

No. 1-12-2099

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	01 CR 27698
)	
FASHONNUS FOY,)	Honorable
)	Domenica A. Stephenson,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

HELD: Trial court's dismissal of petitioner's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous. In the second stage of the postconviction proceeding, the petition failed to make a substantial showing of a constitutional violation.

¶ 1 Petitioner Fashonnus Foy appeals the third-stage dismissal of his petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*

(West 2002)). For the reasons that follow, we affirm.

¶ 2 On February 17, 2005, following a jury trial, petitioner was found guilty of first-degree murder for the shooting death of Corey Jones. Petitioner was sentenced to 60 years' imprisonment for first-degree murder, which included a 20-year enhancement for personally discharging a firearm during the commission of the murder. We affirmed petitioner's conviction and sentence on direct appeal. *People v. Foy*, No. 1-05-1471 (2007) (unpublished order under Supreme Court Rule 23). We subsequently denied his petition for rehearing. The Illinois Supreme Court denied his petition for leave to appeal. *People v. Foy*, 228 Ill. 2d 540 (2008).

¶ 3 Petitioner filed a postconviction petition alleging ineffective assistance of trial and appellate counsel. He claimed trial counsel had been ineffective for failing to investigate and call Ms. Niquisha Hearn as an occurrence witness whose testimony he alleged would have discredited eyewitness identification testimony presented at trial. Petitioner also maintained trial counsel was ineffective for failing to present expert testimony on the unreliability of eyewitness identification.

And he argued appellate counsel was ineffective for not challenging trial counsel's failure to present the expert testimony.

¶ 4 The trial court summarily dismissed the postconviction petition at the first stage of postconviction proceedings, finding it was frivolous and patently without merit. On appeal from the summary dismissal, we determined that Ms. Hearn's description of the shooter as described in her affidavit arguably provided support for trial counsel's challenge to the identification testimony and for his argument that there was a second shooter. *People v. Foy*, No. 1-09-0588 (2010) (unpublished order under Supreme Court Rule 23). We reversed the summary dismissal and remanded for second-stage postconviction proceedings.

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¶ 5 On remand, petitioner filed an amended postconviction petition adopting the same allegations from his original petition. He also alleged a new claim, that the judgment entered against him was void because he was convicted on counts that were dismissed or *nolle prossed* by the State prior to trial and were never reinstated. The State moved to dismiss the amended postconviction petition.

¶ 6 The trial court dismissed all of petitioner's postconviction claims, except for his claim of ineffective assistance of trial counsel based on counsel's alleged failure to investigate and call Ms. Hearn as an occurrence witness. The trial court held a third-stage evidentiary hearing on this issue.

¶ 7 Following the evidentiary hearing at which Ms. Hearn testified, the trial court granted the State's motion for a directed finding and dismissed the amended postconviction petition. Petitioner now appeals.

¶ 8 The parties are familiar with the underlying facts of the case. Moreover, the facts are set out at length in our decision on direct appeal and therefore we repeat only those facts relevant to the disposition of the issues raised in this postconviction appeal.

¶ 9

ANALYSIS

¶ 10 In a noncapital case such as this, the Act provides a three-stage process by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). A postconviction action is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Therefore, issues that were

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decided on direct appeal are barred by *res judicata* and issues that could have been raised, but were not, are forfeited. *Beaman*, 229 Ill. 2d at 71.

¶ 11 In the instant case, petitioner's petition advanced to a third-stage evidentiary hearing. If a petition is dismissed following a third-stage evidentiary hearing at which fact-finding and credibility determinations were made, the dismissal is reviewed for manifest error. *Beaman*, 229 Ill. 2d at 72. "Manifest error is that which is 'clearly evident, plain, and indisputable.'" *People v. Johnson*, 206 Ill. 2d 348, 360 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

¶ 12 On appeal, petitioner raises several claims of ineffective assistance of counsel. Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronin*, 466 U.S. 648, 655-56 (1984).

¶ 13 The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is comprised of two prongs: deficiency and prejudice.

¶ 14 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome of the trial would have been different. *People v. White*, 322 Ill. App. 3d

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982, 985 (2001). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.' " *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 15 A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the court need not determine whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 16 Petitioner first contends trial counsel was ineffective for failing to investigate and call Ms. Hearn as an occurrence witness at trial. He claims her testimony would have discredited eyewitness identification testimony presented at trial. We do not believe trial counsel was ineffective in this regard.

