

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).

2016 IL App (4th) 150365-U

NO. 4-15-0365

FILED

February 19, 2016
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
GUADALUPE MARTINEZ,)	No. 10CF87
Defendant-Appellant.)	
)	Honorable
)	Scott Daniel Drazewski,
)	Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Holder White and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court affirmed the trial court's dismissal of defendant's amended postconviction petition at the second stage of postconviction proceedings as the claim contained therein was forfeited.

¶ 2 In April 2011, a jury found defendant, Guadalupe Martinez, guilty of unlawful delivery of less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West 2008)). In June 2011, the trial court sentenced defendant to 25 years' imprisonment. In June 2014, defendant filed a *pro se* postconviction petition, which advanced to the second stage of postconviction proceedings. In January 2015, defendant, through appointed counsel, filed an amended postconviction petition. In March 2015, the State filed a motion to dismiss, which the court granted. Defendant appeals, arguing the trial court's dismissal was in error as his

postconviction petition made a substantial showing trial counsel provided ineffective assistance by failing to move for a mistrial following the State's improper cross-examination of a defense witness. We affirm.

¶ 3

I. BACKGROUND

¶ 4 In January 2010, the State charged defendant with three crimes related to cocaine distribution. Following an April 2011 trial, a jury found defendant guilty of unlawful delivery of less than 15 grams of a substance containing cocaine (720 ILCS 570/401(c)(2) (West 2008)) but not guilty of the two other crimes. In June 2011, the trial court sentenced defendant to 25 years' imprisonment.

¶ 5 Defendant filed a direct appeal, arguing the State failed to prove him guilty beyond a reasonable doubt. *People v. Martinez*, 2012 IL App (4th) 110544-U, ¶ 20 (unpublished order under Supreme Court Rule 23). Following our review of the evidence, we affirmed the trial court's judgment. *Martinez*, 2012 IL App (4th) 110544-U, ¶ 34.

¶ 6 In June 2014, defendant filed a *pro se* postconviction petition, alleging various claims of ineffective assistance of appellate counsel. In relevant part, defendant asserted appellate counsel provided ineffective assistance by not raising claims of ineffective assistance of trial counsel for trial counsel's failure to (1) object to the State's improper cross-examination of a defense witness, or (2) offer evidence to cure the prejudicial effect of the State's improper cross-examination.

¶ 7 Attached to defendant's petition were portions of transcripts from defendant's trial. Based on those transcripts, the following transpired during the State's cross-examination of a defense witness:

"[THE STATE]: You talked to him about this trial; didn't you?

[ELIZABETH COON]: (No response.)

[THE STATE]: About your testimony?

[ELIZABETH COON]: No.

[THE STATE]: No? You visited him about 120 times over the last year;
isn't that true?

[ELIZABETH COON]: I went to visit him a lot, yes."

Following this line of questioning, the trial court held a hearing outside the presence of the jury. Defendant's trial counsel suggested the State's question was approaching possible grounds for a mistrial and recommended any further questions by the State be limited, if not quashed. In response, the State noted the defense had already elicited testimony on direct examination indicating defendant had been previously "locked up," and regardless, that was not the purpose of the question.

¶ 8 Another portion of the transcripts attached to defendant's petition indicates the jury raised the following question during deliberations: "During Elizabeth Coon's 120 contacts, was [defendant] incarcerated during that time? Were the contacts phone calls or face-to-face visits?" The State asserted it was irrelevant whether defendant was incarcerated and recommended the trial court respond by declining to answer the question and indicating the jury had received all the evidence presented. The State also noted the purpose of its question went to the witness's credibility. The portions of the transcripts attached to defendant's petition do not include defendant's trial counsel's recommendation. The court advised the jury as follows: "The evidence has been concluded. You should continue your deliberations [and] decide the case

based on the evidence presented during the trial [and] the instructions as to the law."

¶ 9 In November 2014, defendant's postconviction petition advanced to the second stage of postconviction proceedings as no action was taken on the petition within 90 days of its filing (see 725 ILCS 5/122-2.1(a) (West 2014)), and the trial court appointed counsel.

¶ 10 In January 2015, defendant, through appointed counsel, filed an amended postconviction petition. Defendant alleged, in relevant part, he received ineffective assistance of counsel when trial counsel failed to move for a mistrial after the jury posed a question during deliberations that demonstrated the trial court improperly allowed evidence from the State's cross-examination from which the jury deduced he was in custody.

