2017 IL App (1st) 151673-U

No. 1-15-1673

Order filed September 21, 2017

Fourth Division

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).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 02 CR 27257
	)	
DENNIS DAVIS,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Burke and Justice Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in granting the State's motion to dismiss defendant's postconviction petition where he failed to make a substantial showing of a constitutional violation of ineffective assistance of counsel.

¶ 2 Defendant Dennis Davis appeals the trial court's order granting the State's motion to dismiss his postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that the trial court erred in dismissing his

petition because he "adequately asserted" that his trial counsel was ineffective for interfering with his right to testify at trial. We affirm.

¶ 3 Following a bench trial, defendant was convicted of criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2002) (recodified as 720 ILCS 5/11-1.20 (a)(1) by P.A. 96-1551, Art. 2, § 5 (eff. July 1, 2011)), and sentenced to 30 years' imprisonment.

¶ 4 We recite only the facts necessary to our disposition. Trial testimony by the victim, S.R., and her mother, Freida Saleem, established that in March 2002, defendant, who was engaged to Saleem, sexually assaulted S.R. while Saleem was at work. An assistant State's Attorney read into the record a statement given by defendant in regard to his prior conviction for sexual assault with a different victim, R.R., in an unrelated case. R.R. testified to the facts underlying defendant's prior conviction. Defendant did not testify. The trial court ultimately found defendant guilty criminal sexual assault and sentenced defendant to 30 years' imprisonment.

¶ 5 On direct appeal, defendant argued, *inter alia*, that he was denied his constitutional right to testify at trial because the record failed to establish that he "voluntarily, knowingly, and intelligently" waived his right to testify. This court affirmed his conviction in *People v. Davis*, 373 Ill. App. 3d 351 (2007). In relevant part, this court found that defendant failed to assert his right to testify because the record was "devoid of any evidence that defendant alerted the trial court that he wanted to testify." *Id.* at 361. The Illinois Supreme Court denied defendant's petition for leave to appeal. *People v. Davis*, 225 Ill. 2d 646 (2007). The United States Supreme Court subsequently denied defendant's petition for *writ of certiorari* on February 19, 2008. *Davis v. Illinois*, 552 U.S. 1197 (2008).

¶ 6 On July 17, 2008, defendant filed a *pro se* postconviction petition under the Act, arguing that (1) he was denied his right to a fair trial; (2) he was denied his right to a speedy trial; (3) he was denied his fundamental right to testify; (4) his right against double jeopardy was violated; and (5) he advances a claim of actual innocence. Defendant attached a notarized verification affidavit to his petition.

¶ 7 Defendant additionally provided a document ("supporting memorandum") which "expand[s] upon and giv[es] the factual basis for his claims," along with a notarized affidavit, averring that the facts contained within the petition are true. Relevant to the instant appeal, defendant argued in his supporting memorandum that defense counsel was ineffective for interfering with defendant's right to testify. Specifically, defendant claimed that,

> "[D]efendant expressed to trial counsel that he wanted to testify on his own behalf and did not know whether he could, he believed that the decision rested with defense counsel. If he had known the decision was his, he would have testified for his own defense. Trial counsel never informed defendant that it was his choice to testify. We also see that there is no evidence in the record as to whether defendant knew that he alone was entrusted with the decision to testify. The defendant spoke out against his public defender many times prior to trial in telling the court that his counsel was ineffective, and that there was inadequate communication."

¶ 8 Defendant also claimed that, based on his repeated complaints regarding counsel prior to trial, "it raises serious question" as to whether trial counsel informed him of his right to testify.

¶ 9 In support of his petition, defendant attached a statement of what he would have testified to at trial regarding his relationship with S.R. and what occurred the night of the assault.

Defendant signed and attached to his statement an unnotarized "affidavit of affirmation under penalty of perjury." The statement and affidavit make no mention of defendant's trial counsel or any conversation between them regarding his right to testify at trial.

¶ 10 The trial court advanced defendant's petition for further proceedings under the Act, and appointed the public defender's office to represent defendant. However, on December 4, 2013, defendant filed a motion to proceed *pro se*, which the trial court allowed after admonishing defendant. On May 2, 2014, the State moved to dismiss defendant's petition, arguing, *inter alia*, defendant's claim regarding his right to testify was barred by *res judicata* because he raised it on his direct appeal, and his affidavit was not notarized. The State further argued that, based on defendant's criminal history, which included a prior bench trial, his contention that he did not know he could choose to testify was not believable. On June 6, 2014, defendant filed a *pro se* response to the State's motion to dismiss, arguing, in relevant part, that the trial court did not admonish him of his right to testify, and on direct appeal, his appellate counsel's argument regarding his right to testify was incomplete. Therefore, according to defendant, his appellate counsel was "incompetent," and *res judicata* is inapplicable to this claim. Defendant conceded that the affidavit attached to the statement of his testimony was not notarized.

¶ 11 After hearing arguments from the parties, the court granted the State's motion to dismiss defendant's petition. With regard to defendant's claim concerning his right to testify, the court concluded that defendant failed to establish prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), and noted that defendant was "not a rookie when it comes to the criminal justice system," and his affidavit was not notarized. This appeal followed.

¶ 12 On appeal, defendant's sole claim is that the trial court erroneously dismissed his petition because he "adequately alleged" that defense counsel was ineffective for interfering with his right to testify at trial. By focusing his appeal on this issue, defendant has abandoned the remaining claims in his postconviction petition, forfeiting them for review. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *People v. Guest*, 166 Ill. 2d 381, 414 (1995).

