2016 IL App (2d) 131052-U
No. 2-13-1052
Order filed February 5, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. AARON D. SWIFT, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 98-CF-465 Honorable John R. Truit, Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's postconviction petition was properly dismissed following second-stage review where he failed to make a substantial showing to support his claims of ineffective assistance of trial and appellate counsel.

¶ 2 Defendant, Aaron D. Swift, appeals the second-stage dismissal of his postconviction petition. He contends that his petition alleges a substantial showing of the ineffective assistance of trial counsel for failing to present expert evidence at trial of defendant's alleged mental illness and ineffective assistance of appellate counsel for failing to raise this claim on appeal. We affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant stabbed 19-year old Karqell Anderson 21 times, causing his death, as the result of a drug-related fight. Defendant used a hunting knife to inflict the wounds to the victim's body, some measuring three inches deep. Defendant testified at trial that he was acting in self-defense when he stabbed the victim. The jury was instructed on self-defense and the lesser offenses of second-degree murder based on imperfect self-defense, second-degree murder based on intense passion, and aggravated battery. The jury convicted defendant of first-degree murder and he was sentenced to an extended term of 80 years' imprisonment. Defendant appealed. He did not challenge the sufficiency of the evidence but argued that his sentence violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

¶ 5 We affirmed the conviction, vacated the sentence based on an *Apprendi* violation and a finding that the sentencing statute was unconstitutional, and remanded for resentencing. *People v. Swift*, 322 Ill. App. 3d 127, 131 (2001). The Illinois Supreme Court affirmed the result reached by this court on *Apprendi* but vacated our conclusion that the sentencing statute was unconstitutional, and the court remanded to the trial court for resentencing. *People v. Swift*, 202 Ill. 2d 378, 393 (2002). Following remand, the trial court resentenced defendant to 60 years' imprisonment. Defendant appealed the resentencing, which we affirmed. *People v. Swift*, No. 2-04-0852 (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant initiated the postconviction petition that is the subject of this appeal on December 18, 2002. His *pro se* postconviction petition advanced to the second stage and postconviction counsel filed an amended petition on November 3, 2010. The amended petition alleges the following two claims: (1) trial counsels' performance was ineffective for not presenting expert evidence at trial of defendant's claimed mental illness and for not investigating

and calling certain witnesses; and (2) appellate counsel's performance was ineffective for not raising these claims in the direct appeal. The petition alleges that evidence of defendant's mental illness was relevant at trial to determine whether defendant should have been found guilty but mentally ill, or guilty of a lesser offense.

¶ 7 Counsel attached to the amended petition transcripts from the direct appeal record and defendant's mental health records. The transcripts show that trial counsel was informed before trial that defendant was on an anti-depressant drug called Ativan. Counsel had defendant evaluated for fitness by a licensed clinical psychologist. Based on the evaluation, the trial court declared defendant fit to stand trial. While preparing for sentencing after trial, defense counsel received a psychiatric report of defendant from the Juvenile Department of Corrections, dated December 22, 1981, in which the psychiatrist states: "This youngster presents an almost classical illustration of the organic brain syndrome (OBS)." Counsel told the court that the matter had just come to his attention and requested that defendant be re-evaluated. The State also received a court order for an evaluation of defendant by its own expert. The reports and their findings were presented at the initial sentencing and at the resentencing hearings.

¶ 8 With regard to the diagnosis of OBS, Dr. Daniel Woloszyn, one of the experts who examined defendant and who testified at the sentencing hearing, explained that defendant had mildly severe depression symptoms and suffered from damage to his brain's frontal lobe from a car accident at the age of 11, leaving him with OBS. He stated that people with frontal lobe damage could display memory difficulties and be very impulsive, sometimes having outbursts.

¶ 9 After he was resentenced, defendant appealed his sentence and argued that the trial judge should have given more weight to mitigating factors, including the diagnosis of OBS. We held that the trial court did consider that particular diagnosis in mitigation but chose not to weigh it as

heavily as the aggravating factors against defendant. *People v. Swift*, No. 2-04-0852 (2006) (unpublished order under Supreme Court Rule 23).

¶ 10 The trial court granted the State's motion to dismiss the amended postconviction petition. The judge orally held that defendant did not sufficiently allege ineffective assistance of trial counsel because the evidence of defendant's mental illness was not discovered until preparation for sentencing, "at which point it was adjudicated and argued at length," and that there was "just simply nothing to suggest that trial counsel would have known about this mental health issue prior to trial." The judge further held that there was nothing to suggest that defendant's expert's testimony would support a claim to use as a defense at trial. The court found that trial counsel made a strategic choice not to present the mental health evidence but to present a self-defense theory instead. The court also found trial counsel was not ineffective for failing to investigate and call certain witnesses. Because the court determined defendant's trial attorneys were not ineffective, it concluded that appellate counsel could not be ineffective either.

