2012 IL App (2d) 100740-U
No. 2-10-0740
Order filed April 2, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-1042
JAMAL R. HARMON,	)	Honorable Rosemary Collins,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Burke concurred in the judgment.

ORDER

Held: The claim that the failure to present evidence allegedly impeaching a prosecution witness did not arguably establish prejujdice under *People v. Cathey*, 2012 IL 111746. The evidence adduced at trial against defendant was overwhelming so that defendant could not arguably establish prejudice arising from his claim of ineffective assistance of counsel or the materiality of the proposed testimony of his sister pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny. As a result, the trial court properly held that defendant had failed to present the gist of a constitutional violation and properly dismissed defendant's postconviction petition as frivolous and patently without merit.

¶ 1 Defendant, Jamal R. Harmon, appeals the first-stage dismissal of his petition for postconviction relief. On appeal, defendant contends that his postconviction petition stated the gist

of a constitutional claim, namely, that his trial counsel was ineffective for failing to investigate and call his sister, Denise Harmon, as a witness, because her testimony would have cast significant doubt on the credibility of Nicole Harmon, which might have led to a different outcome at trial. We affirm.

¶ 2 Following a jury trial, defendant was convicted of the first-degree murder of Raphael Wheatley. 720 ILCS 5/9-1(a)(2) (West 2006). Defendant appealed and this court affirmed his conviction (*People v. Harmon,* No. 2-07-0734 (2009) (unpublished order under Supreme Court Rule 23)). Defendant thereafter filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)). To understand defendant's arguments on appeal from the dismissal of his postconviction petition, we must first summarize the testimony adduced at trial.

¶ 3 Nicole Harmon, defendant's niece, testified at defendant's trial and was the only direct eyewitness to the murder of Wheatley. There was testimony at trial that, at the time of the offense, Nicole and her boyfriend, Adrian Bowman, lived with defendant, defendant's wife, Latrice, and defendant's children in defendant and Latrice's apartment. There was further testimony at trial that Nicole and Bowman were each jealous of the other, and that they had a "hectic" relationship. On the date of the offense, April 23, 2006, Nicole spent the day at a nearby park and children's playground. Nicole testified at trial that she was at the park from around 9 a.m. to 9 or 10 p.m., when the offense was committed.

¶ 4 Nicole testified that she left the park once for a few minutes to get a beer at the apartment of a nearby neighbor, Rhonda Smith, who was also the victim's aunt. Nicole and others testified that there was always a gathering at Rhonda's place, with people drinking alcohol, talking, and playing card games. Nicole testified that she and the victim left Rhonda's apartment together in the evening. The victim had been sent to get more to drink from a liquor store that was across the park. The

victim rode his bike, and Nicole walked to the park and waited for Wheatley. Wheatley had purchased a beer and small bottle of gin for Nicole. He gave them to her in the children's playground area, and they remained in the park talking.

¶ 5 Nicole testified that, after around 10 or 15 minutes, she observed defendant and Bowman ride into the park on bikes. Defendant and Bowman joined Nicole and the victim and drank beer with them. They chatted and defendant shared a cigarette with the victim. Nicole testified that defendant put down his drink, got behind the victim, and began to hit him in the back of the head with a bat he had brought with him. Nicole testified that, at that moment, Bowman was still sitting on his bike on the other side of her. Nicole testified that, when defendant first struck Wheatley in the back of the head, he fell off of his bike onto the ground. Nicole testified that defendant stood over the victim and continued to hit him in the head with the bat. Nicole estimated that defendant struck Wheatley 15 times with the bat. At some point, she reached out and grabbed defendant's wrist. The bat slipped from defendant's grasp and landed nearby. Defendant then grabbed a black stick that he used as a cane and struck the victim some more. After he stopped hitting the victim, defendant went through the victim's pockets, apparently taking some cash, and then ran back towards his apartment. Bowman followed defendant, and the two left their bikes and bat at the scene of the offense.

¶ 6 Nicole testified that Bowman found her in the convenience store. When he came in, he was bleeding from the nose and mouth. Defendant had punched Bowman in the face when Bowman arrived at defendant's apartment. Nicole testified they wanted to call for medical assistance, but the store clerk would not let them use the telephone.