¶ 11 In March 2015, the State filed a motion to dismiss. The State alleged the claim contained in defendant's amended petition was forfeited as he failed to (1) raise it on direct appeal, (2) allege ineffective assistance of appellate counsel, or (3) rely on facts outside the original appellate record. The State also alleged the petition failed to make a substantial showing of a constitutional violation.

¶ 12 In April 2015, the trial court held a hearing on the State's motion to dismiss. The State argued defendant's claims were procedurally barred by the doctrines of *res judicata* and forfeiture. The State noted defendant failed to raise any claim regarding appellate counsel's effectiveness for failing to raise a claim of ineffective assistance of trial counsel. The State further argued defendant failed to demonstrate his trial counsel provided ineffective assistance. In response, defendant argued the jury was improperly given evidence allowing them to infer defendant was in custody and thus guilty. Defendant did not address the State's assertion his claim was procedurally barred. The court granted the motion to dismiss, finding the claim

alleged in defendant's amended postconviction petition did not make a substantial showing of a constitutional violation for all the reasons argued by the State.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, defendant argues the trial court's dismissal was in error as his postconviction petition made a substantial showing trial counsel provided ineffective assistance by failing to move for a mistrial following the State's improper cross-examination of a defense witness. Defendant asserts trial counsel's deficient performance prejudiced the outcome of his trial by allowing evidence by which the jury could convict based on the inference he was in custody and thus a bad person.

¶ 16 In response, the State contends dismissal of defendant's amended postconviction petition was appropriate as his claim contained therein was procedurally barred, and his petition failed to make a substantial showing of a constitutional violation.

¶ 17 A. The Post-Conviction Hearing Act

¶ 18 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)) provides criminal defendants a manner by which they can assert their convictions resulted from a substantial denial of their rights under the United States Constitution, the Illinois Constitution, or both. *People v. Guerrero*, 2012 IL 112020, ¶ 14, 963 N.E.2d 909. In a noncapital case, the Act contemplates three distinct stages. At the first stage, a trial court will summarily dismiss a petition it finds to be frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). However, as in the present case, if the court fails to take any action on the petition within 90 days of filing, it will automatically advance to second-stage proceedings. *People v. Kuehner*, 2015 IL

117695, ¶ 19, 32 N.E.3d 655; 725 ILCS 5/122-2.1(a) (West 2014). If the petition advances to the second stage, counsel may be appointed, the petition may be amended, and the State may move to dismiss or answer the petition. 725 ILCS 5/122-4, 122-5 (West 2014). At the second stage, the trial court tests the legal sufficiency of the petition in determining whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 245-46, 757 N.E.2d 442, 446 (2001). In making this determination, the court accepts all well-pleaded facts as true unless affirmatively refuted by the record. *People v. Domagala*, 2013 IL 113688, ¶ 35, 987 N.E.2d 767. The defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Pendleton*, 223 Ill. 2d 458, 473, 861 N.E.2d 999, 1008 (2006).

¶ 19 B. Standard of Review

¶ 20 Defendant's postconviction petition was dismissed at the second stage of review. Our review of a second-stage dismissal is *de novo*. *Pendleton*, 223 Ill. 2d at 473, 861 N.E.2d at 1008. We may affirm the trial court's dismissal on any grounds substantiated by the record. *People v. Snow*, 2012 IL App (4th) 110415, ¶ 17, 964 N.E.2d 1139.

¶ 21 C. Forfeiture

¶ 22 A postconviction proceeding "is not a substitute for, or an addendum to, direct appeal." *People v. Rissley*, 206 Ill. 2d 403, 412, 795 N.E.2d 174, 178 (2003) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328, 637 N.E.2d 1015, 1017 (1994)). The scope of a postconviction proceeding is ordinarily limited to constitutional matters involved in the original proceedings that have not been, nor could have been, previously adjudicated. *People v. Blair*, 215 Ill. 2d 427, 447, 831 N.E.2d 604, 617 (2005). An issue previously adjudicated on direct appeal will be

barred by the doctrine of *res judicata*, and an issue that could have been raised on direct appeal but was not will be considered forfeited. *People v. Ligon*, 239 Ill. 2d 94, 103, 940 N.E.2d 1067, 1073 (2010). The doctrines of *res judicata* and forfeiture may be relaxed when one of the following three circumstances is present: (1) the facts relating to counsel's alleged ineffectiveness do not appear on the face of the original appellate record; (2) a defendant can establish appellate counsel was ineffective for failing to raise the issue on direct appeal; or (3) fundamental fairness so requires. *People v. Terry*, 2012 IL App (4th) 100205, ¶ 30, 965 N.E.2d 533.

