

No. 1-14-2340

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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. 08 CR 4641
)	
DURWYN TALLEY,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the second-stage dismissal of defendant's postconviction petition, holding that defendant's claim of ineffective assistance of trial counsel was barred by *res judicata*.

¶ 2 Defendant, Durwyn Talley, appeals the second-stage dismissal of his postconviction petition, arguing he made a substantial showing of ineffective assistance of trial counsel. We affirm as the doctrine of *res judicata* bars defendant's postconviction claim of ineffective assistance of trial counsel, where this same claim was earlier addressed and rejected by this court on direct appeal.

¶ 3 The State charged defendant with armed robbery, armed-habitual criminal, unlawful use of a weapon by a felon, aggravated unlawful use of a weapon, and aggravated unlawful restraint.

No. 1-14-2340

Prior to trial, defendant filed a motion to suppress evidence based on an allegedly illegal *Terry* stop (*Terry v. Ohio*, 392 U.S. 1 1968), and a subsequent arrest without probable cause. A hearing was held.

¶ 4 At the hearing, Officer Randall Jones testified that, at approximately 8:30 p.m. on February 19, 2008, he heard a "flash message" on his police radio stating that a Quiznos restaurant (Quiznos) located on 35th Street in Chicago had just been robbed and that the offender was driving a red Jeep Cherokee northbound on Indiana Avenue. No description was given of the driver nor was a license plate number given. Officer Jones was already at a gas station on 31st Street between Michigan Avenue and Indiana Avenue, about four blocks from the Quiznos. He and his partner turned their vehicle around so that they were "sitting facing Indiana at 31st Street" and waited for the Jeep to approach. About 30 seconds later, he saw a red Jeep Cherokee driving northbound on Indiana Avenue. Officer Jones followed it for approximately one block until the vehicle turned into a dead-end parking lot located at 29th Street and Indiana Avenue. Officer Jones activated his police lights and the driver pulled over immediately. Officer Jones stopped the vehicle within one minute from first observing it traveling on Indiana Avenue.

¶ 5 Officer Jones testified he exited his police vehicle and walked to the driver side of the red Jeep Cherokee. His partner, Officer Jeffrey Lawson, walked toward the passenger side. At the same time, other police units arrived on the scene and approached the red Jeep Cherokee. Defendant asked Officer Jones why he had been pulled over. Before Officer Jones could answer, one of the other officers pulled defendant out of the vehicle, handcuffed him, and took him to the back of Officer Jones' squad car. After defendant was secured in the squad car, Officer Jones approached the officers who were seated on the passenger side of the red Jeep Cherokee. Officer Jones learned the officers had recovered a gun on the passenger-side floorboard. After the gun

No. 1-14-2340

was recovered, some of the other officers took defendant back to the Quiznos for a show-up, where defendant was identified. The show-up occurred less than two minutes after his arrest.

¶ 6 Officer Quattrocki testified that, at approximately 8:30 p.m. on February 19, 2008, he was on patrol in a police vehicle with Officer Milazzo and Sergeant Rochowicz. They were in the vicinity of 126 East 35th Street when "an individual from [a nearby] Quiznos" approached them "in a frantic manner" and said the Quiznos had just been robbed by an offender who was fleeing in a red Jeep Cherokee that was going northbound on Indiana Avenue. Sergeant Rochowicz sent out a flash message regarding the robbery and the location and make of the getaway vehicle, and the officers "took off and headed down Indiana." Approximately one minute later, Officer Quattrocki heard over the police radio that another police unit was in the process of pulling over a red Jeep Cherokee at 2901 South Indiana Avenue, which was approximately six blocks from the Quiznos. Less than two minutes had elapsed since the Quiznos employee had informed Officer Quattrocki of the robbery.

¶ 7 Officer Quattrocki testified they proceeded to 2901 South Indiana Avenue, where they heard another flash message over the police radio state that the offender was a black male, dressed in dark clothing and wearing a hat. Officer Quattrocki, Officer Milazzo and Sergeant Rochowicz exited their vehicle and approached the red Jeep Cherokee. Officer Quattrocki heard Officer Lawson yell that there was a gun on the floorboard. Officer Quattrocki and Sergeant Martin pulled defendant out of the vehicle. Officer Quattrocki and Sergeant Rochowicz took defendant to the Quiznos for a show-up, where he was positively identified.

