2015 IL App (2d) 130165-U
No. 2-13-0165
Order filed December 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JOHN F. JOHNSON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 09-CF-1712 Honorable Daniel P. Guerin, Judge, Presiding.

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

ORDER

¶ 1 *Held*: The circuit court properly dismissed defendant's *pro se* petition for post-conviction relief as frivolous and patently without merit as the seven claims defendant raised on appeal are either barred by *res judicata*, moot, forfeited, rebutted by the record on appeal, or lack merit.

¶ 2 Defendant, John F. Johnson, appeals from the first-stage dismissal of his *pro se* petition for relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The parties are familiar with the facts of the case. The facts are also set forth in detail in our decision on direct appeal. See *People v. Johnson*, 2012 IL App (2d) 101025-U. As a result, we set forth only those facts necessary to place into context the issues raised in defendant's post-conviction appeal. Any additional facts necessary to resolve this appeal will be discussed in conjunction with defendant's arguments for reversal.

¶ 5 In June 2009, the Du Page County sheriff's department began investigating an alleged plot by defendant to murder his ex-wife, Tracy Hampton. As part of the investigation, the sheriff's department obtained two overhear orders allowing it to record conversations between defendant and two individuals, Curtis Washington and Detective Rafael Osorio. At the time the overhear orders were obtained, defendant was incarcerated in the Du Page County jail on a charge that he violated an order of protection, with Hampton being the protected party. At the jail, Washington was housed in the same pod as defendant. During the investigation, Osorio posed as a hit man named "Rah-Rah." On August 4, 2009, defendant was charged by indictment in the circuit court of Du Page County with various counts of solicitation of murder (720 ILCS 5/8-1.1(a) (West 2008), now codified as amended at 720 ILCS 5/8-1(b) (West 2012)) and solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2008)). Prior to trial, the State *nolle prossed* all but counts I, III, VII, and X of the indictment. Count I charged solicitation of murder based on the allegation that on July 1, 2009, defendant requested Osorio to commit the offense of murder. Count X charged solicitation of murder for hire based on the allegation that on July 1, 2009, defendant procured Osorio to commit that offense "pursuant to a request for a sum of United States Currency." Counts III and VII charged solicitation of murder and solicitation of murder for hire, respectively, and were identical to counts I and X, except that they alleged that defendant had requested and procured Washington to commit these offenses on June 26, 2009.

¶ 6 During pre-trial proceedings, defendant, who was initially represented by counsel, informed the court that he wanted to represent himself. The court admonished defendant, but he persisted in his desire to proceed *pro se*. The public defender was subsequently appointed as standby counsel to assist defendant with procedural matters. Defendant filed various pre-trial motions, including (1) a motion to suppress a July 13, 2009, videotaped interrogation conducted by members of the sheriff's department and (2) a motion to suppress the conversations recorded as a result of the overhear orders. Following a hearing, the trial court determined that defendant invoked his right to counsel during the July 13, 2009, interrogation and that any statements made by defendant after the invocation of his right to counsel would be suppressed. At the hearing on the motion to suppress the overhear orders, defendant argued that there was no reasonable cause to issue the order authorizing an overhear of conversations between him and Washington because the application was premised on hearsay and there was no showing that Washington was a trustworthy informant. In response to a question from the court, defendant stated that he was not challenging the order allowing an overhear of the conversations between him and Osorio. Ultimately, the trial court denied the motion to suppress the overheard conversations between defendant and Washington, finding that the evidence presented in the application was sufficient to allow for issuance of the order.