¶ 7 Nicole testified that she was intoxicated that night, but also testified that she had only the one beer Rhonda had given her plus the gin and beer she drank with the victim. Nicole testified that, on

April 24, 2006, she provided a written statement to the police. In that statement, she stated that she believed that Bowman and defendant took both the bat and the black stick with them.

¶ 8 Latrice Harmon, defendant's ex-wife (they divorced during the pendency of this case), also testified at the trial. She testified that, during the night of April 23, 2006, defendant came home and was bleeding from a cut on his hand. She also testified that he "looked scared" when he came home. Defendant left again, and Latrice began cleaning up the blood. The police arrived as she was cleaning and ordered her to stop. She complied. There was also evidence showing that defendant punched Bowman in the face. In addition, Bowman's blood was identified via DNA testing from blood evidence collected at defendant's apartment.

¶ 9 Latoya Harmon, another of defendant's nieces, testified that, on April 24, 2006, at about 3 a.m., defendant appeared at her house. She observed that he had with him a cane, appeared to be angry, and was limping. Latoya testified at trial that defendant told her he had been jumped by Larry, Vernon, and "some guys," who went through his pockets and took his money. They taunted him, saying, "now, how does it feel." Latoya denied at trial that defendant mentioned anything about the victim's beating, but she was impeached with a written statement she made to the police shortly after the occurrence.

¶ 10 In Latoya's written statement, she stated that, when defendant arrived, he told her that he thought he had an "attempt murder on his hands." Additionally, he told Latoya that he, Bowman, and Nicole all planned to rob Wheatley, but things did not go as they had planned. Latoya also noted in the written statement that defendant told her that the victim had the "nerve" to beg for his life, holding onto his legs and pleading for the beating to stop.

¶ 11 Defendant was also questioned by the police. During that questioning, defendant stated that Bowman was the person who beat the victim; defendant admitted that he only "poked" the victim two or three times with a stick. A recording of defendant's interrogation was also played for the jury. Defendant stated that he and Wheatley had argued the previous Friday, April 21, 2006, about a crack purchase made by defendant, who forgot to pay Wheatley. On the next day, Harmon returned to Wheatley to buy more drugs, but Wheatley took the money from defendant and refused to give him more credit or drugs. Defendant acknowledged that the was angry with the victim and admitted that he told Bowman that they needed to "get" him. Defendant explained, however, that the problem was resolved when he was able to get his hands on some more money to buy more drugs from the victim.

¶ 12 Also in the recorded statement, defendant stated that, during the evening of April 23, 2006, the date of the offense, he, Bowman, and Nicole were all together when Nicole and Bowman complained that they did not have any money and said that they needed to rob somebody. Defendant did not think that they were serious. They all bought some beer and went to the park where they saw Wheatley. After discussion, Bowman took a bat from Wheatley and hit him in the back of the head. Defendant had a tree branch that he had carved into a cane and painted black. He used the cane and "poked" the victim a couple of times in the back and the legs. Defendant explained that he felt he had to hit the victim once Bowman started the beating because Bowman had taken it upon himself to beat the victim due to defendant's money and drug problems with the victim. Defendant stated that Nicole and Bowman went through Wheatley's pockets while he was on the ground; he did not know what they took, but he believed they took drugs from Wheatley. Defendant also denied that the bat was his.

¶ 13 Defendant did not testify at the trial. Further, defendant presented no live testimony.

¶ 14 Defendant highlights pertinent arguments made by the State. During closing argument, the prosecutor argued that Nicole's testimony was credible and that it had been corroborated, and that all of the evidence together showed that defendant attacked and killed the victim. The prosecutor also argued that the jury knew "nothing about the consequences for Nicole's testimony," and argued that she was a voluntary witness with nothing to gain from her testimony against defendant in this case. Defendant notes that the prosecutor did not argue that the evidence showed that he was responsible for Bowman's actions even though an accountability instruction was given. Defendant also noted that the prosecutor argued that the evidence showed that defendant struck Bowman in the face.

¶ 15 The jury returned a verdict of guilty of first-degree murder, and it did not sign the verdict forms for guilty of first-degree murder accompanied by heinous and brutal conduct or not guilty. Thereafter, the trial court sentenced defendant to a 45-year term of imprisonment.

