

No. 1-12-2409

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 28882
	)	
RAFAEL ALVARDO,	)	Honorable
	)	Lawrence E. Flood,
Defendant-Appellant.	)	Judge Presiding.

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PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.  
Justices Lampkin and Reyes concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition is affirmed, where defendant's various assertions of ineffective assistance of trial counsel were forfeited, barred by principles of *res judicata*, or unfounded.
- ¶ 2 After a jury trial, defendant-appellant, Rafael Alvardo, was convicted of one count of armed robbery and two counts of aggravated battery with a firearm. Defendant was then sentenced to a term of 6 years' imprisonment for the armed robbery conviction, to be served consecutively to two concurrent 20-year terms of imprisonment for the aggravated battery convictions. On appeal, defendant's convictions were affirmed. *People v. Alvardo*, No. 1-07-2232 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 3 Pursuant to the Post-Conviction Hearing Act (720 ILCS 5/122-1 *et seq.* (West 2010)), defendant thereafter filed the instant postconviction petition contending that—for various reasons—his trial counsel provided ineffective assistance. The State responded by filing a motion to dismiss the petition on the grounds that: (1) in light of defendant's direct appeal, defendant's various claims of ineffective assistance were all barred by principles of forfeiture and *res judicata*; and (2) in any case, defendant had failed to meet his burden of making a substantial showing that he had been provided with ineffective assistance of counsel. The circuit court granted the State's motion to dismiss defendant's petition, finding that all of the assertions in defendant's petition were either raised, or could have been raised, in the context of defendant's direct appeal. Defendant has now appealed from that order, and for the following reasons we affirm.

¶ 4 I. BACKGROUND

¶ 5 Defendant was charged by indictment in 2004 with multiple counts of attempted first degree murder, armed robbery, and aggravated battery with a firearm. The counts contained in the indictment generally alleged that defendant had participated in an armed robbery and shooting that occurred on December 7, 2001.

¶ 6 The matter proceeded to a jury trial commencing in April of 2007. The trial proceedings and the evidence presented at trial were fully set out in our prior order, and need not be restated here. See *Alvarado*, No. 1-07-2232 (2010) (unpublished order pursuant to Supreme Court Rule 23). At the conclusion of that trial, defendant was found guilty of armed robbery and two counts of aggravated battery with a firearm. Defendant was then sentenced to a term of 6 years' imprisonment for the armed robbery conviction, to be served consecutively to two concurrent 20-year terms of imprisonment for aggravated battery.

¶ 7 Defendant filed a direct appeal from his convictions, contending: (1) defendant was provided ineffective assistance of counsel at trial, where defense counsel himself "injected [defendant's] criminal history into the trial" and failed to object to the introduction of such evidence by the State; (2) the trial court improperly denied defendant's motions to suppress both defendant's inculpatory statement to the police and an eyewitness identification of defendant; (3) defendant was denied due process and his right to cross-examination, where DNA evidence was introduced against defendant at trial despite the fact that one of two DNA samples taken from a mask defendant allegedly used during the incident had been consumed during initial DNA testing; and (4) defendant was not proven guilty beyond a reasonable doubt. In an order entered on June 30, 2010, this court rejected all of defendant's arguments and affirmed his convictions. *Alvarado*, No. 1-07-2232 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 8 On May 24, 2011, defendant—represented by private defense counsel—filed the instant petition for postconviction relief. Therein, defendant asserted that his trial counsel provided ineffective assistance by failing to: (1) allow defendant to testify at trial, despite indicating to the jury during his opening statement that defendant would in fact testify and despite the fact that defendant wanted to testify; (2) contact and present an expert on witness identification who would have challenged the State's eyewitness identification evidence; (3) have the DNA evidence independently retested by a defense expert; and (4) advise defendant of the possibility that he would be subject to consecutive sentences. Attached to defendant's petition was an affidavit executed by defendant, in which he averred that his trial counsel, *inter alia*: (1) refused to allow defendant to testify, despite the fact that defendant had repeatedly indicated his desire to do so; (2) never informed defendant that he could be subjected to consecutive sentences; and (3) failed to have the DNA sample obtained from the mask used during the robbery retested. Also

attached to the petition were, *inter alia*: (1) an affidavit executed by defendant's father, in which it was averred that trial counsel was paid to have the DNA evidence examined by an independent expert, but this task was not accomplished and no such expert was presented on defendant's behalf at trial; and (2) a *curriculum vitae* and a proffer for a professor of psychology, Dr. Geoffrey Loftus, indicating that he would generally inform the jury about "various relevant aspects of perception and memory" and that "decades of scientific research have indicated that a witness may be testifying honestly about the contents of a memory that seems very real but that, for a variety of reasons, is simply incorrect."

