

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2015 IL App (3d) 130740-U

Order filed July 17, 2015

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-13-0740
)	Circuit No. 07-CF-234
TERRANCE WILLIAMSON,)	
Defendant-Appellant.)	Honorable Walter D. Braud, Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justices Holdridge and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed the defendant's postconviction petition claim of ineffective assistance of trial counsel because the defendant forfeited this issue by failing to raise the issue on direct appeal.

¶ 2 The defendant, Terrance Williamson, was convicted of attempted first degree murder (720 ILCS 5/8-4(a), 9-1(a) (West 2006)) and aggravated domestic battery (720 ILCS 5/12-3.3(a) (West 2006)). The defendant appeals, contending the trial court erred by summarily dismissing his petition for postconviction relief alleging ineffective assistance of trial counsel. We affirm.

FACTS

¶ 3

¶ 4 The defendant was charged with, and ultimately convicted of, attempted first degree murder and aggravated domestic battery. The charges stem from an altercation in which the defendant seriously injured his former girlfriend.

¶ 5

Prior to the defendant's trial, the defendant's attorney filed a motion for substitution of judge as a matter of right, pursuant to section 114-5(a) of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/114-5(a) (West 2006)). The motion was filed more than 10 days after arraignment and was denied as untimely.

¶ 6

At the defendant's sentencing hearing, the defendant claimed he received ineffective assistance from trial counsel because counsel: (1) encouraged him to take the stand; (2) failed to introduce the victim's medical records which demonstrated the lack of seriousness of her injuries; and (3) failed to call medical experts to testify about the victim's injuries. The trial court made no further inquiry into the defendant's allegations and proceeded to sentencing.

¶ 7

On direct appeal, the defendant argued, *inter alia*, that his ineffective assistance claims were sufficient to warrant an inquiry under *People v. Krankel*, 102 Ill. 2d 181 (1984). This court affirmed the defendant's conviction but remanded the case for the trial court to conduct a *Krankel* hearing with respect to the defendant's posttrial claims of ineffective assistance of counsel. *People v. Williamson*, No. 3-07-0854 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8

On remand, the defendant was appointed a new attorney to represent him at the *Krankel* hearing. At the hearing, the defendant testified to claims in addition to those alleged during the sentencing hearing. In particular, the defendant asserted his trial attorney should have filed "a Motion For Change of Venue because [the defendant] is black and the victim is white and that

said motion was filed late and denied because it was late."¹ Ultimately, the trial court found that trial counsel was not ineffective. However, the trial court did not make a specific finding regarding trial counsel's untimely motion for substitution of judge. The court proceeded to enter an order stating: "[A]fter making inquiry into each of defendant's *pro se* claims of ineffective assistance of counsel, there is no merit to the claims, allegations do not rise to [the] level of ineffective assistance of counsel but are matters of trial strategy, defendant's *pro se* posttrial motion is denied."

¶ 9 The defendant appealed the findings of the *Krankel* hearing, contending his newly appointed posttrial counsel failed to provide effective representation at the *Krankel* hearing by failing to read the transcripts from the defendant's trial. *People v. Williamson*, No. 3-10-0011 (2011) (unpublished order under Supreme Court Rule 23).

¶ 10 In finding posttrial counsel was not ineffective, we noted:

"our inquiry of the effective assistance of posttrial counsel is confined to those claims of ineffective assistance of trial counsel raised by defendant at the [sentencing] hearing and outlined by this court in [the defendant's first direct appeal]. [Citation.] At his [sentencing] hearing, defendant did not claim that trial counsel was ineffective for failing to file a timely motion for change of venue. Thus, posttrial counsel was not appointed to review this claim, and we will not review the argument on appeal." *Williamson*, No. 3-10-0011, slip op. at 7.

¶ 11 Ultimately, we affirmed the trial court's findings at the *Krankel* hearing. *Williamson*, No. 3-10-0011.

¹ On appeal, both parties agree the defendant's reference to a motion for change of venue is intended as a reference to a motion for substitution of judge.