¶ 16 On direct appeal, defendant raised a single issue, namely, whether he was denied the effective assistance of counsel based on a failure to try to suppress his statements to the police. This court affirmed the trial court's judgment. *People v. Harmon*, No. 2-07-0734 (2009) (unpublished order under Supreme Court Rule 23). Then, on March 31, 2010, defendant filed a *pro se* postconviction petition. Defendant raised a number of claims, including one that he had received ineffective assistance of counsel because counsel did not investigate or call his sister Denise to testify. Defendant attached Denise's affidavit to his petition. In the affidavit, Denise averred that Nicole had informed her that the Winnebago County State's Attorney's office had made a deal with her. The purported deal was that Nicole would not be prosecuted for abandoning her children and that the State's Attorney's office would assist Nicole in being reunited with her children in exchange for her

testimony at defendant's trial, and that this information remained unknown and uninvestigated by defendant's trial counsel.

¶ 17 On June 29, 2010, the trial court summarily dismissed the postconviction petition, holding that it failed to raise the gist of a constitutional claim and was frivolous and patently without merit. Defendant timely appeals.

¶ 18 On appeal, defendant contends that the trial court erred when it summarily dismissed his petition for postconviction relief. Generally, in cases not involving the death penalty, the postconviction proceedings will consist of up to three stages. In the first stage, the defendant files his or her postconviction petition; the trial court has 90 days to review the petition without the input of any party, and the trial court will dismiss the petition if it is frivolous and patently without merit. 725 ILCS 5/122-2.1(2)(2) (West 2008); *People v. Hansen*, 2011 IL App (2d) 081226, ¶ 18. In order for the petition to survive summary dismissal at this stage, it must present only the gist of a constitutional claim. *Hansen*, 2011 IL App (2d) 081226, ¶ 18. If the petition survives the first stage, it is advanced to the second stage, where the defendant may be appointed counsel and may amend his petition, and the State may move to dismiss the petition. 725 ILCS 5/122-4 (West 2008); *Hansen*, 2011 IL App (2d) 081226, ¶ 18. To survive the second stage, the petition must make a substantial showing of a constitutional violation. *Hansen*, 2011 IL App (2d) 081226, ¶ 18. If the petition survives the second stage, it is advanced to the third stage, and the trial court will hold an evidentiary hearing on the petition. 725 ILCS 5/122-6 (West 2008); *Hansen*, 2011 IL App (2d) 081226, ¶ 18.

¶ 19 Further, when reviewing a postconviction petition presenting a claim of ineffective assistance of counsel, the petition "may not be summarily dismissed if (i) it is arguable that counsel's

performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced. *People v. Cathey*, 2012 IL 111746, ¶ 23. Likewise, this standard should apply to the review of a *Brady* claim, so that the petition may not be summarily dismissed if (1) it is arguable that the evidence was favorable because it was exculpatory or impeaching, (2) if it is arguable that the evidence was suppressed by the State either wilfully or inadvertently, and (3) if it is arguable that the defendant was prejudiced because the evidence was material to guilt or punishment. See *Cathey*, 2012 IL 111746, ¶ 23; *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 112. We review *de novo* the trial court's first-stage dismissal of a postconviction petition. In this context, *de novo* review means that we accept as true all well pleaded facts in the petition, disregard legal and factual conclusions that are unsupported by allegations of fact, and perform the same analysis as the trial court would. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 48.

¶ 20 Defendant argues that his petition raises the gist of a constitutional issue in two ways: first, by alleging that his trial counsel was ineffective for failing to investigate his sister's testimony, which would have led him to discover that Nicole had an agreement with the State about her testimony. Defendant contends that, second, the ineffective assistance raises the issue of a violation of the prosecutor's duty to disclose evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963).

¶ 21 Defendant reasons that, because his trial counsel did not sufficiently investigate, he overlooked the testimony of his sister, Denise, who was prepared to testify that Nicole told her that she had an agreement with the State. Specifically, defendant contends that Nicole told Denise that, in exchange for her testimony against defendant at trial, the State would not prosecute her for abandoning her children and would help Nicole in her efforts to become reunited with and obtain custody of her children. Defendant argues that the agreement between Nicole and the State would

have demonstrated Nicole's bias and motive to testify in favor of the State and against defendant. Defendant further contends that Nicole was the only eyewitness to the attack on Wheatley, and if her testimony were impeached with a revelation about her deal with the State, then the jury might have been able to come to a different result.