¶ 8 Following Officer Quattrocki's testimony, defense counsel argued Officer Jones lacked a reasonable, articulable suspicion to effectuate a *Terry* stop where the only information he had was that the offender was seen leaving the crime scene in a red Jeep Cherokee. Defense counsel

No. 1-14-2340

argued that, in the absence of any information regarding the offender's gender, race, age, clothing or license plate number, the officer's stop of defendant's vehicle constituted a fourth amendment violation.

¶ 9 The State responded Officer Jones had a reasonable, articulable suspicion to effectuate a *Terry* stop where he observed the red Jeep Cherokee traveling northbound on Indiana Avenue only moments after a flash message had been sent indicating a nearby Quiznos had been robbed by an offender seen fleeing northbound on Indiana Avenue in such a vehicle. The State further argued probable cause to arrest defendant existed once Officer Lawson saw the gun in plain view. The circuit court agreed with the State and denied defendant's motion to quash arrest and suppress evidence. In so ruling, the court specifically found the officers to be credible.

¶ 10 Defendant filed a *pro se* motion to reconsider the ruling on the motion to suppress evidence. Defendant represented himself at the hearing and attacked the officers' credibility. The court informed defendant it had found the officers who testified at the hearing to be credible. Defendant argued the court erred in finding that the gun had been in plain view. The court reiterated it had found the officers to be credible and denied defendant's motion to reconsider.

¶ 11 At the bench trial, Dewanda McBride testified that, on February 19, 2008, she was working as a nighttime shift manager at the Quiznos located at 126 East 35th Street. At about 8:30 p.m. on that date, she was working with her co-worker, Lamont Dorch, when defendant walked into the restaurant. The lights in the store were on and defendant was the only customer. Ms. McBride described the lighting as "bright" and as "very good." Ms. McBride stood face-to-face with defendant, who was three to four feet away. Defendant was wearing blue jeans and a dark hoodie and a hat that was slightly lighter in color than the hoodie. Defendant placed his order for a sandwich. Ms. McBride was able to see defendant's face as he placed his order.

¶ 12 Ms. McBride testified that, after she made his sandwich, she told defendant to step down toward the cash register. He did so. Ms. McBride rang up his order and told defendant what he owed. Defendant asked Ms. McBride where his sandwich was, and she told him it was being toasted. Defendant told her he did not want it toasted, so she turned to tell Mr. Dorch to take the sandwich out of the toaster. Ms. McBride turned back around, started getting the bag and napkins ready, and again told defendant what he owed. At that point, defendant "stepped back," which caused Ms. McBride to step back in response. Defendant then pulled up his jacket and showed her the handle of a gun and told her to give him all the money in the cash register. Ms. McBride hesitated because she was so scared, and Mr. Dorch told her to give defendant the money. Defendant told Ms. McBride not to "lose [her] life over somebody else's money." Ms. McBride opened the cash register and gave defendant some money. Defendant grabbed the rest of the money and walked out of the restaurant. Ms. McBride hit the emergency button which notified the police of trouble. She saw Mr. Dorch walk outside. Ms. McBride locked the door and called her boss, Mr. James.

¶ 13 Lamont Dorch testified that, at approximately 8:30 p.m. on February 19, 2008, he was working at the Quiznos located at 126 East 35th Street with his coworker, Dewanda McBride, when defendant walked in and ordered a sandwich. Defendant was wearing a hoodie on his head, but Mr. Dorch could see his face. As Mr. Dorch made the sandwich, defendant walked over to the cash register. Ms. McBride suddenly jumped behind Mr. Dorch. Defendant flashed his jacket up and said, "don't get killed over nobody else's money." Mr. Dorch told Ms. McBride to give defendant the money. After she gave him the money, defendant walked outside.

¶ 14 Mr. Dorch testified he followed defendant outside and saw him jog down the street and enter a red Jeep Cherokee. Mr. Dorch stopped a police vehicle that was driving past the

No. 1-14-2340

Quiznos, reported the robbery, identified the get-away vehicle, and pointed out the direction in which it was driving. The police drove off in that direction.

