2015 IL App (2d) 130511-U
No. 2-13-0511
Order filed May 19, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TODD ALLGOOD, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. No. 01-CF-229 Honorable Robbin J. Stuckert, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Schostok and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court properly dismissed defendant's ineffective-assistance claim on res judicata grounds: although defendant submitted a new reason why counsel allegedly should have challenged an evidentiary ruling, we had already ruled on direct appeal that defendant could not show prejudice from that ruling; (2) the trial court erred in dismissing defendant's proportionate-penalties claim, which validly asserted that his 15-year firearm enhancement for aggravated criminal sexual assault was unconstitutional; thus, as no evidentiary hearing was required, we vacated his sentence and remanded for resentencing.

¶ 2 Defendant, Todd Allgood, appeals the trial court's dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) in connection with his convictions of aggravated criminal sexual assault while armed with a firearm (720 ILCS

5/12-14(a)(8) (West 2000)) and aggravated kidnapping while armed with a firearm (720 ILCS 5/10-2(a)(6) (West 2000)). He contends that his counsel was ineffective for failing to properly challenge the State's ability to present evidence of previous sexual assaults and that a 15-year sentencing enhancement for use of a firearm violates the proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). We determine that the evidentiary issue is *res judicata*. However, we vacate the 15-year enhancement and remand for resentencing.

¶ 3 I. BACKGROUND

¶ 4 Defendant was indicted for the April 25, 2001, abduction and sexual assault of the victim, N.K., and a jury trial was held.

¶ 5 Evidence at trial showed that, on April 25, 2001, between 1:15 and 1:30 p.m., defendant abducted N.K. at gunpoint as she entered her vehicle in a parking lot. Defendant ordered N.K. to drive to a trailer park, enter a trailer, and remove her clothes. When she realized that a sexual assault was inevitable, she asked defendant to use a condom. Defendant retrieved a condom from a backpack and then sexually assaulted N.K., during which she could see his gun. After the assault, defendant ordered N.K. to take a shower. He then instructed her to drive in a direction away from where she was abducted. N.K. convinced defendant that she would not tell anyone what happened, and he allowed her to return to the parking lot where she was abducted. He told her that, if she said anything, he would claim that the encounter was consensual and would come back and kill her.

¶ 6 N.K. reported the incident to the police, who were able to recreate the route that she drove to the trailer. N.K. identified the trailer, and then went to the hospital where she underwent a medical examination. She later identified the trailer a second time and also identified defendant from a photographic lineup.

¶ 7 The police went to the trailer that night. Defendant's wife testified that, when the doorbell rang, defendant got out of bed and walked to the front door. Then, without opening the door, defendant came back, got his backpack, and went to the bathroom. While he was in there, his wife heard the toilet flush. Defendant then answered the door. The police found a used condom on the bathroom floor. Defendant's wife testified that she and defendant did not use condoms during their sexual relations and that there had not been a condom on the bathroom floor when she went to bed. DNA matching defendant was found inside of the condom, and DNA matching N.K. was found on the outside of it. The police further recovered a gun matching the description given by N.K., which she also identified at trial. A shoe print in N.K.'s car was consistent with defendant's shoe.

¶ 8 Before trial, the court ruled *in limine* that, if defendant raised a consent defense, it would allow the State to present evidence of two other sexual assaults linked to defendant, which occurred in December 1989 and February 1990, to show intent. Defendant's counsel asked for, and was given, additional time to review the DNA evidence and consult with an expert. Counsel later moved to bar evidence from the 1990 case because it had been destroyed and was not available for genetic testing by the defense. The court denied the motion on the basis that the reports still existed so that counsel could challenge the procedures used and the determination that the profiles matched. Defendant did not testify, and the other-crimes evidence was not admitted at trial.

¶ 9 The jury found defendant guilty. At sentencing, an expert for the State testified about the methods used to test the DNA and opined that the 1989 and 1990 DNA came from the same person. Another expert compared the DNA from the 1989 case to that of defendant, testified about the methods used, and opined that defendant could not be excluded as the source of the

DNA in the 1989 case; indeed, the chance that an unrelated person was the source was 1 in 180 quadrillion. The court allowed the evidence to be used in connection with sentencing. Defendant was sentenced to 30 years' incarceration for aggravated criminal sexual assault, plus a 15-year enhancement for use of a firearm during the commission of the offense under section 12-14(d)(1) of the Criminal Code of 1961 (720 ILCS 5/12-14(d)(1) (West 2000)). He was sentenced to a consecutive term of 10 years for aggravated kidnapping while armed with a firearm.

