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2015 IL App (3d) 140298-U

Order filed October 1, 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 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0298
JOHNNIE WOODS,)	Circuit No. 01-CF-1237
Defendant-Appellant.)	Honorable David A. Brown, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices O'Brien and Schmidt concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court properly dismissed defendant's postconviction petition at the second stage of postconviction proceedings.
- ¶ 2 Defendant, Johnnie Woods, appeals the denial of his postconviction petition at the second stage of postconviction proceedings, arguing that: (1) he received ineffective assistance of appellate counsel; (2) he received ineffective assistance of trial counsel; (3) the trial court erred in denying his motion for a directed verdict; and (4) the State engaged in prosecutorial

misconduct. Because we find that defendant's claims either failed to make a substantial showing of a constitutional claim or were forfeited, we affirm the dismissal of the postconviction petition.

¶ 3

FACTS

¶ 4

Defendant was charged by indictment with first degree murder (720 ILCS 5/9-1(a)(3) (West 2000)). The indictment alleged that defendant knowingly caused William Wireman's death while committing the forcible felony of robbery.

¶ 5

Defendant filed a motion to suppress oral and videotaped statements made by defendant to police officers, alleging among other things, that: (1) his statements were involuntary because they were "the direct result of either physical and/or mental coercion"; and (2) defendant's statements were the result of improper threats or promises.

¶ 6

At the hearing on defendant's motion to suppress, Detectives Jerry Wolland, Richard Ledbetter, and Pat Rabe testified for the State. Their testimony revealed that defendant gave two oral statements and two videotaped statements to the police prior to his arrest. Ledbetter and Rabe interrogated defendant, and Wolland served as their video technician during defendant's two videotaped interviews. Ledbetter and Rabe testified that they never used physical force, made no threats, and made no promises to defendant in exchange for his answers to their questions. Rabe testified that he did not discuss specific examples of people who had gotten breaks for cooperating with the police, mention an individual named Jarvis Neely to defendant, or tell defendant they could get his charges reduced in an unrelated case if he cooperated. Ledbetter testified that he did not witness Rabe discussing these things with defendant. Rabe also testified that he did not recall indicating to defendant that they would charge defendant's girlfriend with Wireman's murder if defendant did not cooperate with them. Wolland testified

that he did not witness Ledbetter or Rabe strike or threaten defendant or make him promises in exchange for his cooperation.

¶ 7 Rabe testified that between the first and second videotaped interviews, he interviewed Mark Parsons, who was also charged with Wireman's murder. There were some discrepancies between Parsons' version of events and defendant's version. Prior to the second videotaped interview, Rabe discussed these discrepancies with defendant but did not go into great detail or show defendant Parsons' videotaped interview. Rabe did not recall ever telling defendant the method by which Wireman had died. However, Ledbetter testified that the method by which Wireman was murdered was revealed to defendant at some point.

¶ 8 Defense counsel presented no witnesses. The trial court denied the motion to suppress, finding that there was no indication that defendant's statements were involuntary or the result of any force or improper conduct. The trial court found that it was not improper for Rabe to point out discrepancies in defendant's original story.

¶ 9 A jury trial was held. The State's theory at trial was that defendant planned to rob Wireman with Parsons, and defendant served as a lookout while Parsons strangled and robbed Wireman. Wireman died as a result of the robbery. Following the trial, defendant was convicted of first degree murder (720 ILCS 5/9-1(a)(3) (West 2000)) and sentenced to 52 years' imprisonment.

¶ 10 Defendant filed a direct appeal, arguing that his sentence was excessive. We affirmed the judgment of the trial court, finding that defendant's sentence was not manifestly disproportionate to the offense. *People v. Woods*, No. 3-02-1032 (2004) (unpublished order under Supreme Court Rule 23).

¶ 11 Defendant filed a postconviction petition, arguing that the trial court erred in: (1) refusing to give a jury instruction for theft; (2) denying defendant's motion for a directed verdict; and (3) imposing a sentence that was 12 years' longer than Parsons', who actually perpetrated the crime. Additionally, defendant argued that two jurors were biased because they worked for the same company as the victim. Defendant also argued that he received ineffective assistance of trial counsel in that trial counsel failed to: (1) present evidence of coercion at the hearing on the motion to suppress; and (2) present evidence at defendant's sentencing hearing that Parsons was sentenced to only 40 years' imprisonment. Additionally, defendant argued that appellate counsel was ineffective for failing to request a new sentencing hearing on the basis that defendant received a sentence 12 years' longer than Parsons. Defendant attached his own affidavit to the petition, stating what he would have testified to at the suppression hearing.

¶ 12 The trial court advanced defendant's postconviction petition to the second stage of proceedings and appointed a public defender to represent defendant. The public defender did not file an amended petition. The State filed a motion to dismiss, arguing: (1) defendant forfeited his claims regarding trial error and ineffective assistance of counsel due to his failure to raise such claims on direct appeal; (2) defendant's claims of ineffective assistance of trial and appellate counsel failed to establish that trial and appellate counsel were deficient or that defendant was prejudiced by their errors; and (3) defendant failed to attach sufficient supporting documents to his postconviction petition.