¶ 15 Detoy James testified that he owned the Quiznos located at 126 East 35th Street on February 19, 2008. Mr. James had surveillance equipment set up in the restaurant. There was a camera that recorded the events that took place at the cash register and in the lobby area of the restaurant. When the Quiznos shift manager, Dewanda McBride, called him on February 19, 2008, following the robbery, Mr. James went to the Quiznos and spoke with two detectives. Mr. James then examined the surveillance footage and determined his surveillance equipment had recorded the robbery that occurred at approximately 8:30 p.m. on February 19, 2008. Mr. James subsequently made a DVD recording from that surveillance footage.

¶ 16 The prosecutor moved to publish the DVD of the surveillance footage taken at the time of the robbery, using Ms. McBride to testify to the DVD's contents. The circuit court granted the motion. The DVD depicts an African-American man entering the Quiznos, which is very well lit. He is wearing a black jacket with a baseball-type cap on his head. He is also wearing a hood (either from the jacket or from a sweatshirt underneath the jacket; it is unclear from the DVD) on top of his head, covering most of the baseball cap except for its bill. His face is visible. He stands approximately three feet from Ms. McBride as he orders the sandwich. Ms. McBride pointed out for the court where the man showed her the gun handle and told her to give him the money in the cash register.

¶ 17 Sergeant Rochowicz testified that, at 8:30 p.m. on February 19, 2008, he was working with Officer Quattrocki and Officer Milazzo. They were traveling in an unmarked police vehicle on 35th Street heading eastbound when they were approached by Mr. Dorch, who was dressed in a Quiznos uniform. Mr. Dorch pounded on their vehicle, spoke to the officers, and pointed north

No. 1-14-2340

on Indiana Avenue. The officers put out a flash message and proceeded north on Indiana Avenue. The officers received a message from another police unit, learned the location of the vehicle they were looking for, and then went to 29th Street and Indiana Avenue, where they saw a red Jeep Cherokee. Sergeant Rochowicz saw two officers take defendant into custody, after which Officer Quattrocki performed a pat-down on him. Officer Quattrocki recovered \$372 from defendant's right jacket pocket. Sergeant Rochowicz walked over to the passenger side of the vehicle, where he observed a handgun on the floorboard and a black hat.

¶ 18 Officer Randall Jones testified that, at approximately 8:30 p.m. on February 19, 2008, he and his partner, Officer Lawson, were in their squad car at the BP Amoco gas station on 31st Street and Michigan Avenue when they heard an emergency dispatch over the police radio. Based on that emergency dispatch, the officers began looking for a black male driving a red Jeep Cherokee northbound on Indiana Avenue. They saw the vehicle travelling northbound on Indiana Avenue at 31st Street. They followed the vehicle as it made a left-hand turn into a dead-end parking lot located at 29th Street. The officers activated the emergency lights and pulled up behind the vehicle.

¶ 19 Officer Jones testified that, as he exited his police vehicle, he noticed two other police vehicles had also responded to the scene. Officer Jones approached the driver side and saw defendant, who was wearing a black sweatshirt with a hood, sitting in the driver's seat. Defendant asked why he had been pulled over. As he was about to respond, Sergeant Martin ran up, pulled defendant from the Jeep, and "took him to the ground." Defendant was handcuffed and placed in the back of Officer Jones' police vehicle. Officer Jones then walked over to the passenger side of the Jeep, where he observed a small black handgun on the floorboard and a black and grey baseball cap on the passenger seat.

No. 1-14-2340

¶ 20 Edwin Jones, an evidence technician, testified that, at approximately 9:15 p.m. on February 19, 2008, he received an assignment to go to 2901 South Indiana Avenue. He arrived at approximately 9:32 p.m., looked inside the Jeep, and saw a black handgun on the floorboard and a baseball cap on the passenger seat. He photographed the scene, inventoried the gun, and found that it was loaded.

¶ 21 Detective Jamie Duignan testified she was working with her partner, Detective Kneip, on February 19, 2008, when she received an assignment to go to the Quiznos located at 126 East 35th Street at approximately 9:15 p.m. Detective Duignan learned an offender was in custody. They went to the Quiznos, where Detective Duignan interviewed Dewanda McBride, who described the offender as a male black who was wearing a black, dark hoodie. Detective Duignan also spoke with Deto James, who showed them the surveillance footage of the robbery.