¶ 9 The State responded to defendant's petition by filing a motion to dismiss. Therein, the State argued: (1) defendant's claims of ineffective assistance were barred by principles of forfeiture and *res judicata*, because they were all either raised, or could have been raised, during defendant's direct appeal; and (2) defendant had failed to meet his burden of showing that he had been provided with ineffective assistance of trial counsel. In his response to the State's motion to dismiss, defendant additionally complained that his trial counsel had improperly told the jury about defendant's criminal history during his opening statement and had failed to object to the introduction of such evidence by the State.

¶ 10 After reviewing the transcripts from the underlying trial and this court's order entered upon defendant's direct appeal, the circuit court granted the State's motion to dismiss. The circuit court found that all of the issues raised in defendant's petition were barred by principles of forfeiture and *res judicata*. Defendant timely appealed.

¶ 11

## II. ANALYSIS

¶ 12 On appeal, defendant contends that the circuit court improperly dismissed his postconviction claims of ineffective assistance of trial counsel without first holding an evidentiary hearing. We disagree.

¶ 13 A. Legal Framework and Standard of Review

¶ 14 As noted above, defendant filed the instant petition pursuant to the Post-Conviction Hearing Act. 720 ILCS 5/122-1 *et seq.* (West 2010). Our supreme court has recently summarized the procedures to be employed in evaluating such a petition as follows:

"The Post-Conviction Hearing Act \*\*\* provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. [Citations.] A postconviction action is not an appeal from the judgment of conviction, but is a collateral attack on the trial court proceedings. Thus, issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited. An action for postconviction relief is initiated by the person under criminal sentence, who files a petition in the circuit court in which the original proceeding took place. As a result, most such petitions are filed *pro se* by persons who are incarcerated and lack the means to hire their own attorney.

In a noncapital case, a postconviction proceeding contains three stages. At the first stage, the circuit court must independently review the petition, taking the allegations as true, and determine whether ' "the petition is frivolous or is patently without merit.' " [Citation.] A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact. [Citation.] This first stage in the proceeding allows the circuit court 'to act strictly in an administrative

capacity by screening out those petitions which are without legal substance or are obviously without merit.' [Citation.] Because most petitions are drafted at this stage by defendants with little legal knowledge or training, this court views the threshold for survival as low. At this initial stage of the proceeding, there is no involvement by the State.

If the circuit court does not dismiss the petition as 'frivolous or \* \* \* patently without merit' [citation], the petition advances to the second stage, where counsel may be appointed to an indigent defendant [citation], and where the State, as respondent, enters the litigation [citation]. It is at this point, not the first stage, where the postconviction petition can be said to be at issue, with both sides engaged and represented by counsel. [Citation.] At this second stage, the circuit court must determine whether the petition and any accompanying documentation make 'a substantial showing of a constitutional violation.' [Citation]. If no such showing is made, the petition is dismissed. [Citation]. If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. [Citations]." *People v. Tate*, 2012 IL 112214, ¶¶ 8-10.

¶ 15 Here, defendant's petition was prepared and filed by private counsel. After the circuit court found that the petition was sufficient to withstand an initial review, this matter proceeded to the second stage. "At the second stage of postconviction proceedings, the State may file a motion to dismiss the petition and the postconviction court must determine whether the petition and any accompanying documents make a substantial showing of a constitutional violation." *People v. Graham*, 2012 IL App (1st) 102351, ¶ 31. At this stage, "[t]he postconviction court takes 'all well-pleaded facts that are not positively rebutted by the trial record' as true." *Id.*

(quoting *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006)). The dismissal of a postconviction petition at the second stage is reviewed *de novo* (*id.*), and we may affirm such a second-stage dismissal "on any basis supported by the record" (*People v. Stoecker*, 384 Ill. App. 3d 289, 292 (2008)).