¶ 13 After hearing arguments, the trial court dismissed defendant's petition. Defendant appealed, arguing that he was denied reasonable assistance of postconviction counsel. We reversed the judgment of the trial court and remanded for further postconviction proceedings, finding that postconviction counsel's efforts fell short of the reasonableness standard of Illinois

Supreme Court Rule 651(c) (eff. Dec. 1, 1984). *People v. Woods*, No. 3-06-0100 (2007) (unpublished order under Supreme Court Rule 23).

¶ 14 On remand, defendant's original postconviction counsel withdrew and assistant public defender Thomas Sheets was appointed. Sheets filed a Rule 651(c) certificate and a supplemental Rule 651(c) certificate. Sheets's supplemental certificate stated that he reviewed, among other things, the sentencing order entered in Parsons' case by which Parsons was sentenced to 40 years' imprisonment for first degree murder pursuant to a fully negotiated plea. Sheets attached the sentencing order to the supplemental certificate as an exhibit. Sheets did not file an amended postconviction petition.

¶ 15 Additionally, Sheets filed an affidavit stating: (1) no transcript of *voir dire* existed because both parties waived the presence of the court reporter; (2) the assistant State's Attorney who prosecuted the case told Sheets she had no notes in her file regarding the questions asked of the potential jurors; (3) defendant's trial counsel told Sheets that no juror indicated any bias or prejudice; and (4) defendant's trial counsel told Sheets that he did not present evidence of Parsons' plea agreement at the sentencing hearing because he hoped the court would view defendant as an unwilling accomplice and sentence him to significantly less time than the 40-year sentence Parsons received.

¶ 16 A hearing was held on the postconviction petition and the State's motion to dismiss. Sheets argued that trial counsel was ineffective for failing to have defendant testify at the hearing on defendant's motion to suppress his videotaped statements because defendant's testimony was critical to establishing that the police coerced his videotaped statements. The State stood on its motion to dismiss.

¶ 17 The trial court took the matter under advisement. After reviewing the State's motion to dismiss, the trial court asked for more argument on defendant's claims that trial counsel and appellate counsel were ineffective for failing to raise, brief, or argue the disparity of defendant's sentence with that of Parsons. The trial court granted the motion to dismiss as to defendant's other claims.

¶ 18 At the hearing on defendant's remaining postconviction claims, the State argued that because Parsons was sentenced based on a plea agreement, his sentence could not be compared to defendant's sentence, which was imposed following a conviction at trial. The State cited the case *People v. Morales*, 339 Ill. App. 3d 554 (2003) for its holding that the defendant did not establish that appellate counsel was ineffective for failing to raise the issue of disparate sentencing where the codefendant received a shorter sentence but was allegedly more culpable because the codefendant pled guilty whereas the defendant was convicted after trial. The *Morales* court held that because the codefendant pled guilty and the defendant did not, the sentencing disparity did not prove that the defendant's sentence was excessive. *Id.* The State argued that *Morales* presented exactly the same situation as the present case.

¶ 19 After taking the matter under advisement, the trial court entered an order dismissing the postconviction petition in its entirety. The court noted that *Morales*, 339 Ill. App. 3d 554, appeared to be directly on point. The trial court also cited the holding of *People v. Moss*, 205 Ill. 2d 139, 171 (2001) ("A sentence imposed pursuant to a plea of guilty does not provide a valid basis of comparison to a sentence imposed subsequent to trial and conviction."). Additionally, the trial court noted that defendant's petition failed to include any documents or details relating to his codefendant's sentence or sentencing hearing. Consequently, the court was unable to find

that defendant made a substantial showing of a constitutional violation that would necessitate an evidentiary hearing.

¶ 20

ANALYSIS

¶ 21

Defendant filed a *pro se* appeal, arguing that the trial court erred in dismissing his postconviction petition at the second stage of proceedings because: (1) he received ineffective assistance of appellate counsel; (2) he received ineffective assistance of trial counsel; (3) the trial court erred in denying defendant's motion for a directed verdict; and (4) the State engaged in prosecutorial misconduct. We reject each of defendant's claims.

¶ 22

At the outset, we note that defendant argued these issues in his brief as if this were a direct appeal. Since this appeal involves the dismissal of a postconviction petition at the second stage of proceedings, we will consider whether defendant made a substantial showing of a constitutional violation with regard to each of these issues. See *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 23

In order to make a substantial showing of a violation of constitutional rights, "the allegations in the petition must be supported by the record in the case or by its accompanying affidavits." *People v. Coleman*, 183 Ill. 2d 366, 381 (1998). We take as true all well-pleaded facts that are not positively rebutted by the record. *Pendleton*, 223 Ill. 2d at 473. "[T]he dismissal of a post-conviction petition is warranted only when the petition's allegations of fact—liberally construed in favor of the petitioner and in light of the original trial record—fail to make a substantial showing of imprisonment in violation of the state or federal constitution." *Coleman*, 183 Ill. 2d at 382. We review *de novo* the dismissal of a postconviction petition at the second stage of proceedings. *Pendleton*, 223 Ill. 2d at 473.