¶ 22 Before considering the standards under which we review claims of ineffectiveness of counsel and *Brady* violations, we first dispose of the State's initial arguments against defendant's position. The State first argues that *res judicata* should bar defendant's ineffectiveness claim. According to the State, because defendant raised an ineffective-assistance-of-counsel argument in his direct appeal, his ineffective assistance claim based on his attorney's failure to investigate should be precluded from being raised in his postconviction petition by *res judicata*. We disagree. Defendant's postconviction ineffectiveness claim is based on matters that are outside of the record. We note that the State's general position, that issues that could have been but were not raised on direct appeal are forfeited in subsequent postconviction proceedings, is correct. See *People v. Moore*, 402 Ill. App. 3d 143, 145-46 (2010) ("issues that could have been raised on direct appeal, but were not, are considered forfeited and, therefore, barred from consideration in a postconviction proceeding"). The forfeiture rule, however, applies only in cases where it was possible to raise an issue on direct appeal; if the postconviction issue depends on matters outside of the record, it is ordinarily not forfeited, because matters outside of the record may not be raised on direct appeal. *Moore*, 402 Ill. App. 3d at 146. Here, the failure to investigate defendant's sister's testimony is a matter outside of the trial record and so it could not have been raised in defendant's direct appeal. *Moore*, 402 Ill. App. 3d at 146. Accordingly, we reject the State's *res judicata* contention and hold

that defendant did not forfeit the ineffective assistance argument regarding Denise's proposed testimony.

¶ 23 The State also argues that defendant failed to support his claim of ineffective assistance with any evidence, namely an affidavit to provide a factual basis for his claim. Curiously, however, the State cites to the affidavit from defendant's sister which was attached to defendant's postconviction petition as part of its argument that defendant did not include any evidence to support the contentions raised in his postconviction petition. We find that the record flatly belies the State's contention. The affidavit of defendant's sister, Denise, pertinently avers that Nicole entered into a deal with the State: in exchange for her testimony in this case, the State purportedly agreed not to prosecute Nicole for abandoning her children and that the State would work to help Nicole become reunited with and gain custody of her children. At this first stage of consideration of a postconviction petition, Denise's affidavit provides sufficient evidence to support defendant's factual claims. Accordingly, we reject the State's contention that defendant failed to support his claim with evidence in light of Denise's affidavit attached to defendant's postconviction petition.

¶ 24 Having disposed of the State's preliminary arguments, we return to the standards under which we consider claims of *Brady* violations and ineffective assistance of counsel. In order to make out a claim for a constitutional deprivation pursuant to *Brady*, a defendant must show that (1) the evidence was favorable because it was exculpatory or impeaching, (2) the evidence was suppressed by the State either wilfully or inadvertently, and (3) the defendant was prejudiced because the evidence was material to guilt or punishment. *Cosmano*, 2011 IL App (1st) 101196, ¶ 112. The materiality of the evidence is determined by considering whether there is a reasonable probability

that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *People v. Garcia*, 405 Ill. App. 3d 608, 615 (2010).

¶ 25 Similarly, in order to succeed in a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's performance fell below an objective standard of reasonableness, and (2) as a result, the defendant was prejudiced. *Garcia*, 405 Ill. App. 3d at 616. Prejudice is shown to exist where, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Garcia*, 405 Ill. App. 3d at 617. Failing to demonstrate either deficient performance or prejudice is fatal to an ineffectiveness claim; nevertheless, an ineffectiveness claim can be decided solely on the basis that the defendant was unable to establish prejudice without needing to consider whether counsel's performance was deficient. *Garcia*, 405 Ill. App. 3d at 617.

¶ 26 We note that the materiality of the evidence for a *Brady* claim is defined in exactly the same manner as prejudice in an ineffective assistance claim. To establish materiality for purposes of *Brady* or prejudice from deficient representation, the defendant must show that there is a reasonable probability that the outcome of the proceeding would have been different had the evidence not been suppressed (*Garcia*, 405 Ill. App. 3d at 615) or had the representation not been deficient (*Garcia*, 405 Ill. App. 3d at 617). From this linked definition of "materiality" and "prejudice," it is clear that defendant's postconviction claims rise or fall based on whether he can arguably establish that there exists a reasonable probability that the outcome of the trial would have been different had his lawyer investigated and presented Denise's testimony or had the State released information to the defense about Nicole's purported deal with the State.