¶ 16 Finally, we note that all of the claims raised in defendant's petition involve allegations that he received ineffective assistance of trial counsel. A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313 (2010).

¶ 17 While the defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if the defendant fails to establish any prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Our supreme court has held that "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008). A defendant has the burden of establishing any such prejudice. *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006). Thus, at the second stage of these postconviction proceedings, defendant had the burden of making a substantial showing that a reasonable probability exists that the outcome of trial would have been different had his trial counsel's performance been different. *People v. Harris*, 206 Ill. 2d 293, 307 (2002).

¶ 18

B. Discussion

¶ 19 We now turn to a review of each of the individual arguments defendant raises with respect to his claim that the circuit court improperly dismissed his postconviction petition without holding an evidentiary hearing.

¶ 20 As an initial matter, we are not entirely convinced the circuit court properly concluded that all of the issues raised in defendant's postconviction petition were barred by principles of forfeiture and *res judicata*. See *Tate*, 2012 IL 112214, ¶ 14 (recognizing that ineffective assistance claims based on what the record discloses trial counsel did, in fact, do are subject to the usual procedural default rules, while claims based on what ought to have been done may depend on proof of matters which could not have been included in the record and are thus not typically subject to procedural default). Nevertheless, we reiterate that we may affirm a second-stage dismissal on any basis supported by the record (*Stoecker*, 384 Ill. App. 3d at 292), and we conclude that the record in this matter does in fact support the circuit court's decision to dismiss all of the claims of ineffective assistance of counsel contained in defendant's petition.

¶ 21 1. Defendant's Criminal History

¶ 22 We first consider defendant's assertion that his trial counsel was ineffective because he referred to defendant's criminal history repeatedly during both his opening statement and in his cross-examination of the State's witnesses, and because his trial counsel failed to object to the introduction of such evidence by the State.

¶ 23 First, we note that this issue was not included in defendant's actual postconviction petition. Rather, in the context of these postconviction proceedings, this issue was raised for the first time in defendant's written response to the State's motion to dismiss. Defendant raises it again in his brief on appeal. However, the Post-Conviction Hearing Act clearly provides that "[a]ny claim of substantial denial of constitutional rights not raised in the original or an amended

petition is waived." 725 ILCS 5/122-3 (West 2010); see also *Pendleton*, 223 Ill. 2d at 474 (recognizing that appellate court has no authority to overlook forfeiture of issues not actually included in a postconviction petition).

¶ 24 Any forfeiture aside, the record also clearly reflects that these exact arguments were raised, addressed, and rejected by this court in the context of defendant's direct appeal. As we noted above, issues raised and decided on direct appeal are barred by principles of *res judicata*. *Tate*, 2012 IL 112214, ¶ 8. The circuit court, therefore, properly dismissed this claim on that basis.

¶ 25 2. Right to Testify

¶ 26 We next consider defendant's contention that his trial counsel improperly refused to allow defendant to testify at trial, despite indicating to the jury during his opening statement that defendant would testify and despite the fact that defendant wanted to testify. As we mentioned above, this argument is supported by the affidavit attached to defendant's postconviction petition, in which defendant averred that his trial counsel refused to allow defendant to testify despite the fact that defendant had repeatedly indicated his desire to do so. Defendant contends that the affidavit constitutes new evidence of his trial counsel's ineffective assistance, this new evidence is unrebutted and must be taken as true at the second-stage of these postconviction proceedings, and that the circuit court, therefore, erred in failing to advance this matter to an evidentiary hearing on this issue. We disagree.

¶ 27 First, we reject defendant's contention that the contents of his affidavit must be accepted as true with respect to this issue. Again, at the second stage of these proceedings, only those well-pleaded facts that are not *positively rebutted* by the trial record are to be taken as true. *Graham*, 2012 IL App (1st) 102351, ¶ 31. Here, and as our prior decision indicated, defendant's

trial counsel specifically informed the trial court at trial that defendant had chosen not to testify and defendant specifically confirmed that decision before the trial court. Thus, defendant's assertions to the contrary are positively rebutted by the record.