¶ 17 "Attorneys have an obligation to explore all readily available sources of evidence that might benefit their clients." *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). However, "[c]ounsel has only a duty to make reasonable investigations or to make a reasonable decision which makes particular investigations unnecessary, and the reasonableness of a decision to investigate is assessed applying a heavy measure of deference to counsel's judgment." *People v. Orange*, 168 Ill. 2d 138, 149-50 (1995). "Where circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not

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ineffective for the attorney to forego additional investigation." *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997).

¶ 18 At the evidentiary hearing, evidence was presented that Ms. Hearn is the mother of the victim's baby daughter. Ms. Hearn testified that she was at the scene of the crime talking with the victim when the shooting occurred. She testified that she saw the shooter, whom she claimed was not the defendant. Ms. Hearn and the defendant grew up together in the same neighborhood.

¶ 19 Ms. Hearn testified that in 2006, she heard neighborhood rumors that the defendant had been convicted of killing the victim. Nevertheless, on cross-examination, she admitted that during the seven-year period between the time of the shooting in 2001, and 2008 when she was contacted by private investigators retained on defendant's behalf, she never went to court and never attempted to contact the police. When the assistant state's attorney asked Ms. Hearn if she ever wanted to find out who was convicted of killing her child's father, she responded "No, ma'am."

¶ 20 In dismissing petitioner's postconviction, the trial court stated in part:

"[Ms. Hearn] didn't make any efforts to try to find out if anybody was ever charged with the shooting of [the victim]. That she didn't try to follow up. She never went to court. She never learned about the fact that [petitioner] was charged or convicted. She didn't learn until 2006 that he was charged with the murder. And even though [the victim] is supposedly the father of her child, she took no steps to try to find out who was charged with this murder, if anyone, and she didn't do anything to make it known that she was present at the time of the shooting.

So I cannot say that [trial counsel] was ineffective for not trying to find out who this

woman was. This is a woman who just didn't make herself available or known or anything."

¶ 21 Our supreme court has determined that defense counsel cannot be faulted for "failing to pursue a witness who was apparently unavailable." *People v. Williams*, 147 Ill. 2d 173, 247 (1991). In addition, our court has concluded that "defense counsel's representation is not deemed deficient because he failed to call unnamed and unknown witnesses on defendant's behalf." *People v. Blankley*, 319 Ill. App. 3d 996, 1005 (2001).

¶ 22 As Ms. Hearn's own testimony shows, after the shooting, she made every effort not to be found. She did not stay and talk to the police after the shooting; she never reported to police what she had allegedly witnessed; and she did not come forward with any information about the shooting even after she learned in 2006 that the petitioner had been convicted of the murder. Therefore, under the facts and circumstances of this case, and especially in light of Ms. Hearn's testimony, we cannot say that trial counsel was incompetent for failing to investigate and call her as an occurrence witness at trial.

¶ 23 We also agree with the trial court that Ms. Hearn's testimony was incredible. She told defense investigators in 2008 that the shooter wore a black ski mask with only his eyes exposed. However, at the evidentiary hearing, she testified that the shooter wore a mask covering only the lower half of his face, exposing his eyes and forehead. In addition, she told defense investigators that the shooter had a medium complexion, but testified at the hearing that the shooter was dark skinned.

¶ 24 Ms. Hearn's description of the shooter's clothing was at odds with the testimony presented

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at trial. At the evidentiary hearing, she acknowledged it was "pretty hot" outside the evening of the shooting on June 17, 2001. Ms. Hearn testified that the shooter wore black pants, a black hoody, and a black mask covering the lower half of his face. However, testimony presented at trial described the shooter as wearing a white t-shirt and jeans, clothing arguably more appropriate for hot weather.

¶ 25 In light of the trial court's assessment of Ms. Hearn's credibility and the eyewitness testimony against petitioner, it is unlikely that but for trial counsel's alleged failure to investigate and call her as an occurrence witness, there is a reasonable probability that the outcome of the trial would have been any different. Petitioner has failed to satisfy the prejudice prong of the *Strickland* test.

¶ 26 Petitioner next contends the trial court erred in dismissing his petition for postconviction relief at the second stage of the proceedings, arguing he demonstrated a substantial deprivation of his constitutional rights sufficient to warrant an evidentiary hearing with regard to his claim that trial counsel was ineffective for failing to present expert testimony on the unreliability of eyewitness identification. We must disagree.

¶ 27 In a noncapital case such as this, a petition will be dismissed at the second stage of the proceedings if the allegations in the petition and any accompanying affidavits, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation. *Coleman*, 183 Ill. 2d at 381; *People v. Hall*, 217 Ill. 2d 324, 334 (2005). If no such showing is made, a petitioner is not entitled to an evidentiary hearing and the petition may be dismissed. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). However, if the allegations in the petition,

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supported by the record and accompanying affidavits, demonstrate a substantial violation of a constitutional right, then the petition advances to the third stage where the trial court conducts an evidentiary hearing. *People v. Edwards*, 17 Ill. 2d 239, 246 (2001).