¶ 24

I. Ineffective Assistance of Appellate Counsel

¶ 25 Initially, defendant argues that his appellate counsel was ineffective for failing to raise on direct appeal: (1) trial errors that were objected to at trial and properly preserved in defendant's posttrial motion; and (2) ineffective assistance of trial counsel based on trial counsel's failure to rebut the testimony of State witnesses at the suppression hearing. We deem both arguments forfeited as neither is contained in defendant's postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004) ("[O]ur appellate court is not free *** to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition.").

¶ 26 II. Ineffective Assistance of Trial Counsel

¶ 27 Next, defendant argues that he made a substantial showing of ineffective assistance of trial counsel in that counsel failed to present evidence at the suppression hearing that defendant's prearrest statements to police officers concerning his involvement in the murder were coerced. Specifically, defendant argues that trial counsel should have called him to testify that the police officers who interrogated him threatened to charge his girlfriend with murder if defendant did not tell them what they wanted to hear and that the officers told him what to say before his videotaped interviews. Defendant cites no evidence other than his own testimony that counsel could have presented at the suppression hearing. Upon review, we find that defendant's petition failed to make a substantial showing that his trial counsel was ineffective for failing to present evidence that defendant's statements to the police were coerced at the suppression hearing.

¶ 28 Under *Strickland v. Washington*, 466 U.S. 668 (1984), to establish ineffective assistance of counsel, a defendant must demonstrate both that: (1) "counsel's performance was deficient"; and (2) "but for defense counsel's deficient performance, the result of the proceeding would have been different." *Id.* In demonstrating that counsel's performance was deficient, a defendant

"must overcome the strong presumption that the challenged action or inaction of counsel was the product of sound trial strategy and not of incompetence." *Id.* "Decisions concerning what witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy. Such decisions are generally immune from claims of ineffective assistance of counsel." *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002).

¶ 29 Defendant's petition failed to make a substantial showing that his trial counsel's performance was deficient. Trial counsel's decision not to have defendant testify at the suppression hearing is a matter of trial strategy. *People v. Follins*, 196 Ill. App. 3d 680, 691 (1990) ("[C]ounsel's decision not to have defendant testify at the motion to suppress hearing may be viewed as a tactical decision."). See also *People v. Hernandez*, 2014 IL App (2d) 131082, ¶ 33 ("Generally speaking, unless counsel refused to allow defendant to testify, advice not to testify constitutes trial strategy and does not support an ineffective-assistance claim."). It was reasonable trial strategy for trial counsel not to have defendant testify at the hearing because, had trial counsel called defendant as a witness, trial counsel risked the possibility of defendant making inculpatory statements on cross-examination or providing the State with sworn testimony that could be used to impeach defendant if he testified at trial.

¶ 30 Alternatively, defendant argues in his reply brief that there was a reasonable probability that the trial court would have suppressed his statements to the police had he testified at the suppression hearing. His postconviction petition, however, did not contain such an allegation. In his postconviction petition, defendant makes the conclusory claim that the results of the suppression hearing would have been different if he had been called to testify because the trial court would have had testimonial evidence that defendant was coerced and "would have had, at minimum, a reason to consider not admitting such prejudicial evidence into [defendant's] trial

proceedings." Nevertheless, there were no allegations that there was reasonable probability that his statements would have been suppressed. See *People v. Houston*, 229 Ill. 2d 1, 4 (2008) ("A defendant establishes prejudice by showing that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different."); *People v. Patterson*, 192 Ill. 2d 93, 107 (2000). It was insufficient for defendant to allege merely that the court would have had a reason to consider not admitting his statements at trial or that evidence of coercion would be before the trial court if he had testified. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) ("*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice.").

¶ 31 III. Denial of Defendant's Motion for Directed Verdict

¶ 32 Next, defendant argues that he made a substantial showing that his constitutional right to due process was violated when the court denied his motion for a directed verdict following the State's presentation of evidence. Because the record shows that defendant presented a witness in his defense after moving for a directed verdict and failed to renew his motion for a directed verdict at the close of evidence, defendant forfeited this issue. *People v. Barrow*, 133 Ill. 2d 226, 249 (1989) ("[A]n election by the defendant to present evidence after a motion for directed verdict has been overruled waives any error in the trial court's ruling on the motion [citation], except when the defendant renews the motion at the close of all the evidence [citation].").

¶ 33 Defendant argues, for the first time on appeal, that his appellate counsel was ineffective for failing to arguing the issue on direct appeal. As this claim is not included in defendant's postconviction petition, we deem it forfeited may not consider the argument on appeal. *Jones*, 213 Ill. 2d at 508.

¶ 34 IV. Prosecutorial Misconduct

¶ 35 Finally, defendant argues that "the State engaged in prosecutorial [*sic*] misconduct throughout trial by shifting the burden of proof to the defendant to prove elements of robbery without formally introducing the elements in the information/indictment." As this claim is not included in defendant's postconviction petition, we deem it forfeited and may not consider the argument on appeal. *Jones*, 213 Ill. 2d at 508.

¶ 36 CONCLUSION

¶ 37 The judgment of the circuit court of Peoria County is affirmed.

¶ 38 Affirmed.