¶ 28 Second, even if we accepted as true defendant's contention that his trial counsel refused to allow him to testify, we note that "it has been expressly held that a defendant must show prejudice from the denial of his right to testify in order to make out a claim of ineffective assistance of counsel." *People v. Youngblood*, 389 Ill. App. 3d 209, 218 (2009) (citing *People v. Madej*, 177 Ill. 2d 116, 146-47 (1997)). Thus, defendant had the burden of making a substantial showing that a reasonable probability exists that the outcome of trial would have been different had he testified. *Harris*, 206 Ill. 2d at 307.

¶ 29 In an apparent effort to show such prejudice, defendant avers in the affidavit attached to his petition that, if he had been called to testify at trial, "[he] would have testified to the fact that [he] was not in that bar."<sup>1</sup> However, we again note that the evidence presented against defendant at trial included defendant's own inculpatory statement, the testimony of an eyewitness placing defendant at the scene, and evidence that a DNA sample obtained from a mask used during the armed robbery and shooting matched defendant's DNA profile. We conclude that, in light of the overwhelming evidence of defendant's guilt, there is no reasonable probability that the outcome of defendant's trial would have been different if he provided this proffered testimony. Again, "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *Bew*, 228 Ill. 2d at 135; see also *People v. Buchanan*, 403 Ill. App. 3d 600, 608-09 (2010) (no possible prejudice resulted from any possible interference with defendant's right to testify, where

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<sup>1</sup> The evidence presented at trial established that the incident in question occurred at a tavern on the northwest side of Chicago.

evidence of defendant's guilt was overwhelming). Thus, the circuit court properly dismissed this claim of ineffective assistance of counsel.

¶ 30 3. Failure to Present an Expert on Eyewitness Identification

¶ 31 We come to a similar conclusion with respect to defendant's argument that his trial counsel was ineffective for failing to contact and present an expert on eyewitness identification in an effort to challenge the State's eyewitness identification evidence.

¶ 32 As an initial matter, it must be noted that effective assistance of counsel refers to competent, not perfect, representation. *People v. Palmer*, 162 Ill.2d 465, 476 (1994). Thus, a defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010). "Decisions involving what evidence to present and which witnesses to call fall within the broad category of trial strategy and are not subject to a claim of ineffective assistance unless they deprive a defendant of a meaningful adversary proceeding." *People v. Smith*, 2012 IL App (1st) 102354, ¶ 86 (citing *People v. Hamilton*, 361 Ill. App. 3d 836, 847 (2005)). Moreover, it is well recognized that "[n]either mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent." *Smith*, 2012 IL App (1st) 102354, ¶ 86 (quoting *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998)).

¶ 33 Here, the decision not to call a defense expert on eyewitness identification clearly involves a matter of trial strategy that is presumed to be sound and which is typically not subject to a claim of ineffective assistance of counsel. Additionally, defendant has not argued that any possible error in not presenting a defense expert on eyewitness identification deprived defendant

of a meaningful adversary proceeding, nor do we think that the record would support any such conclusion.

¶ 34 Moreover, defendant had the burden of showing a reasonable probability that the outcome of his trial would have been different if his trial counsel had, in fact, presented such an expert. In his petition, and again on appeal, defendant contends he met this standard because "the [State's] whole case was premised on the identification of [defendant] as the offender." We disagree.

¶ 35 Certainly, the State's case was premised upon its ability to prove defendant committed the offenses for which he was charged and convicted. However, the State's case did not rest *solely* on the testimony of the eyewitness. Again, the State's evidence also included defendant's own inculpatory statement and the DNA evidence. Moreover, the proffer attached to defendant's petition did not indicate that Dr. Loftus would actually challenge the specific testimony of the State's eyewitness in this matter; rather, he would only provide general testimony regarding "various relevant aspects of perception and memory." Thus, even if defendant's trial counsel had erred by failing to present an expert to challenge the credibility of eyewitness's testimony, we conclude that defendant has failed to show any prejudice because the evidence of his guilt was overwhelming. *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 112 (defendant cannot demonstrate defense counsel's purported errors prejudiced the outcome of trial where the evidence of guilt is overwhelming).