¶ 7 Defendant's trial commenced on March 30, 2010. The State called various witnesses, including Washington. Washington testified that he had various conversations with defendant when the two men were housed in the same pod at the Du Page County jail. During these conversations, defendant asked Washington if he could arrange for someone to "whack" Hampton. Defendant told Washington that he would provide compensation for the killing. Defendant also suggested how to kill Hampton and provided Washington a slip of paper with

Hampton's address. Further, during the State's case-in-chief, conversations between Washington and defendant, recorded on June 26, 2009, and June 28, 2009, were played for the jury. Also played for the jury were recordings of (1) June 27, 2009, telephone calls from the Du Page County jail, involving Washington, defendant, and an unknown third party, (2) a July 1, 2009, telephone conversation between defendant and Osorio, and (3) a July 12, 2009, conversation between defendant and Osorio (posing as Rah-Rah) over a telephone in the visitor's room at the jail. During his case-in-chief, defendant testified on his own behalf in a narrative fashion. On cross-examination, defendant acknowledged that his voice is heard on the recordings of the overheard conversations, but insisted that he did not want Hampton murdered. Defendant maintained that his conversations about having Hampton killed were "just talk" and "venting."

¶ 8 After the defense rested, the State advised the court that, in rebuttal, it intended to recall one of its witnesses and introduce six segments from various recordings, including four segments from defendant's July 13, 2009, interrogation. The State informed the court that three of the four segments from the July 13, 2009, interrogation were from the portion of the videotaped statement that the court had suppressed based upon defendant's invocation of his right to counsel. However, the State asserted that the segments were being offered "for impeachment purposes." These segments were subsequently played for the jury.

¶ 9 Following a jury trial, defendant was found guilty of two counts of solicitation of murder and two counts of solicitation of murder for hire. The trial court merged the convictions on the two counts of solicitation of murder into the two counts of solicitation of murder for hire. The court sentenced defendant to 34 years' imprisonment on each count of solicitation of murder for hire, with the sentences to run concurrently. On direct appeal, this court vacated one of

defendant's convictions of solicitation of murder for hire based on one-act, one crime principles (see *People v. King*, 66 Ill. 2d 551, 566 (1977)), but otherwise affirmed. *Johnson*, 2012 IL App (2d) 101025-U. The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Johnson*, 979 N.E. 2d 883 (2012). On October 29, 2012, defendant filed a *pro se* petition for post-conviction relief in which he raised 49 claims. On January 24, 2013, the trial court, in an 11-page written order, dismissed the petition as frivolous and patently without merit. This *pro se* appeal followed.

¶ 10 II. ANALYSIS

¶ 11 The Act outlines a process by which a criminal defendant may challenge his or her conviction. 725 ILCS 5/122-1 *et seq*. (West 2012). To be accorded relief under the Act, the defendant must establish "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both" in the proceedings which resulted in his or her conviction. 725 ILCS 5/122-1(a)(1) (West 2012). A post-conviction action, however, is not a substitute for, or an addendum to, a direct appeal. *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). Rather, it is a collateral attack on a prior conviction and sentence (*Kokoraleis*, 159 Ill. 2d at 328), and its scope is limited to constitutional matters that have not been, nor could have been, previously adjudicated (*People v. Rissley*, 206 Ill. 2d 403, 412 (2003)). Accordingly, any issue that could have been raised on direct appeal, but was not, is considered procedurally defaulted, and any issue that was adjudicated on direct appeal is barred by the doctrine of *res judicata*. *People v. Scott*, 194 Ill. 2d 268, 274 (2000); *People v. Rivera*, 2014 IL App (2d) 120884, ¶ 6.

¶ 12 Proceedings under the Act are commenced by the filing of a petition, verified by affidavit, with the clerk of the court in which a defendant's conviction took place. 725 ILCS 5/122-1(b) (West 2012). In non-capital cases, the Act provides a three-stage process for the

adjudication of a post-conviction petition. *People v. Harris*, 224 Ill. 2d 115, 125 (2007). At the first stage, the petition must allege "sufficient facts to state the gist of a constitutional claim, even where the petition lacks formal legal argument or citations to authority." *People v. Allen*, 2015 IL 113135, ¶ 24; see also *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). This low threshold, however, does not excuse the *pro se* petitioner from providing any factual support for his claims. *Hodges*, 234 Ill. 2d at 9-10. The petitioner must supply a sufficient factual basis to show the allegations in the petition are capable of objective or independent corroboration. *Hodges*, 234 Ill. 2d at 10. During this initial stage, the trial court independently assesses the allegations in the petition without any input from the State. *People v. Boclair*, 202 Ill. 2d 89, 99 (2002). If the trial court determines that the petition is frivolous or patently without merit, it must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2012); *People v. Turner*, 2012 IL App (2d) 100819, ¶ 18. A post-conviction petition is frivolous or patently without merit when its allegations, liberally construed and taken as true, have no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 16; *People v. Brooks*, 233 Ill. 2d 146, 153 (2009). A petition has no arguable basis in law or in fact if it is based on an indisputably meritless legal theory, *i.e.*, a legal theory completely contradicted by the record, or a fanciful factual allegation, *i.e.*, those which are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. If the trial court finds that the petition is not frivolous or patently without merit, the petition advances to the second stage of the post-conviction process. *People v. Vasquez*, 356 Ill. App. 3d 420, 422 (2005).