¶ 10 Defendant appealed, arguing in part that the trial court abused its discretion when it ruled *in limine* that it would admit evidence of the 1989 and 1990 sexual assaults as evidence of intent if defendant testified that N.K. consented to the sexual conduct. In particular, defendant argued that the DNA evidence from the 1990 case was destroyed and not available for testing, the State failed to establish a chain of custody for the 1989 case, and the offenses were too remote in time. We affirmed. *People v. Allgood*, No. 2-03-0612 (2005) (unpublished order under Supreme Court Rule 23).

¶ 11 Noting that we could affirm for any reason appearing in the record, we held that the evidence was admissible to show propensity under section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2000)). *Allgood*, slip op. at 31-34. We noted that the genetic evidence indicated that defendant was the assailant in all three cases, and we rejected defendant's argument that the trial court's ruling prevented him from testifying. *Id*. at 34. We held that defendant's choice not to testify forfeited consideration of the ruling because any assessment of the harm to defendant by the ruling was speculative. *Id*. at 34-35 (citing *Luce v. United States*, 469 U.S. 38, 41 (1984), and *People v. Benson*, 266 Ill. App. 3d 994, 1001 (1994)).

We further held that defendant could not claim prejudice from his refusal to testify. *Id*. at 35. Defendant also raised a proportionate-penalties-clause argument that we rejected. *Id*. at 45.

¶ 12 In September 2006, defendant filed a postconviction petition alleging ineffective assistance of counsel. Counsel was appointed and, in September 2011, an amended petition was filed, alleging in part that the trial court erred in ruling *in limine* that the State could introduce evidence of the 1989 and 1990 assaults. The petition alleged that the ruling effectively took away defendant's right to testify. Defendant argued that his trial and appellate counsel were ineffective for failing to argue that the evidence lacked foundation, and he provided a report from an expert who he alleged would testify about various failings of the reports from the State's experts. The petition also alleged that the 15-year sentencing enhancement was an unconstitutional violation of the proportionate-penalties clause because it punished defendant twice for the same crime.

¶ 13 The State moved to dismiss, and the trial court granted the motion, finding that the allegations were barred by principles of *res judicata*. Defendant appeals.

¶ 14 II. ANALYSIS

¶ 15 Defendant contends that his counsel was ineffective for failing to object to the foundation for the admission of DNA evidence from the 1989 and 1990 assaults and that his appellate counsel was ineffective for failing to challenge the issue in that manner on appeal.

¶ 16 The Act provides a three-stage mechanism for a defendant who alleges a substantial deprivation of his or her constitutional rights at trial. At the first stage, the trial court must independently review the petition within 90 days of its filing and determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2006). If the petition survives initial review, the process moves to the second stage, where the trial court appoints

counsel for the defendant, if necessary (725 ILCS 5/122-4 (West 2006)), and the State may file a motion to dismiss or an answer (725 ILCS 5/122-5 (West 2006)).

¶ 17 At the second stage of the proceedings, "[i]f the State moves to dismiss, the trial court may hold a dismissal hearing, which is still part of the second stage." *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009) (citing *People v. Coleman*, 183 Ill. 2d 366, 380-81 (1998)). At this stage, to survive dismissal, the petition must make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The propriety of a dismissal at the second stage is a question of law, which we review *de novo*. *People v. Simpson*, 204 Ill. 2d 536, 547 (2001).

¶ 18 In reviewing a claim of ineffective assistance of counsel, we apply the two-part test established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). "To prevail under *Strickland*, a defendant must show that his attorney's assistance was both deficient and prejudicial." *People v. Curry*, 178 Ill. 2d 509, 518-19 (1997). "More precisely, a defendant must show [(1)] that his attorney's assistance was objectively unreasonable under prevailing professional norms, and [(2)] that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *Id*. (quoting *Strickland*, 466 U.S. at 687). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *People v. Edwards*, 195 Ill. 2d 142, 163 (2001) (quoting *Strickland*, 466 U.S. at 694). The failure of a defendant to satisfy either the deficiency prong or the prejudice prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76.