¶ 27 The State contends that the evidence at trial against defendant was overwhelming, so that defendant cannot arguably establish that there was a reasonable probability that the outcome would have been different even with Denise's proposed testimony. We agree. We note that there was evidence, namely his niece Latoya's written statement, that, on the night of the murder, defendant told her that he had an "attempt murder on his hands." Defendant also described to her details of the incident, including that Wheatley balled himself up and grabbed at defendant's leg during the beating. Defendant also told her that he kept hitting Wheatley with the bat while Wheatley begged him to stop because the victim thought he was going to die. Defendant observed to Latoya that Wheatley "had the nerve to beg for his life." Defendant also admitted to Latoya that Nicole tried to pull him off of the victim and that, "if it wasn't for Nicole[,] he would still be hitting" Wheatley. In addition, defendant admitted in his verbal statement to the police, that he had participated in Wheatley's beating (although he minimized his role in that statement).

¶ 28 Latrice's testimony revealed that defendant had been involved in some kind of occurrence. When he arrived at their apartment, he looked scared and was bleeding from a cut on his hand as well as dripping some blood onto the floor. The blood from defendant's apartment underwent DNA testing which demonstrated that Bowman's blood was also present in blood that Latrice was cleaning up when the police arrived. This evidence is certainly corroborative of defendant's involvement in some sort of altercation before he returned, and it corroborates Nicole's testimony about Bowman's injuries when he found her at the liquor store.

¶ 29 Nicole also testified that defendant beat Wheatley with the bat, and her testimony corroborated Latoya's written statement. Nicole noted that defendant approached the victim, shared a cigarette with him, and then began hitting him with a baseball bat. Nicole testified that, after

defendant had struck Wheatley around 15 times with the bat, she grabbed his wrist and tried to make him stop. Nicole testified that, when she grabbed defendant's wrist, the bat flew out of his hand, and defendant struck Wheatley some more with his cane. (We note that defendant admitted in his statement to the police that he hit Wheatley with his cane a few times.)

¶ 30 Thus, we have eyewitness testimony, defendant's statement admitting involvement, and defendant's statement to Latoya, who testified that she was effectively defendant's confidant and that he always talked to her about things that were happening in his life, as well as Latrice's testimony about defendant's demeanor and injuries around the time of the offense, all of which was substantially similar concerning the details and circumstances of Wheatley's beating. We hold that this evidence developed at trial was overwhelming, so that there was no reasonable probability that the outcome of the trial would have been different if Denise had testified about a purported agreement between the State and Nicole. Ignoring Nicole's testimony entirely, defendant's statement to Latoya (which was substantially similar to the testimony given by Nicole) along with his admission of involvement to the police and the other evidence admitted at trial constituted overwhelming evidence against defendant. Accordingly, we hold that, because defendant cannot arguably establish that there was a reasonable probability that the trial outcome would have been different if Denise's evidence had been presented, it is not arguable that Denise's evidence was material under the *Brady* line of cases, and it is not arguable that his attorney's failure to present Denise's evidence resulted in prejudice under ineffective assistance authority. Because defendant has failed to arguably establish prejudice resulting from the failure of Denise's proposed testimony being presented to the trier of fact, defendant has failed to make out the gist of a constitutional deprivation, and his postconviction claims necessarily fail.

¶ 31 We also note that, regarding first-stage dismissals of postconviction petitions, overwhelming evidence against the defendant has been a valid ground on which to sustain the trial court's judgment. See *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 69 (where the evidence was overwhelming, the defendant could not demonstrate prejudice, and the summary dismissal of his postconviction petition was proper); *People v. Robinson*, 375 Ill. App. 3d 320, 334 (2007) (where the evidence was overwhelming against him, defendant failed to raise the gist of a meritorious argument that he was prejudiced by being shackled where it was not clear that the jury observed the shackles and the State proved beyond a reasonable doubt that the verdict was not as a result of the shackling). Accordingly, we affirm the trial court's judgment that defendant's postconviction petition frivolous and patently without merit.

¶ 32 For the foregoing reasons, we affirm the judgment of the circuit court of Winnebago County.

¶ 33 Affirmed.