¶ 13 At the second stage, the trial court may appoint counsel to represent an indigent defendant (725 ILCS 5/122-4 (West 2012)), and counsel will have an opportunity to amend the petition (*Boclair*, 202 Ill. 2d at 100). The State then answers or files a motion to dismiss the petition. 725 ILCS 5/122-5 (West 2012); *Vasquez*, 356 Ill. App. 3d at 422. The trial court must

then determine whether the petition and any attached documents make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). If such a showing is made, the trial court will proceed to the third stage and conduct an evidentiary hearing on the merits of the petition. 725 ILCS 5/122-6 (West 2012); *Boclair*, 202 Ill. 2d at 100. As noted above, in the present case, the trial court dismissed defendant's petition following a first-stage review. We review *de novo* the first-stage dismissal of a postconviction petition. *People v. House*, 2013 IL App (2d) 120746, ¶ 9.

¶ 14 Defendant raised 49 claims in the post-conviction petition he filed in the trial court. However, he only argues seven of those issues on appeal. Defendant first challenges the validity of the overhear orders. Specifically, defendant alleges that the trial court erred in denying his motion to suppress the recorded conversations between him and Washington. According to defendant, there was no showing of "reasonable cause" for the issuance of the order permitting the sheriff's department to record his conversation with Washington because the application submitted in support of the order was based entirely on hearsay from Washington and there was no substantial basis shown for crediting that hearsay. Defendant further contends that the recorded conversations between him and Osorio should have also been suppressed as the "fruit of the initial unlawful order." However, these contentions have been previously addressed and rejected by this court on direct appeal. See *Johnson*, 2012 IL App (2d) 101025-U, ¶¶ 15-26.

¶ 15 Relevant here, in defendant's direct appeal, we noted that in assessing the reliability of information received from an informant, a court may consider various factors, including: (1) the level of detail in the informant's statement; (2) whether the informant had previously provided reliable tips; (3) whether, in providing the information, the informant made a statement against interest; (4) whether the informant's information was gathered through direct contact with the

defendant; (5) whether the informant was paid for the information; and (6) any other independent corroboration of the information. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 22. Ultimately, we held that the trial court did not err in failing to suppress the recorded conversations between defendant and Washington because the application for the overhear order contained sufficient facts to permit the conclusion that the information upon which it was based was reliable. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 26. We noted, for instance, that Washington obtained the information he provided to the police through direct contact with defendant, after having multiple conversations with defendant while the two men were housed in the Du Page County jail. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 23. We also pointed out that much of the information provided by Washington was corroborated by other sources and that Washington exposed himself to criminal liability by admitting to police that he had engaged in conversations with defendant regarding the plan to have Hampton killed. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 23. In light of our conclusion, we found moot defendant's contention that the recorded conversations between defendant and Osorio should have been suppressed as the "fruit of the initial unlawful order." *Johnson*, 2012 IL App (2d) 101025-U, ¶ 26. Because we addressed and rejected defendant's challenge to the validity of the overhear orders on direct appeal, defendant's attempt to raise this argument again in this appeal is barred by the doctrine of *res judicata*. See *Scott*, 194 Ill. 2d at 274; *Rivera*, 2014 IL App (2d) 120884, ¶ 6.