¶ 22 Sergeant Rochowicz testified that after his arrest, defendant was placed in a squad car and driven to the Quiznos. Mr. Dorch walked out of the Quiznos, pointed at defendant, who was still in the squad car, and said "that's the guy that robbed the store." Dewanda McBride then walked out of the Quiznos, came up to the squad car, and identified defendant as the robber.

¶ 23 Consistent with Sergeant Rochowicz's testimony, both Mr. Dorch and Ms. McBride testified to identifying defendant. Mr. Dorch also viewed the DVD of the surveillance video of the robbery and identified defendant in the video as the robber.

¶ 24 The State introduced into evidence certified copies of defendant's prior convictions of robbery and aggravated robbery for the limited purpose of establishing the elements of the armed-habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful use of a weapon charges. The State also introduced into evidence a photograph of defendant depicting

No. 1-14-2340

how he appeared at the time of his arrest. In the photograph, defendant is wearing a black jacket with what appears to be a hooded sweatshirt underneath.

¶ 25 Following all the evidence, the circuit court convicted defendant of armed robbery, armed habitual criminal, unlawful use of a weapon by a felon, and aggravated unlawful restraint.

¶ 26 Defendant filed a *pro se* "motion for ineffective assistance of counsel" and an "amended motion for new trial." Defense counsel filed a separate motion for new trial. The circuit court denied all the post-trial motions and later sentenced defendant to 34 years' imprisonment for the armed robbery conviction, and a concurrent 6 years' imprisonment for the armed-habitual criminal conviction. The other convictions merged into the armed robbery conviction.

¶ 27 On direct appeal, defendant argued in pertinent part that the circuit court erred in denying his motion to suppress based on his illegal arrest without probable cause. *People v. Talley*, 2011 IL App (1st) 093352-U, ¶ 44. Defendant argued there was no probable cause because he was arrested prior to the officers seeing the gun in the vehicle. *Id.* ¶ 45. This court disagreed, noting defendant's argument was belied by Officer Quattrocki's testimony at the suppression hearing that he pulled defendant from the vehicle and arrested him only *after* hearing Officer Lawson yell "there's a gun on the floorboard." *Id.*

¶ 28 Defendant also brought 40 claims of ineffective assistance of trial counsel. *Id.* ¶ 61. This court rejected all of defendant's claims of ineffective assistance, holding that, given all the evidence against defendant, "there is no reasonable probability the result of the trial would have been different but for counsel's allegedly unprofessional errors. In the absence of any prejudice, defendant's claims of ineffective assistance fail." *Id.* ¶ 64.

¶ 29 Defendant's convictions and sentence were affirmed. *Id.* ¶ 72.

No. 1-14-2340

¶ 30 Defendant then filed a postconviction petition alleging, in pertinent part, that his trial counsel was ineffective for failing to ask the circuit court to reconsider its ruling denying his motion to suppress after Officers Jones and Rochowicz admitted at trial they only learned there was a gun in the vehicle *after* defendant was thrown to the ground and arrested.

¶ 31 The postconviction court advanced the petition to second-stage proceedings and the State filed a motion to dismiss, arguing that defendant's claim of ineffective assistance of trial counsel was barred by *res judicata* because it had been raised and rejected on direct appeal. In support, the State attached defendant's appellant's brief from his direct appeal, in which he argued that his trial counsel was ineffective for failing to ask the circuit court to reconsider its denial of his suppression motion after hearing the trial testimony. The State also attached this court's order which rejected defendant's claims of ineffective assistance of counsel and affirmed his convictions. The postconviction court granted the State's motion and dismissed defendant's petition.

¶ 32 Defendant now appeals from the second-stage dismissal of his postconviction petition.

¶ 33 "A postconviction proceeding 'is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment.' [Citation.] Such a proceeding 'allow[s] inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal.' [Citation.] 'Thus, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are considered waived.' [Citation.]" *People v. Graham*, 2012 IL App (1st) 102351, ¶ 30.

