective for failing to raise defendant's "deranged" mental state as an affirmative defense. Following a hearing, the trial court granted the State's motion to dismiss defendant's petition. Defendant appeals.

¶ 13 Defendant contends that his amended postconviction petition made a substantial showing of constitutionally ineffective assistance by his trial counsel based on counsel's failure to investigate and raise an insanity defense. He notes that trial counsel filed a mitigation report prior to sentencing that indicated defendant had mental health problems and that several individuals gave affidavits that he was acting strangely during the month of the killing. He also argues that trial counsel's strategic choice to not to pursue an insanity defense was unreasonable where he set forth a legally untenable provocation argument.

¶ 14 The State responds that defendant has forfeited his ineffectiveness claim as to the insanity defense for failing to bring it on direct appeal. Alternatively, it argues that the petition failed to make a showing of ineffective assistance of counsel because the presentation of an affirmative defense is a matter of trial strategy and defendant suffered no prejudice.

¶ 15 Before reaching the merits of defendant's claim, we must determine whether he has forfeited the claim. A postconviction proceeding is a collateral attack on the trial court proceedings, not an appeal from the judgment of conviction. *People v. Johnson*, 191 Ill. 2d 257, 268 (2000). Issues that could have been raised on direct appeal but were not are forfeited. *People v. Enis*, 194 Ill. 2d 361, 375 (2000). Therefore, when a claim is based entirely on facts contained in the trial court record, it is forfeited. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Defendant's present claim relies in part on affidavits attached to his petition. None of these documents were included in the trial record. Thus, the issue could not have been raised on appeal and is not forfeited. See *id.*

¶ 16 We now turn to the substantive merits of defendant's claim. The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-stage mechanism for a

defendant who alleges that he suffered a substantial deprivation of his constitutional rights. *People v. Clark*, 2011 IL App (2d) 100188, ¶ 15. At the second stage of the proceeding, as in this case, the State may either file an answer to the defendant's petition or a motion to dismiss it. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27. Before a postconviction petition moves to the third stage, an evidentiary hearing, the trial court must determine if the petition and any attached documents "make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). In making this determination the court takes all well-pleaded facts in the petition and attached documents as true, unless contradicted by the record. *People v. Coleman*, 183 Ill. 2d 366, 381-82 (1998). When a petition is dismissed at the second stage, review is *de novo*. *Id.* at 389.

¶ 17 A claim of ineffective assistance of counsel is evaluated under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Under this test, a defendant must demonstrate (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that the result of the proceeding would have been different without counsel's deficient representation. *Ramsey*, 239 Ill. 2d at 433.

¶ 18 A defendant is legally insane if, "as a result of mental disease or mental defect, he lacks substantial capacity to appreciate the criminality of his conduct." 720 ILCS 5/6-2(a) (West 2002*); People v. Dwight*, 368 Ill. App. 3d 873, 879 (2006). A trier of fact may determine a defendant's sanity based solely on lay testimony, particularly, "observations by lay witnesses made shortly before or after the crime was committed." *Dwight*, 368 Ill. App. 3d at 880.

¶ 19 We first determine whether defendant's amended petition made a substantial showing that trial counsel's performance was objectively unreasonable. When determining whether counsel was ineffective for failing to investigate and present evidence, we consider the value of the evidence that was not presented and the closeness of the evidence presented at trial. *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002). Generally, the selection of witnesses and evidence "is a tactical decision which will not be reviewed and cannot support a claim of ineffective assistance of counsel." *People v. Bell*, 152 Ill. App. 3d 1007, 1012 (1987). However, "[a]ttorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *Morris*, 335 Ill. App. 3d at 79. A failure to investigate and call potential witnesses can indicate unreasonable performance when "trial counsel knows of the witnesses and their testimony may be exonerating." *Bell*, 152 Ill. App. 3d at 1012; see also *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005) (failure to investigate and develop a defense has been found to be ineffective assistance of counsel).

¶ 20 A trial counsel's failure to investigate rises to the level of ineffective assistance only when the attorney knew or should have known of exonerating witnesses or evidence. See *Bell*, 152 Ill. App. 3d at 1012. Defendant's petition fails to show that trial counsel had reason to know of potentially exonerating evidence of defendant's state of mind. While defendant argues that counsel had access to the witnesses and records used by the social worker in her mitigation report, this does not indicate that counsel knew of the social worker's opinions prior to trial. Additionally, defendant's argument that counsel was ineffective necessarily relies not on the underlying information that the social worker relied upon, but rather on the social worker's expert opinions based upon that information. An attorney need not possess the same diagnostic

knowledge as a licensed clinical social worker in order to render constitutionally effective representation. Furthermore, nothing in the record cited by defendant indicates that there were prior medical diagnoses, reports, or obvious symptoms that should have prompted trial counsel to seek an expert opinion on defendant's sanity at the time of the shooting prior to trial.

¶ 21 Similarly, there is no indication that trial counsel knew of Derrick Morris or Michele Lee's potential testimony prior to trial. Neither affiant indicated that they ever spoke with trial counsel or offered to testify at trial. Trial counsel was not ineffective for failing to investigate witnesses of which he was never apprised. *People v. English*, 403 Ill. App. 3d 121, 138 (2010). While defendant argues on appeal that trial counsel may have learned of these witnesses if he had investigated Ethan Morris, this claim is purely speculative and belied by the record; Ethan's affidavit makes no mention of Lee or Derrick.

¶ 22 In contrast to Derrick and Lee's affidavits, Ethan averred in his affidavit that he volunteered to testify, but was never called. As this contention is not rebutted by the record, we presume that trial counsel had knowledge of Ethan's potential testimony. See *Coleman*, 183 Ill. 2d at 381-82. The question, therefore, is whether Ethan's potential testimony was exonerating. See *Bell*, 152 Ill. App. 3d at 1012. Ethan stated that he visited his brother once during the month before the shooting. At that time his brother "acted strangely," talked to himself, and "seemed to break in and out of lucidity." While these vague observations may offer some slight evidence that defendant suffered from a mental disease or defect, they give no indication of his "capacity to appreciate the criminality of his conduct." See 720 ILCS 5/6-2(a) (West 2002). Moreover, Ethan's observations come from a single interaction and do not indicate when that interaction took place in relation to the shooting. Thus, the observations' relevance to defendant's state of

mind on the morning of the shooting is questionable at best. Given the weak and questionably exonerating effect of Ethan's statements, we do not find that trial counsel acted objectively unreasonably when he declined to call Ethan to testify at trial.

¶ 23 We therefore conclude that defendant's petition fails to make a substantial showing that trial counsel's representation was objectively unreasonable. As such, it is unnecessary to consider whether defendant was prejudiced by counsel's performance. *People v. Irvine*, 379 Ill. App. 3d 116, 130 (2008).

¶ 24 For the foregoing reasons, we find that defendant's petition fails to make a substantial showing the trial counsel rendered constitutionally ineffective representation. Accordingly, we affirm the judgment of the circuit court of Cook County.

¶ 25 Affirmed.