¶ 16 Defendant next argues that the trial court erred in allowing the State to use statements made by him during the July 13, 2009, interrogation by the sheriff's department. Defendant asserts that although the State purported to use the statements for impeachment purposes, the statements were taken in violation of his right to counsel and they did not actually impeach his in-court testimony. Defendant further argues that the error was compounded because the jury

was not instructed that the uncounseled statements could be considered only for impeachment purposes. Like defendant's preceding argument, we addressed and rejected this issue in defendant's direct appeal. *Johnson*, 2012 IL App (2d) 101025-U, ¶¶ 27-40. We found that defendant had procedurally defaulted this issue. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 29. Forfeiture notwithstanding, we concluded that the trial court did not abuse its discretion in admitting defendant's uncounseled statements because they were inconsistent with defendant's testimony at trial. *Johnson*, 2012 IL App (2d) 101025-U, ¶¶ 37-40 (citing *Oregon v. Hass*, 420 U.S. 714, 721-23 (1975) (holding that while a defendant's uncounseled statements cannot be used by the State during its case-in-chief, they may be used to impeach the defendant should he testify inconsistently at trial). We acknowledged that the jury was not instructed regarding the limited purpose for which defendant's inconsistent statements had been admitted, but noted that defendant failed to tender a limiting instruction. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 40. Because we addressed and rejected defendant's challenge to the use of defendant's uncounseled statements for impeachment purposes on direct appeal, defendant's attempt to raise this argument again in this appeal is barred by the doctrine of *res judicata*. See *Scott*, 194 Ill. 2d at 274; *Rivera*, 2014 IL App (2d) 120884, ¶ 6.

¶ 17 Defendant next argues that one of his convictions of solicitation of murder for hire must be vacated pursuant to one-act, one-crime principles. However, defendant raised this same argument on direct appeal, and this court vacated one of defendant's convictions of solicitation of murder for hire. *Johnson*, 2012 IL App (2d) 101025-U, ¶ 41-49. Because defendant already received the relief he now requests, we find this argument moot.

¶ 18 Defendant next contends that he was denied his right to due process under the federal and state constitutions because he was "entrapped by the State's informant to commit a crime he was

not pre-disposed to commit." Defendant has forfeited this issue by failing to raise an entrapment defense at trial. *People v. Montes*, 2015 IL App (2d) 140485, ¶ 19. The record establishes that although defendant initially voiced his intention to assert the affirmative defense of entrapment, he later chose not to present this defense. In this regard, the court expressly asked defendant prior to trial if he was "asserting the affirmative defense of entrapment." Defendant responded in the negative. Nevertheless, the court noted that defendant had previously indicated that he would be relying on an entrapment defense. Upon further discussion, defendant reiterated that he was "not going with the entrapment defense." In addition, prior to the start of jury selection, defendant, in response to an inquiry from the State, reiterated his decision not to present an entrapment defense. Moreover, on direct appeal, defendant did not raise entrapment, and he does not argue before this court that appellate counsel was ineffective for failing to raise this defense on direct appeal. See *Montes*, 2015 IL App (2d) 140485, ¶ 19. For these reasons, we find that defendant cannot raise an entrapment defense for the first time in a post-conviction setting. *Montes*, 2015 IL App (2d) 140485, ¶ 19; see also *People v. Outten*, 13 Ill. 2d 21, 25 (1958) (holding that a defendant cannot assert a defense of entrapment on appeal if he failed to raise it as an affirmative defense at trial).

¶ 19 Defendant next claims that the indictment charging him is invalid because the grand jury that returned it was never impaneled or sworn as required by Illinois Supreme Court Rule 608(a)(2) (eff. Jan. 1, 1998) and Section 112-2 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/112-2 (West 2012)). We disagree. Illinois Supreme Court Rule 608(a)(2) (eff. Jan. 1, 1998) provides that the record on appeal must contain "a certificate of the clerk [of the court] showing the impaneling of the grand jury if the prosecution was commenced by indictment." Section 112-2 of the Code governs the impaneling of the grand jury. That section

provides that the grand jury shall consist of 16 persons, that the grand jury "shall be impaneled, sworn and instructed as to its duties by the court," that the court "shall select and swear one of the grand jurors to serve as foreman," and that before the grand jury "shall enter upon the discharge of [its] duties" the oath set forth in the statute shall be administered to the jurors. 725 ILCS 5/112-2 (West 2012).