¶ 28 Review of a trial court's dismissal of a postconviction petition at the second stage is *de novo*. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). In this case, we do not believe the trial court erred in dismissing petitioner's petition without conducting an evidentiary hearing regarding his claim of ineffective assistance of trial counsel based on counsel's alleged failure to present expert testimony on the unreliability of eyewitness identification.

¶ 29 In support of his ineffective assistance claim, petitioner attached a proffer in the form of a report allegedly authored by Professor Geoffrey R. Loftus, Ph.D., describing various factors involved in perception, memory, and eyewitness identification. This issue was previously raised and decided in petitioner's direct appeal. On direct appeal, petitioner cited a number of scientific studies critical of the reliability of eyewitness testimony, arguing that these studies would discredit the eyewitness identification testimony presented at trial. *Foy*, No. 1-05-1471, slip order at 14.

¶ 30 We declined to consider the studies because they were not presented to the trial court and because of the hearsay and credibility problems they presented. *Foy*, No. 1-05-1471, slip order at 16.

However, we also determined that even if we considered the studies, we were satisfied that the concerns they raised were addressed in our consideration of the eyewitness identification testimony in light of the factors set forth by the United States Supreme Court in *Neil v. Biggers*,

409 U.S. 188, 199–200 (1972)¹. *Id.*

¶ 31 Petitioner's present argument concerning expert testimony on the unreliability of eyewitness identification testimony is nothing more than an attempt to relitigate this issue under the guise of an ineffective assistance of counsel claim and is therefore barred by *res judicata*. The doctrine of *res judicata* bars consideration of issues that were previously raised and decided on direct appeal. *People v. Blair*, 215 Ill. 2d 427, 443 (2005). A petitioner may not evade the operation of *res judicata* by simply couching his claims under the guise of an ineffective assistance of counsel claim. *People v. Flores*, 153 Ill. 2d 264, 277-78 (1992).

¶ 32 Petitioner finally contends the trial court erred in dismissing his petition for postconviction relief at the second stage of the proceedings, arguing he demonstrated a substantial deprivation of his constitutional rights sufficient to warrant an evidentiary hearing with regard to his claim that the judgment entered against him was void because he was convicted on counts one and two of the indictment, which were dismissed or *nolle prossed* by the State prior to trial and were never reinstated. Again, we must disagree.

¶ 33 Count one of the indictment charged petitioner with intentional or knowing first-degree

¹ In assessing eyewitness identification testimony, Illinois courts rely on the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199–200 (1972): (1) the opportunity the witness had to view the offender at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation.

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murder of the victim with a firearm. Count two charged petitioner with strong-probability of death or great bodily harm first-degree murder of the victim with a firearm. In addition, these counts included language alleging petitioner "personally discharged a firearm that proximately caused death," warranting imposition of the 25 years to life sentencing enhancement. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2000).

¶ 34 The State *nolled* these counts because ballistic evidence included .9 mm bullets fired from more than one weapon and because the firearm was never recovered. The State opted to proceed on counts three and four of the indictment.

¶ 35 Counts three and four also respectively charged petitioner with intentional first-degree murder and first-degree murder based on knowledge that his action in shooting the victim created a strong probability of death or great bodily harm. However, these counts included language alleging petitioner "personally discharged a firearm" during the commission of the offense, warranting imposition of the 20 years sentencing enhancement. 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2000).

¶ 36 The record indicates the jury was instructed consistent with the theory advanced in counts three and four of the indictment, including being instructed regarding the special finding that "during the commission of the offense, [petitioner] personally discharged a firearm." Moreover, at sentencing, petitioner argued the 20-year enhancement was inapplicable because it was not established that he "personally discharged the firearm that caused the death." In response, the trial court stated the jury was not asked to find that petitioner personally caused the death, but was asked and did find that he "personally discharged a firearm during the commission of the offense."

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In addition, the trial court imposed the proper 20-year enhancement, as opposed to the higher enhancement had he been convicted on counts one or two. The record affirmatively rebuts petitioner's contention he was improperly convicted on previously dismissed charges.

¶ 37 In sum, the trial court correctly determined petitioner failed to make a substantial showing that his convictions and sentences were improperly entered on charges that were dismissed by the State prior to trial and never reinstated. The trial court also correctly concluded petitioner failed to make a substantial showing that his trial counsel was ineffective for not presenting expert testimony on the unreliability of eyewitness identification.

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

¶ 39 Affirmed.