¶ 11 Defendant timely appeals the dismissal of his postconviction petition at the second stage. He contends that his postconviction petition raises a substantial showing of ineffective assistance of trial counsel for failing to present evidence of his mental health at his jury trial and ineffective assistance of appellate counsel for failing to raise this issue on direct appeal. Defendant does not appeal the trial court's dismissal of his claim regarding the failure to investigate and call certain witnesses. We will discuss additional relevant facts in the context of the issues raised on appeal.

¶ 12 II. ANALYSIS

¶ 13 A. Standard of Review

¶ 14 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122 *et seq*. (West 2012)) provides a way for defendants to challenge their convictions based on claims of the substantial denial of

their constitutional rights. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). The Act contemplates a three-stage process. *Id*. A petition may be dismissed at stage two, as in this case, when it fails to make a substantial showing of a constitutional violation. See *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, all well-pleaded facts are taken as true, and the dismissal of the petition is subject to *de novo* review. *People v. Makiel*, 358 Ill. App. 3d 102, 105 (2005).

¶ 15 B. *Res Judicata*

¶ 16 The State argues that defendant's contention is barred by *res judicata* and forfeiture because he did not raise it on direct appeal. A proceeding under the Act is a collateral challenge to the judgment, and it is not designed to relitigate the defendant's guilt or innocence. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010). Issues raised on direct appeal are barred by *res judicata*. *People v. Walker*, 2015 IL App (1st) 130530, ¶ 11. By definition, *res judicata* is inapplicable in the present case because the State concedes that the issue of ineffective assistance of counsel was not raised on direct appeal. Additionally, a claim of ineffective assistance of trial counsel is not forfeited or otherwise procedurally barred where, as in this case, the postconviction petition alleges ineffective assistance of appellate counsel for failing to raise the claim on direct appeal. *People v. Lester*, 261 Ill. App. 3d 1075, 1078 (1994). Accordingly, defendant's ineffective assistance of counsel claim is not procedurally barred and we may address the merits.

¶ 17 C. Ineffective Assistance

¶ 18 The sixth amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel. U.S. Const., amend. VI; see *People v. Simms*, 192 Ill. 2d 348, 402 (2000) (citing *People v. Hattery*, 109 Ill. 2d 449, 460-61 (1985)). The purpose of this guarantee is to ensure that a criminal defendant receives a fair trial. *People v. Davis*, 353 Ill. App. 3d 790, 794 (2004). "Effective assistance of counsel means competent, not perfect,

representation." *People v. Rodriguez*, 364 Ill. App. 3d 304, 312 (2006). We review claims of ineffective assistance of counsel in light of all of the circumstances of the case (*People v. Cunningham*, 191 Ill. App. 3d 332, 337 (1989)) and in accordance with the analysis developed by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1994), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984).

¶ 19 The *Strickland* analysis consists of two components. First, a defendant alleging that he was deprived of the effective assistance of counsel must demonstrate that counsel's performance was deficient, *i.e.*, it fell below an objective standard of reasonableness. *People v. Fillyaw*, 409 Ill. App. 3d 302, 311 (2011); *Rodriguez*, 364 Ill. App. 3d at 312. Second, a defendant must establish a reasonable probability that he was prejudiced. *Fillyaw*, 409 Ill. App. 3d at 312; *Rodriguez*, 364 Ill. App. 3d at 312. Because a defendant's failure to establish either component of the *Strickland* analysis will defeat an ineffectiveness claim, a reviewing court need not address both prongs of the inquiry if the defendant makes an insufficient showing as to one prong. *Strickland*, 466 U.S. at 697; *People v. Gonzalez*, 339 Ill. App. 3d 914, 922 (2003).

¶ 20 To establish that counsel's performance was not objectively reasonable, a defendant must overcome the strong presumption that the challenged action or inaction was the product of sound trial strategy and not incompetence. *People v. Coleman*, 183 Ill. 2d 366, 397 (1998). A defendant must show that " 'counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.' " *Fillyaw*, 409 Ill. App. 3d at 312 (quoting *Strickland*, 466 U.S. at 687). General, conclusory allegations of ineffectiveness are insufficient to establish the first prong of the *Strickland* test. *People v. Williams*, 139 Ill. 2d 1, 17 (1990). Therefore, the defendant must identify with specificity " 'the acts or omissions of

counsel that are alleged not to have been the result of reasonable professional judgment.' " *Williams*, 139 Ill. 2d at 17 (quoting *Strickland*, 466 U.S. at 688).