¶ 13 The Act provides for a three-stage process by which a defendant may assert his conviction was the result of a substantial denial of his constitutional rights. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If the petition is not dismissed within 90 days at the first stage, counsel is appointed and it advances to the second stage. 725 ILCS 5/122-2.1(a), (b) (West 2008).

¶ 14 The instant case involves the second stage of postconviction proceedings. At the second stage of postconviction proceedings, the dismissal of a petition is warranted only when the allegations in the petition, liberally construed in light of the original trial record, fail to make a substantial showing of a constitutional violation. *People v. Hall*, 217 Ill. 2d 324, 334 (2005). At this stage, the trial court is "concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act" (*People v. Coleman,* 183 Ill. 2d 366, 380 (1998)), and "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true" (*People v. Pendleton,* 223 Ill. 2d 458, 473 (2006)). The defendant "bears the burden of making a substantial showing of a constitutional violation." *Id.* We review *de novo* the trial court's dismissal of defendant's postconviction petition without an evidentiary hearing. *Id*.

¶ 15 Prior to addressing the merits of defendant's claim, we must first address whether the claim is barred by *res judicata*. Defendant argues that the factual allegations regarding counsel's ineffectiveness raised in his petition are not part of the appellate record, and therefore, his claim is not barred by *res judicata*. The State responds that the claim is barred because defendant merely rephrases his claim from his direct appeal as a claim for ineffective assistance of counsel. While a defendant is precluded from raising claims that were previously raised and decided on direct appeal (*People v. Blair*, 215 Ill. 2d 427, 443 (2005)), here, defendant's claim involves different operative facts than his direct appeal. See *e.g., People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 65 (holding that *res judicata* did not bar defendant's ineffectiveness claims which were not raised on direct appeal). On direct appeal, defendant argued that his right to testify was violated by the trial court, when the court did not admonish him of his right to testify. By contrast, here, defendant argues that his right to testify was violated by trial counsel, when counsel allegedly interfered with his right to testify. Accordingly, *res judicata* does not bar consideration of defendant's claim of ineffective assistance of counsel.

¶ 16 However, defendant's claim still fails on its merits. To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668 (1984). *People v. Enis*, 194 Ill. 2d 361, 376 (2000). Defendant must show, first, that "counsel's representation fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 687-88) and, second, that he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Id.* at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, namely, that counsel's deficient performance

rendered the result of the trial unreliable or the proceeding fundamentally unfair." *Enis,* 194 Ill. 2d at 376. To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. *Id.* at 377.

¶ 17 The decision whether to testify on one's own behalf belongs to the defendant (*People v. Thompkins,* 161 Ill. 2d 148, 177 (1994)), although this decision should be made with the advice of counsel (*People v. Smith,* 176 Ill. 2d 217, 235 (1997)). "Advice not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel unless evidence suggests that counsel refused to allow the defendant to testify." *People v. Youngblood,* 389 Ill. App. 3d 209, 217 (2009). To obtain an evidentiary hearing based on a claim that a defendant was prevented by his attorney from testifying at trial, a postconviction petitioner must allege in his petition or affidavit that "when the time came for him to testify, [he] told his lawyer that he wanted to do so despite advice to the contrary." *People v. Brown,* 54 Ill. 2d 21, 24 (1973).

¶ 18 Here, defendant's petition contains no allegation that he made any such assertion during the trial, and neither his petition nor his supporting documents attest to any conversations defendant allegedly had with counsel regarding his right to testify. Instead, his attached statement merely outlines what he would have testified to at trial. Defendant's supporting memorandum claims that he "expressed to trial counsel that he wanted to testify on his own behalf and did not know whether he could," and that his counsel did not inform him that it was his choice to testify. The petition goes on to state that defendant repeatedly complained of counsel's performance prior to trial, and concludes that his complaints "raise[] [a] serious question" as to whether trial counsel informed him that he had the right to testify and that the decision was his alone. This is insufficient to make a substantial showing that defense counsel

interfered with his right to testify. Defendant does not assert when he "expressed" to trial counsel that he wished to testify, whether it was prior to or during trial, and does not include counsel's response, if any. Moreover, the record reveals that defendant's numerous complaints about counsel did not concern his right to testify. Absent an allegation that he informed his attorney he wished to testify when the time came, defendant has not made a substantial showing that his right to testify was violated by counsel. See *Brown*, 54 Ill. 2d at 24 (where defendant's postconviction petition and supporting affidavit were silent regarding a contemporaneous assertion by the defendant of his right to testify, the trial judge properly denied an evidentiary hearing).

¶ 19 We acknowledge that defendant asserts that counsel did not inform him that the decision to testify belonged to defendant alone, and a counsel's incomplete or inaccurate information to a defendant regarding the right to testify "is arguably a factor in consideration of whether counsel was ineffective." *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986). However, even assuming *arguendo* that counsel's performance was deficient, defendant cannot demonstrate he was prejudiced by the alleged denial of his right to testify. Defendant does not argue he was actually prejudiced, and instead argues that an evidentiary hearing is necessary to determine whether his testimony would have altered the outcome of the trial. This is not the proper standard for advancing to an evidentiary hearing under the Act. As noted above, the onus is on defendant to make a substantial showing that there is a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694. Claims of ineffective assistance of counsel require that defendant affirmatively prove prejudice (*Strickland*, 466 U.S. at 693), and may not be based on mere speculation (*People v. Olinger*, 176

Ill. 2d 326, 363 (1997) ("pure speculation falls far short of the demonstration of actual prejudice required by *Strickland*"). Without presenting an argument that he was prejudiced, defendant fails to demonstrate that there was a reasonable probability that the outcome of his trial would have been altered but for counsel's conduct. Accordingly, we conclude that defendant failed to make a substantial showing that counsel was ineffective.

¶ 20 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 21 Affirmed.