¶ 12 The defendant's most recent pleading is a petition for postconviction relief. In the petition, the defendant contends, among other claims of ineffectiveness, that trial counsel was ineffective for failing to timely file a motion for substitution of judge. According to the defendant:

"trial counsel who stated if [the defendant] 'stayed with [the trial] judge, [the defendant] would get slammed due to it being a black against white case,' thus indicating a possibility of bias known to be attorneys representing the [defendant]. Trial counsel failing to file a proper motion, that trial counsel thought necessary, in the appropriate time would be below any standard of reasonableness required in an ineffective assistance claim."

Stated another way, the defendant believed a substitution of judge was necessary because the trial judge was biased. Thus, trial counsel was ineffective for failing to move to substitute judges when trial counsel was aware of the trial judge's purported bias.

¶ 13 In its order summarily dismissing the defendant's petition, the trial court found the defendant's claim concerning the untimely motion for "change of venue" barred under *res judicata*.

¶ 14 ANALYSIS

¶ 15 On appeal, the defendant argues his postconviction petition stated the gist of a constitutional claim of ineffective assistance of trial counsel where counsel filed a late motion for substitution of judge, despite telling the defendant that the judge was potentially biased against

his particular type of case.² We find the defendant forfeited this issue by failing to raise it on direct appeal.

¶ 16 The Post–Conviction Hearing Act (725 ILCS 5/122–1 *et seq.* (West 2012)) provides a statutory remedy to criminal defendants claiming substantial violations of their constitutional rights at trial. *People v. Edwards*, 2012 IL 111711. Our supreme court in *People v. Barrow*, 195 Ill. 2d 506 (2001), discussed the scope of postconviction proceedings and the application of *res judicata* and forfeiture to those proceedings:

"The Post–Conviction Hearing Act [citation] provides a remedy by which defendants may challenge their convictions or sentences for violations of federal or state constitutional law. [Citations.] A post-conviction action is a collateral proceeding, and not an appeal from the underlying judgment. [Citations.] The purpose of the proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal. [Citations.] Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered waived." *Id.* at 518-19.³

² The defendant argues trial counsel was ineffective for untimely filing a motion for substitution of judge as a matter of right pursuant to section 114-5(a) of the Code (725 ILCS 5/114-5(a) (West 2006)). The defendant does not contend trial counsel was ineffective for failing to file a motion for substitution of judge for cause pursuant to section 114-5(d) (725 ILCS 5/114-5(d) (West 2006)).

³ Although the *Barrow* court discussed waiver, as did the State in this case, we note—as has the supreme court itself—that there is a distinct difference between waiver and forfeiture.

¶ 17 In the instant case, the defendant forfeited the issue he currently appeals because he failed to raise the issue on direct appeal. The motion for substitution of judge as a matter of right was filed in the trial court and a matter of record on direct appeal. Likewise, the trial court's denial of the motion as untimely was a matter included in the report of the proceedings on direct appeal. Thus, the defendant could have raised the issue of ineffectiveness for untimely filing the motion on direct appeal along with his request for a *Krankel* hearing. We note, the defendant was aware of the facts constituting his allegation of ineffectiveness at the time of his sentencing hearing, but failed to raise the issue along with the other allegations of ineffectiveness. The fact that the defendant added additional detail to this allegation in his petition for postconviction relief does not cure the defendant's failure to raise the issue at the sentencing hearing or on direct appeal. Consequently, the trial court properly dismissed the defendant's petition for postconviction relief. See *People v. Blair*, 215 Ill. 2d 427 (2005) (holding a court may summarily dismiss postconviction petitions on the grounds of forfeiture where the complained of errors are not based on facts absent from the face of the original appellate record).

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Rock Island County is affirmed.

¶ 20 Affirmed.

See *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 320 n.2 (2008) ("While waiver is the voluntary relinquishment of a known right, forfeiture is the failure to timely comply with procedural requirements. [Citations.] These characterizations apply equally to criminal and civil matters."). Thus the relinquishment of an argument through failure to bring it on direct appeal is properly termed a forfeiture of that argument.