¶ 21 Defendant contends that his postconviction petition and attached mental health records make a substantial showing of ineffective assistance of counsel for failing to present extensive mitigating mental health evidence at his jury trial. Defendant claims that he suffered a severe brain injury as a child, resulting in numerous symptoms that were relevant at the guilt phase of his murder case. Defendant maintains that his trial attorneys "were aware that [defendant] was taking psychotropic medication for his condition, but they did not retain a mental health expert or present any mental health evidence."

¶ 22 The only evidence defendant points to in the record to show his trial attorneys were put on notice of defendant's mental health is when, on June 30, 1998, while defendant was incarcerated and awaiting his murder trial, trial counsel disclosed to the court that it had come to his attention that defendant may have been taking some sort of anti-depressant drug. Counsel had defendant evaluated for fitness by a licensed clinical psychologist. On July 8, 1998, counsel presented the court with a copy of the fitness evaluation, which found defendant fit to stand trial. Counsel indicated that defendant was taking a "very minimal dosage" of Ativan, which had been discontinued. The trial court noted that no one, including defense counsel, had any doubt about defendant's fitness to stand trial.

¶ 23 A copy of the fitness evaluation is in the record, which indicates that defendant was taking Ativan until June 29, 1998, when it was discontinued and the evaluation found defendant fit to stand trial. Other than complaining of depression and becoming emotional while discussing the severity of the charges he was facing, defendant did not complain of or present any other psychological issues.

¶ 24 After the trial and in preparation for sentencing, on November 5, 1998, defendant's trial counsel received a psychiatric report from the Juvenile Department of Corrections, dated December 22, 1981. Defendant's counsel stated to the court that he had "received a number of reports, *** and one of the things that came to light in the reports is the fact that back in '81 when [defendant] was evaluated by a psychiatrist, they [*sic*] stated that [defendant] presented 'an almost classical illustration of the [OBS].' " Trial counsel requested that defendant be re-evaluated, and counsel made it clear at this time that he had just learned of defendant's brain injury. Counsel stated: "Judge, this matter just came to my attention this morning. We called Dr. Lichtenwald and talked to him, we expect the doctor to be up to see [defendant] tomorrow."

¶ 25 Defendant seems to assert that, since counsel discovered that defendant had taken an anti-depressant drug prior to trial, this should have put counsel on notice that there might have been other evidence of defendant's "mental health," and their failure to investigate further was incompetent. As *Strickland* instructs, we evaluate the reasonableness of counsels' challenged conduct from counsels' perspective at the time, taking all of the circumstances into consideration. *Strickland*, 466 U.S. at 689. Given that defendant was prescribed small doses of an anti-depressant, that were never related to the OBS suffered by defendant, and that the trial court found defendant was fit to stand trial, it would be professionally reasonable for counsel to conclude that further investigation regarding any other mental health issues was unnecessary and that counsels' investigative energies would be more profitably directed elsewhere. Indeed, there is nothing in the fitness evaluation or any other information noted in defendant's postconviction petition that would have put defense counsel on notice of OBS or any major psychological, psychiatric, or physical condition suffered by defendant prior to trial.

¶ 26 Applying "a heavy measure of deference to counsel's judgments" (*Strickland*, 466 U.S. at 692), and taking all of the circumstances into consideration (*Strickland*, 466 U.S. at 690), we conclude that defendant has failed to establish that his counsels' performance fell below an objective standard of reasonableness. The failure to obtain evidence of defendant's mental illness was not an error "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" (*Strickland*, 466 U.S. at 688). Because defendant has not shown that his counsels' performance was deficient, he has failed to satisfy the first prong of the *Strickland* test, and we need not consider the second prong. See *Strickland*, 466 U.S. at 697; *Gonzalez*, 339 Ill. App. 3d at 922. Therefore, his claim of ineffective assistance of counsel must fail and so must his claim against appellate counsel. The trial court correctly dismissed this postconviction claim without an evidentiary hearing.

¶ 27 III. CONCLUSION

¶ 28 Defendant's postconviction petition fails to make a substantial showing of a constitutional violation. Accordingly, the judgment of the circuit court of Winnebago County is affirmed. 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).

¶ 29 Affirmed.