¶ 34 "At the second stage of postconviction proceedings, the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any

No. 1-14-2340

accompanying documents make a substantial showing of a constitutional violation. [Citation.] The postconviction court takes 'all well-pleaded facts that are not positively rebutted by the trial record' as true. [Citation.] If the petition fails to make a substantial showing of a constitutional violation, it is dismissed; if such a showing is made, the petition advances to the third stage, where the postconviction court conducts an evidentiary hearing. [Citation.] A second-stage dismissal of a postconviction petition is reviewed *de novo*. [Citation.]" *Id.* ¶ 31.

¶ 35 Claims of ineffective assistance of counsel are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance of counsel, defendant must show counsel's performance was objectively unreasonable under prevailing professional norms and he was prejudiced thereby such that a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. The reviewing court may reject a claim of ineffective assistance of counsel by finding defendant was not prejudiced by counsel's representation without determining whether counsel's performance was deficient. *People v. Lear*, 175 Ill. 2d 262, 269 (1997).

¶ 36 On appeal, defendant contends the postconviction court erred in dismissing his petition at the second stage, as the petition makes a substantial showing that his trial counsel provided ineffective assistance by failing to ask the circuit court to reconsider its ruling denying his motion to suppress based on lack of probable cause to arrest. In denying the motion to suppress, the circuit court found that the officers had probable cause to arrest based on Officer Quattrocki's testimony at the suppression hearing that Officer Lawson saw a gun on the floorboard of defendant's vehicle. A bench trial was then held. Officer Quattrocki did not testify at trial; however, Officers Jones and Rochowicz testified at trial they only learned there was a gun in the

vehicle *after* defendant was thrown to the ground and arrested. Defendant contends that Officer Jones' and Officer Rochowicz's testimony at trial established that defendant was arrested before the gun was found, *i.e.*, that probable cause was lacking for his arrest, and therefore that his trial counsel "was required to move for reconsideration of the ruling on the pre-trial motion to suppress." Defendant contends he has made a substantial showing his trial counsel was ineffective for failing to so move for reconsideration of the suppression motion, and therefore that we should reverse the second-stage dismissal of his postconviction petition.

¶ 37 Defendant's contention is without merit, as it previously has been addressed and rejected by this court on direct appeal. Specifically, on direct appeal, defendant brought 40 claims of ineffective assistance of trial counsel (*Talley*, 2011 IL App (1st) 093352-U, ¶ 61), one of which was that his trial counsel failed to ask the circuit court to reconsider its denial of his motion to suppress after hearing the testimonies of the witnesses¹. This court rejected all of defendant's claims of ineffective assistance based on lack of prejudice. *Id.* ¶ 64. Thus, as defendant's claim of ineffective assistance of trial counsel based on the failure to ask the circuit court to reconsider its denial of the suppression motion has already been raised and decided on direct appeal, it is barred from further consideration here by the doctrine of *res judicata*. *Graham*, 2012 IL App (1st) 102351, ¶ 30.

¶ 38 In his reply brief, defendant makes a one-sentence argument that "fundamental fairness" requires us to relax the *res judicata* doctrine and consider his claim of ineffective assistance. See *People v. Harris*, 206 Ill. 2d 1, 13 (2002) (holding that a postconviction claim may be addressed,

¹ In its order affirming defendant's convictions on direct appeal, this court did not specify what any of the 40 claims of ineffective assistance consisted of; however, in defendant's appellant's brief on direct appeal, which is included in the record here, and which we could also take judicial notice of (see *People v. Mosley*, 2015 IL 115872), defendant details all 40 claims, including the claim that is the subject of the present appeal.

No. 1-14-2340

even if it was earlier raised on direct appeal, where "fundamental fairness" requires relaxation of the *res judicata* doctrine.) Defendant gives no reason or explanation for why "fundamental fairness" requires relaxation of *res judicata* in this case. In the absence of such an explanation, the "fundamental fairness" issue is forfeited (see Ill. Sup. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)), and we affirm the postconviction court's dismissal order.

¶ 39 For all the foregoing reasons, we affirm the second-stage dismissal of defendant's postconviction petition, holding: (1) defendant's claim of ineffectiveness of trial counsel was addressed and rejected on direct appeal, and, thus, was barred by *res judicata*; and (2) defendant's claim that *res judicata* should be relaxed under "fundamental fairness" is forfeited based on a lack of argument in support thereof.

¶ 40 Affirmed.