¶ 36 4. Failure to Obtain Independent DNA Testing

¶ 37 Next, we address defendant's contention that his trial counsel improperly delayed—and ultimately failed—to have one of the two DNA samples obtained from the crime scene by the State independently retested by a defense expert. Defendant contends he was prejudiced by this

delay because "by the time trial counsel asked to have the test done on the eve of trial, the sample had been destroyed." We find this argument to be unfounded, as its factual basis is belied by the record.

¶ 38 As we specifically noted in our prior order, the record reflects that the DNA sample to which defendant refers was completely consumed—as opposed to destroyed or lost—during initial testing that occurred in 2002. It was not until 2004 that the DNA profile obtained from this testing was matched to a DNA profile for defendant, defendant was positively identified as an offender by the eyewitness, and defendant was indicted. Defendant's trial counsel did not file his appearance in this matter until 2005.

¶ 39 Thus, we fail to see how defendant's trial counsel can be faulted for failing to have this DNA sample retested in a timely fashion, where that sample had been completely consumed prior to the time defendant was even indicted and prior to the time defendant's trial counsel appeared in this matter. Moreover, as we concluded in our prior order, defendant was not prejudiced by the introduction of any evidence obtained from this DNA sample despite the fact that it had been consumed during initial testing. *Alvarado*, No. 1-07-2232 (2010) (unpublished order pursuant to Supreme Court Rule 23).

¶ 40 5. Consecutive Sentencing

¶ 41 Finally, we consider defendant's argument that his trial counsel was ineffective for failing to inform defendant of the possibility that he could be subjected to consecutive sentences. In an effort to demonstrate prejudice resulting from this failure, the affidavit attached to defendant's petition averred that had defendant been aware of this possibility, he "would have asked [trial counsel] to inquire about getting less time or having my sentences [run] concurrent." Once again, even assuming defendant's factual assertions are true, we conclude that defendant

has not shown any possible prejudice resulting from this allegedly ineffective performance of his trial counsel.

¶ 42 Proof of prejudice cannot be based on mere conjecture or speculation as to outcome. *People v. Palmer*, 162 Ill. 2d 465, 481 (1994). Our supreme court has specifically recognized that, where a defendant asserts ineffective assistance of counsel with respect to a possible plea deal, any claim of prejudice is too speculative where: (1) the record did not indicate that the State ever offered a plea agreement and defendant's assertion that he could have obtained a favorable deal if counsel had pursued a plea agreement was thus conclusory; and (2) there was no reason to believe a plea deal could have been reached given the overwhelming evidence of defendant's guilt. *Id.* (citing *People v. Odle*, 151 Ill. 2d 168, 174 (1992), and *State v. Jackson*, 170 Ariz. 89, 91-92 (1991)); see also *Bew*, 228 Ill. 2d at 135-36 (finding defendant's claim that trial counsel's errors resulted in a loss of bargaining leverage in plea negotiations was "entirely speculative," where there was no factual basis in the record to support the contention that defendant and the State were involved in plea negotiations and no evidence that such negotiations would have resulted in a different outcome but for trial counsel's errors).

¶ 43 Here, defendant does not point to any evidence that a plea deal was ever discussed or offered, nor does the record indicate such an offer was ever made or discussed. Additionally, defendant does nothing to establish that a favorable plea deal could have been negotiated other than aver that he "would have asked [trial counsel] to inquire about getting less time or having my sentences [run] concurrent." In this context, a showing of prejudice must encompass more than a defendant's own subjective and self-serving testimony. *People v. Hale*, 2013 IL 113140, ¶ 18. Finally, we reiterate that the evidence of defendant's guilt was overwhelming, and there is

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thus no reason to believe a favorable plea deal could have been reached. As such, we find that this assertion of ineffective assistance of counsel was properly dismissed.

¶ 44

### III. CONCLUSION

¶ 45 Because defendant's assertions of ineffective assistance of counsel were forfeited, barred by principles of *res judicata*, or unfounded in that defendant failed to make a substantial showing that a reasonable probability exists that the outcome of trial would have been different but for his trial counsel's purported errors, we affirm the judgment of the circuit court which dismissed defendant's postconviction petition at the second stage.

¶ 46 Affirmed.