¶ 23 We find defendant's claim is forfeited. In its motion to dismiss, the State alleged the claim contained in defendant's amended petition was forfeited as he failed to (1) raise it on direct appeal, (2) allege ineffective assistance of appellate counsel, or (3) rely on facts outside the original appellate record. At the hearing on the motion to dismiss, the State again argued the claim was procedurally barred. In fact, the State specifically noted defendant failed to raise any claim regarding appellate counsel's effectiveness for failing to raise a claim of ineffective assistance of trial counsel. Defendant did not respond to the State's assertion his claim was procedurally barred. On appeal, the State again asserted defendant's claim was procedurally barred, to which defendant did not respond. As defendant's claim could have been raised on direct appeal, it is forfeited. See *Ligon*, 239 Ill. 2d at 103, 940 N.E.2d at 1073. Defendant does not present any argument below or on appeal as to why we should relax the forfeiture rule and address his claim. See *Terry*, 2012 IL App (4th) 100205, ¶ 30, 965 N.E.2d 533; Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (requiring an appellant's brief to contain argument supported by citation to authority).

¶ 24

D. Ineffective Assistance of Counsel

¶ 25

Forfeiture aside, we find defendant's petition was properly dismissed as it failed to make a substantial showing of a constitutional violation. Ineffective-assistance-of-counsel claims are subject to the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Albanese*, 104 Ill. 2d 504, 526-27, 473 N.E.2d 1246, 1255 (1984). To succeed on a claim of ineffective assistance of counsel, a defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687; *People v. Evans*, 186 Ill. 2d 83, 93, 708 N.E.2d 1158, 1163-64 (1999). To satisfy the deficiency prong of *Strickland*, counsel's performance must be so deficient that counsel was "not functioning as the 'counsel' guaranteed by the sixth amendment [(U.S. Const., amend. VI)]." *People v. Easley*, 192 Ill. 2d 307, 317, 736 N.E.2d 975, 985 (2000). To satisfy the prejudice prong of *Strickland*, the defendant must demonstrate, but for counsel's deficient performance, there is a reasonable probability the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687-88, 694; *People v. Houston*, 226 Ill. 2d 135, 144, 874 N.E.2d 23, 29 (2007). Failure to satisfy either prong defeats the claim. *Strickland*, 466 U.S. at 697; *People v. Coleman*, 183 Ill. 2d 366, 397, 701 N.E.2d 1063, 1079 (1998).

¶ 26

Given the record presented, we find defendant's claim fails to meet either prong of *Strickland*. See *Strickland*, 466 U.S. at 687. On direct appeal, defendant suggested his conviction was based on a compromise by the jury that "resulted from improper questioning by the State that gave rise to the inference [he] was being held in prison before his trial." *Martinez*, 2012 IL App (4th) 110544-U, ¶ 31. We found, although "defendant overlook[ed] the fact that his

imprisonment was first broached on direct examination of a defense witness, regardless ***, " the jury's finding of not guilty of the other two crimes may have simply been caused by (1) an exercise in the jury's historic power of lenity, or (2) defendant's successful cross-examination of the State's witnesses regarding those crimes. See *Martinez*, 2012 IL App (4th) 110544-U, ¶ 32. Here, defendant does not dispute his imprisonment was first addressed on direct examination of a defense witness, nor does he include the necessary trial court transcripts in the record on appeal to rebut such a claim. See *People v. Lopez*, 229 Ill. 2d 322, 344, 892 N.E.2d 1047, 1060 (2008) ("[T]he appellant bears the burden of providing a reviewing court with a complete record sufficient to support his claims of error, and any doubts that arise from the incompleteness of the record will be resolved against the appellant."). Given the record presented, we cannot say (1) trial counsel's performance was deficient for failing to move for a mistrial after the State elicited testimony on cross-examination by which a jury could infer defendant was in pretrial custody when defendant's imprisonment was already broached on direct examination of a defense witness, or (2) a reasonable probability exists the result of the proceeding would have been different had trial counsel made such a motion. See *Strickland*, 466 U.S. at 687-88, 694. As such, appellate counsel would likewise not have been ineffective for failing to raise this claim on direct appeal.

¶ 27

III. CONCLUSION

¶ 28

We affirm the trial court's dismissal of defendant's postconviction petition. As part of our judgment, we award the State its \$50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2014).

¶ 29

Affirmed.