2010 IL App (2d) 100358-U
No. 2-10-0358
Order filed March 16,2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Du Page County.
Plaintiff-Appellee,	)	
v.	)	No. 05-CF-218
TERRENCE L. MILLER,	)	Honorable George J. Bakalis,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Schostok and Hudson concurred in the judgment and opinion.

ORDER

Held: Trial court's first-stage dismissal of defendant's postconviction petition alleging ineffective assistance of trial counsel was proper because defendant forfeited the issue by failing to raise it on direct appeal.

Trial court's first-stage dismissal of defendant's postconviction petition, alleging ineffective assistance of trial counsel for failure to call witnesses was proper, because the purported testimony was inadmissible hearsay.

¶ 1 Defendant, Terrence L. Miller, appeals portions of the trial court's orders dismissing his postconviction petition and denying his motion to reconsider. Defendant argues that the trial court erred by dismissing his postconviction petition because the petition raised the gist of a constitutional

claim of ineffective assistance of counsel for failure to investigate and present the testimony of witnesses who would have contradicted the testimony of the State's key witness. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The facts are well known by all parties and have been extensively recounted by this court in its Rule 23 order affirming defendant's conviction on direct appeal. *People v. Miller*, No. 2-07-0202 (2009) (unpublished order under Supreme Court Rule 23). Therefore, only those facts necessary for a complete understanding of the issues before this court appear below. After a jury trial, defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(3) (West 2000) (felony murder)), and sentenced to 70 years' imprisonment. On December 28, 2009, defendant filed a petition for postconviction relief raising five issues. The only issue defendant raises in this appeal is ineffective assistance of counsel for failure to investigate or call witnesses who could have been beneficial to his case. At the first stage of the postconviction proceedings, the trial court dismissed defendant's petition. Regarding defendant's claim of ineffective assistance of counsel, the court determined that the issue was barred by *res judicata* because defendant could have raised, but failed to raise, the issue on direct appeal. The court further determined that the issues were matters of record on direct appeal and, therefore, were waived. The court further stated defendant's petition contained neither the names of the witnesses whom defense counsel should have called to testify nor affidavits describing the testimony the witnesses would have provided. The trial court concluded that "[m]ere conclusions by the petitioner unsupported by facts are not sufficient to state the gist of a constitutional claim." The trial court dismissed defendant's petition.

¶ 4 Defendant filed a motion to reconsider on February 24, 2010, and a notice of appeal on February 25, 2010. The notice of appeal was struck by the trial court due to defendant's pending

motion to reconsider. The trial court denied defendant's motion to reconsider on March 10, 2010. Defendant filed a second notice of appeal on March 22, 2010. In a supervisory order, the Illinois Supreme Court directed this court to consider defendant's second notice of appeal as timely.

¶ 5 II. ANALYSIS

¶ 6 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a procedural mechanism by which a defendant may challenge his conviction by contending that he was substantially deprived a federal or state constitutional right in the proceeding that resulted in his conviction. 725 ILCS 5/122-1(a) (West 2010); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). A defendant begins a postconviction proceeding by filing a petition in the trial court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2010).

¶ 7 In noncapital cases, postconviction proceedings may consist of up to three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). During the first stage, a petition must present "the gist of a constitutional claim." *Harris*, 224 Ill. 2d at 126. The trial court must dismiss petitions that are frivolous or patently without merit. *Id*. We review a first-stage summary dismissal of a postconviction petition *de novo*. See *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). We may affirm the dismissal of a postconviction petition on any basis supported by the record. See *People v. Rajagopal*, 381 Ill. App. 3d 326, 329 (2008).

¶ 8 After reviewing the record, we conclude that the trial court properly dismissed defendant's *pro se* postconviction petition and motion to reconsider. The trial court properly determined that defendant forfeited his claim that his trial counsel was ineffective for failing to investigate and present the testimony of certain witnesses. A postconviction proceeding is limited to constitutional issues that have not been, or could not have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124.

Accordingly, issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding. *People v. Petrenko*, 237 Ill. 2d 490, 498-99 (2010). However, a postconviction claim that depends on matters outside the record is not ordinarily forfeited because such matters may not be raised on direct appeal. *People v. Youngblood*, 389 Ill. App. 3d 209, 215 (2009).

¶ 9 In this case, defendant raised the issue of his trial counsel's failure to investigate and present the testimony of certain witnesses in a *pro se* "Motion to Relieve Counsel" filed before his trial and in a letter he wrote to the trial court before sentencing. Thus, the claim at issue here could have been raised on direct appeal, and defendant's failure to do so results in its forfeiture. See *Petrenko*, 237 Ill. 2d at 499.