¶ 19 The State contends that the issue concerning the 1989 and 1990 assaults is *res judicata*. The purpose of a postconviction proceeding is to permit inquiry into constitutional issues

involved in the original conviction and sentence that were not, nor could have been, adjudicated previously upon direct appeal. *People v. Peeples*, 205 Ill. 2d 480, 510 (2002). Because a proceeding brought under the Act is a collateral attack on the defendant's conviction and/or sentence, the doctrine of *res judicata* bars consideration of issues that were raised and decided on direct appeal. *Id*. Further, issues that could have been presented on direct appeal but were not are forfeited for purposes of postconviction review. *Id*.

¶ 20 Defendant contends that the matter is not *res judicata*, because he is arguing that his trial counsel and appellate counsel failed to challenge the evidence in the manner that he raised in his postconviction petition. However, regardless of whether defendant's specific argument was previously raised (or could have been raised), his argument fails because he cannot show prejudice. Further, the lack of prejudice was already determined on direct appeal.

¶ 21 As we held on direct appeal, defendant cannot show that he was prejudiced by the trial court's determination that the 1989 and 1990 assaults could be used as evidence at trial, because defendant chose not to testify and thus the evidence was never used. As we held there, a defendant's decision not to testify forfeits consideration of the propriety of a trial court's decision *in limine* to allow impeachment evidence. See *Luce*, 469 U.S. at 41; *Benson*, 266 Ill. App. 3d at 1001. Further, a defendant's refusal to testify, standing alone, cannot serve as the basis for a conclusion that he was prejudiced. *People v. Gray*, 192 Ill. App. 3d 907, 916 (1989). Moreover, as we noted on direct appeal, the evidence of defendant's guilt was overwhelming. *Allgood*, Slip op. at 29. Thus, despite defendant's new theory, his argument is barred by *res judicata*.

¶ 22 Defendant next contends that the 15-year enhancement for use of a firearm during the commission of aggravated criminal sexual assault must be vacated because it violates the

proportionate-penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). The State agrees.

¶ 23 The issue was raised and rejected on direct appeal. However, when the law has changed since a defendant's appeal was decided, fundamental fairness dictates that the defendant may raise the issue in a postconviction petition. *People v. Sanders*, 393 Ill. App. 3d 152, 162 (2009); *People v. Cowherd*, 114 Ill. App. 3d 894, 898 (1983). In *People v. Hauschild*, 226 Ill. 2d 63, 86-87 (2007), which was decided after defendant's direct appeal, our supreme court held that a 15-year enhancement for armed robbery while armed with a firearm violated the proportionate-penalties clause because armed robbery while armed with a firearm carried a greater penalty than armed violence predicated on robbery while armed with a Category I, Category II, or Category III weapon. The principles announced in *Hauschild* have been applied to cases involving aggravated criminal sexual assault while armed with a firearm. See, *e.g.*, *People v. Hampton*, 406 Ill. App. 3d 925, 942 (2010). The State concedes that those cases control, and we agree.

¶ 24 Defendant asks that we simply vacate the 15-year enhancement. However, *Hauschild* held that the remedy was a remand for resentencing. *Hauschild*, 226 Ill. 2d at 88-89. Generally, we would remand this matter for third-stage postconviction proceedings, but this issue does not present any factual dispute that requires an evidentiary hearing. See *People v. Toy*, 2013 IL App (1st) 120580, ¶ 30. Since the 15-year enhancement for aggravated criminal sexual assault while armed with a firearm violates the proportionate-penalties clause, defendant is entitled to be resentenced without the unconstitutional enhancement. *Id*. Thus, pursuant to Illinois Supreme Court Rule 615(b)(2) (eff. Jan. 1, 1967), we reverse the dismissal of defendant's postconviction petition on this issue, vacate his sentence for aggravated criminal sexual assault while armed with a firearm, and remand for resentencing on that count. *Toy*, 2013 IL App (1st) 120580, ¶ 30.

¶ 25 III. CONCLUSION

¶ 26 We affirm in part and reverse in part the dismissal of defendant's sentence for aggravated criminal sexual assault while armed with a firearm, and we remand the cause to the circuit court of De Kalb County for resentencing. 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 2012); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 27 Affirmed in part and reversed in part; sentence vacated; cause remanded.