THIRD DIVISION
February 3, 2016

No. 1-13-2951

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 15348
	)	
STEVEN CULLARS,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of defendant's postconviction petition affirmed over his contention that he was denied the right to the effective assistance of trial counsel.

¶ 2 Defendant, Steven Cullars, appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act). 725 ILSC 5/122-1 *et seq.* (West 2010). He contends that he presented an arguable claim of trial counsel's ineffectiveness for failing to have him examined for sanity on the day of the offense, requiring further proceedings under the Act.

¶ 3 The record shows that following a jury trial on October 21, 2010, defendant was found guilty of first degree murder and kidnapping, then sentenced to consecutive, respective terms of 45 and 6 years' imprisonment. This court affirmed that judgment on direct appeal over defendant's claims that the State failed to prove him guilty beyond a reasonable doubt and that his sentence should be vacated because the trial court improperly considered an aggravating factor inherent in the charged offense. *People v. Cullars*, 2013 IL App (1st) 110074-U.

¶ 4 On January 31, 2013, defendant filed the *pro se* postconviction petition at bar alleging, *inter alia*, ineffective assistance of trial counsel for failing to have him examined for sanity on the day of the offense. Defendant claimed that counsel's failure to investigate this defense constituted ineffective assistance given his "well-documented psychiatric history." He maintains that counsel's decision not to raise the defense of insanity or present an expert witness in support of that defense was due to counsel's "misapprehension of the law and not to trial tactics or strategy."

¶ 5 On April 25, 2013, the circuit court summarily dismissed defendant's petition in a written order finding that his claims were forfeited and, in any case, were frivolous and patently without merit. In that order, the court found that each of the claims in defendant's petition could have been raised on direct appeal and, as such, were forfeited for purposes of a postconviction proceeding. Nonetheless, in assessing defendant's ineffective assistance claim for failing to have him examined for sanity or to conduct a fitness hearing, the court stated that it had observed defendant on 30 separate court dates and his conduct never raised "even the specter of a *bona fide* doubt as to fitness." The court also noted that defense counsel had retained an expert to

evaluate defendant's mental health for a possible insanity defense, but ultimately chose not to present an insanity defense because there was no legal basis to do so.

¶ 6 In this court, defendant focuses solely on his claim of ineffective assistance of trial counsel, contending that he set forth an arguable claim of counsel's ineffectiveness for failing to have him examined for sanity on the day of the offense.[1] He maintains that he should have been so examined given the bizarre circumstances of the case, his behavior following the murder, and his history of psychiatric issues, prescribed medication, and drug abuse.

¶ 7 The State responds that defense counsel was aware of defendant's mental health history and that the record shows that counsel thoroughly investigated defendant's sanity in preparation of an insanity defense, but ultimately determined not to pursue it. The State thus asserts that because defendant's claim is contradicted by the record and could have been raised on direct appeal, but was not, and defendant has not attached any affidavits or other documents to his petition to show otherwise, he has forfeited this claim for postconviction review.

¶ 8 The Act provides a three-stage mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2012); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). Section 122-2 of the Act specifically provides that "the petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2012); *People v. Jones*, 213 Ill. 2d 498, 503 (2004). At the first stage of proceedings, defendant need only set forth the "gist" of a

[1]In raising this sole issue, defendant has forfeited the other issues in his petition for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

constitutional claim, and the circuit court may summarily dismiss the petition if it finds that the petition is frivolous or patently without merit, *i.e.*, that it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 9, 16 (2009). We review the summary dismissal of a post-conviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 389 (1998).

¶ 9 In this case, defendant claimed ineffective assistance of trial counsel for failing to have him examined for sanity on the day of the offense. The record shows, however, that defendant was present throughout the trial and was aware that his counsel was not presenting an insanity defense and instead chose to argue self-defense. The record in fact shows that defendant was present in court when counsel informed the court that she would not be calling the expert who examined him, and would not be raising an insanity defense, and that defendant voiced no comment or objection to counsel's representations. It is thus apparent that the matter was of record and could have been raised on direct appeal, but was not, and defendant did not attach any supporting material to his petition in support of his claim or to show that it could not have been considered on direct appeal because it was *dehors* the record. Accordingly, we find that his claim is forfeited. *People v. Stewart*, 121 Ill. 2d 93, 104 (1988); *People v. Hayes*, 279 Ill. App. 3d 575, 580 (1996).