¶ 20 In this case, the record contains both (1) a certificate of impaneling of the grand jury and (2) an order impaneling the grand jury. The certificate of impaneling provides that a grand jury, "each member of which was summoned, drawn and certified by the Clerk [of the court] *** from an active jury list of qualified persons *** reported into open Court and *was impaneled, sworn* and instructed as to its duties by a Judge of the Circuit Court and was a duly and lawfully constituted GRAND JURY of the County of DUPAGE and State of Illinois." (Emphasis added.) The order impaneling the grand jury lists the names of the 16 individuals comprising the grand jury (plus 2 alternates), appoints one of those individuals as the foreperson of the grand jury, states that the foreperson has taken the required oath, provides that the other jurors have taken the same oath as the foreperson, and states that the foreperson along with the other jurors constitute the grand jury for the applicable term of service indicated. Moreover, although the face of the indictment need not recite compliance with section 112-2 of the Code (*People v. Bell*, 2013 IL App (3d) 120328, ¶ 8), we note that each count of the indictment against defendant provides that "The Grand Jurors chosen, selected, *and sworn*, in and for the County of DuPage, in the State of Illinois, *** upon their oaths present" that defendant committed the offenses charged. (Emphasis added.) These documents establish that the grand jury that indicted defendant was properly sworn and impaneled. Because the record belies defendant's claim that the grand jury that indicted him was not sworn or impaneled, the trial court properly rejected this

argument. See *Hodges*, 234 Ill. 2d at 16 (noting that a post-conviction claim lacks an arguable basis in law or fact, and therefore is frivolous or patently without merit, if the record contradicts the claim).

¶ 21 In a related argument, defendant claims that appellate counsel was ineffective for failing to challenge the indictment in his direct appeal. To succeed on a claim of ineffective assistance of appellate counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). Under *Strickland*, a defendant must show that his attorney's performance was deficient and that the attorney's deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687. To demonstrate a performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). To establish prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. If either prong of the *Strickland* test is not satisfied, then the defendant has not established ineffective assistance of counsel. *Strickland*, 466 U.S. at 697. As noted above, defendant's claim that the indictments charging him are invalid because the grand jury that returned the indictment against him was not sworn or impaneled is contradicted by the record. Thus, any challenge to the validity of the indictments would have been futile, and defendant's claim of ineffective assistance of appellate counsel fails.

¶ 22 Finally, defendant claims that he was denied due process under the federal and state constitutions because the State knowingly used perjured testimony to convict him. Specifically,

defendant alleges that Washington committed perjury when he testified that defendant solicited him to kill Hampton. According to defendant, Washington recanted this statement on July 12, 2009. However, any claims unsupported by affidavit or by other evidentiary materials must be dismissed. *People v. Coleman*, 2012 IL App (4th) 110463, ¶ 55. Here, dismissal of this claim is appropriate because defendant does not include Washington's recanted statement in his petition. Even accepting defendant's assertion of Washington's statement as true, we do not agree that the statement establishes that Washington committed perjury. According to defendant, "Washington recanted his statement on July 12, 2009, stating that [defendant] told him [Hampton] was better off living so that the defendant may sue civilly for his losses." We fail to see how this constituted a recantation or is indicative of perjury as Washington does not state that he fabricated his original statements to police. At most, this statement reflects that defendant remarked that he should sue Hampton after he had already solicited Washington and Osorio to kill her. Accordingly, this claim lacks merit.

¶ 23 III. CONCLUSION

¶ 24 For the reasons set forth above, we affirm the judgment of the circuit court of Du Page County dismissing defendant's *pro se* petition for post-conviction relief as frivolous and patently without merit. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 25 Affirmed.[1]

[1] On September 29, 2015, defendant filed a "Motion for Instanter," requesting this court to "rule upon and dispose of his Reply Brief and argument through this Motion for Instanter proceedings." Having resolved defendant's appeal in this disposition, we dismiss defendant's motion as moot.