¶ 10 Defendant argues that the claim could not have been raised on direct appeal because the record did not identify the witnesses or include any information about the testimony they would have provided. Defendant fails to recognize that the claim he made in his postconviction petition did not contain this information. Rather, defendant included this new information in his motion to reconsider. Regardless, even if defendant is now relying on materials outside the record on direct appeal, the forfeiture exception does not apply here. The names of the witnesses and the content of their purported testimony were entirely within defendant's knowledge at the time he filed his pretrial *pro se* "Motion to Relieve Counsel." Further, defendant had ample opportunity to present this information to the trial court when it directly asked defendant about this issue prior to sentencing. Yet, defendant decided to keep the information to himself. Thus, defendant certainly could have raised this claim on direct appeal. Accordingly, the trial court properly determined that the issue was forfeited. See *People v. Vilces*, 321 Ill. App. 3d 937, 941-42 (2001).

¶ 11 Forfeiture aside, defendant cannot establish ineffective assistance of trial counsel. We apply the *Strickland* test to determine whether trial counsel rendered ineffective assistance. *See Strickland v. Washington*, 466 U.S. 668 (1984). Under the *Strickland* test, a defendant must show that: (1) counsel's performance was unreasonable, and (2) but for the error, there is a reasonable probability that the outcome would have been different. *Strickland*, 466 U.S. at 689-94. Both prongs of *Strickland* must be met, and the failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Patterson*, 192 Ill. 2d 93, 107 (2000).

¶ 12 In this case, defendant alleged in his postconviction petition and motion to reconsider that two witnesses:

> "[W]ould have testified or told counsel that prior to the offense [defendant] went to 'talk' with the victim to clear up a misunderstanding and that the above witnesses had discussed this immediately prior to the crime for which [defendant] is currently convicted."

Defendant alleged that this would have established that he did not intend to kill or rob the victim. However, defendant fails to explain how trial counsel would have convinced the trial court to admit this hearsay testimony into evidence.

¶ 13 Hearsay evidence is "an out-of-court statement offered to prove the truth of the matter asserted" and "unless it falls within an exception to the hearsay rule," is inadmissable. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001). Under the state-of-mind exception, a hearsay statement may be admissible if it "[expresses] the declarant's state of mind at the time of the utterance," *i.e.*, his intentions, plans or motivations. *People v. Lawler*, 142 Ill. 2d 548, 559 (1991). However, the state-of-mind exception applies only if: (1) the declarant is unavailable to testify, (2) there is a

reasonable probability that the statements are truthful, and (3) the statements are relevant to a material issue in the case. *Caffey*, 205 Ill. 2d at 91.[1]

¶ 14 The statements at issue were allegedly made out of court and, according to defendant, would be offered to prove the matter asserted; that he intended to "talk" to the victim. Thus, the statements at issue are hearsay. Further, because defendant was available to testify at trial, the state-of-mind exception to the hearsay rule would not apply, rendering the statements inadmissible. Accordingly, the trial court should have barred the purported statements. Therefore, defendant cannot establish a reasonable probability that the outcome of his trial would have been different even if trial counsel would have called the witnesses at issue. Accordingly, defendant cannot establish ineffective assistance of trial counsel. *Strickland*, 466 U.S. at 689-94.

¶ 15 Defendant cites *Hodges*, 234 Ill. 2d 1, to support his argument. In *Hodges*, the Illinois Supreme Court held that defendant's claim that his trial counsel was ineffective for failure to call witnesses was not "indisputably meritless." *Hodges*, 234 Ill. 2d at 22. However, *Hodges* is distinguishable from the case at bar because the purported testimony at issue in *Hodges* was arguably admissible; the defendant alleged that the witnesses would have testified that they knew the victim had a gun and saw the victim with a weapon prior to the incident. *Hodges*, 234 Ill. 2d at 18. In this case, defendant alleged that the witnesses would have offered statements constituting inadmissible hearsay. Thus, *Hodges* is distinguishable from this case.

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[1]The new Illinois Rules of Evidence changed the common law with regard to the state- of-mind hearsay exception. Under Rule 803(3), the availability of the declarant is now immaterial and the trial court is no longer required to find there is a "reasonable probability" the statement is true Ill. R. Evid. 803(3) (eff. Jan. 1, 2011).

¶ 16 III. CONCLUSION

¶ 17 Defendant forfeited his claim of ineffective assistance of trial counsel and failed to establish any defect in the representation by trial counsel that might have prejudiced him. For these reasons, the judgment of circuit court of Du Page County is affirmed.

¶ 18 Affirmed.