¶ 10 Nonetheless, in an attempt to avoid this result, defendant contends in his reply brief that forfeiture would be "fundamentally unfair" and that this court should consider that his *pro se* claims "implicitly" indicate that his appellate counsel was ineffective for failing to raise these issues on direct appeal. For the reasons to follow, we decline.

¶ 11 We initially observe that in *People v. Taylor*, 237 Ill. 2d 356, 372-73 (2010), the supreme court recognized that such a characterization is an acknowledgement that no such allegation was

made, and this case is not an exception. Although we are cognizant of the low pleading standard applied to *pro se* postconviction petitions, we note that the supreme court has repeatedly held that claims not raised in the postconviction petition may not be raised for the first time on appeal from the circuit court's dismissal, and that the concept of "fundamental fairness" does not permit an appellate court to review errors that were never considered by the court below. *Jones*, 213 Ill. 2d at 503-05. As applied here, claims of ineffective assistance of appellate counsel cannot be inferred by postconviction appellate counsel merely because issues of trial error were not raised on direct appeal. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 13, citing *Jones*, 213 Ill. 2d at 504. Consistent with that ruling, we find that defendant failed to allege ineffective assistance of appellate counsel in his petition, and he is thus precluded from asserting it for the first time on appeal. *Cole*, 2012 IL App (1st) 102499, ¶ 12.

¶ 12 Even if such review were permissible, we would find that defendant's underlying claim was insufficient to avoid summary dismissal. *Cole*, 2012 IL App (1st) 102499, ¶ 17. Claims of ineffective assistance of counsel are examined under the two-prong test set forth in *Strickland v. Washington*, 446 U.S. 668 (1984). To prevail on a claim of ineffective assistance under *Strickland*, defendant must show that his counsel's performance "fell below an objective standard of reasonableness," and that the deficient performance prejudiced the defense. *Hodges*, 234 Ill. 2d at 17, citing *Strickland*, 466 U.S. at 687-88. However, at the first stage of postconviction proceedings, a petition alleging ineffective assistance may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶ 19, quoting *Hodges*, 234 Ill. 2d at 17.

¶ 13 The record in this case shows that defense counsel retained an expert to evaluate defendant's mental health for a possible insanity defense. At a hearing on defendant's motion to suppress his videotaped statement, in which defendant confessed to committing the kidnapping and murder, defense counsel stated that "there will be evidence that [defendant] was intoxicated and also that he was suffering from mental illness." On another court date, defense counsel informed the court that she needed to hire an expert to examine defendant's videotaped statement "with an eye towards moving to suppress that statement." Defense counsel later informed the court that defendant would be evaluated by the expert, and on a subsequent date explained to the court that she had received the expert's report and needed to discuss it "in detail" with defendant, but that she would not call the expert as a witness. Counsel later informed the court that she would not be raising an insanity defense. Prior to sentencing, the court noted that defendant had a significant mental health history, but that "it did not preclude trial in this case. He was fit for trial. There was no mental health defense available because none was advanced. I know if there was one available, certainly the very able and capable attorney in this case would have advanced it as such."

¶ 14 The record is thus replete with evidence that defense counsel was not only aware of defendant's mental health history, but thoroughly investigated it with the goal of a presenting an insanity defense, expert witness testimony, or suppressing defendant's videotaped statement. Defendant concedes that the record shows that counsel performed some inquiry into his mental health, but contends that the inquiry was not reasonably sufficient under the circumstances. We find that the record belies his claim of ineffective assistance (*Hodges*, 234 Ill. 2d at 16) and that without some supporting evidence to the contrary (*People v. Collins*, 202 Ill. 2d 59, 65 (2002);

People v. Mitchell, 189 Ill. 2d 312, 334 (2000)), defendant's bare allegation of ineffective assistance of trial counsel failed to meet the arguable test for avoid summary dismissal at the first stage of proceedings (*Tate*, 2012 IL 112214, ¶¶ 19, 20).

¶ 15 For the reasons stated, we affirm the summary dismissal of defendant's postconviction petition by the circuit court of Cook County.

¶ 16 Affirmed.