2012 IL App (2d) 101095-U
No. 2-10-1095
Order filed March 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM G. KASPAR, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Du Page County. No. 05-CF-1939 Honorable Blanche Hill Fawell, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

Held: Where defendant's postconviction petition claim could have been raised in his direct appeal, the trial court's summary dismissal of the petition was affirmed.

¶ 1 Following a jury trial, defendant, William G. Kaspar, was convicted of solicitation of murder for hire (720 ILCS 5/8-1.2(a) (West 2004)) and sentenced to 25 years' imprisonment. We affirmed on direct appeal. *People v. Kaspar*, No. 2-07-0596 (2009) (unpublished order under Supreme Court Rule 23). Defendant subsequently filed a postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)), which the trial court dismissed as frivolous and patently without merit. For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On June 20, 2005, Detective Tim Garlisch of the Du Page County Sheriff's Office executed an application for an order authorizing the use of an eavesdropping device (initial application), in which he stated the following. On June 18, 2005, the sheriff's department had begun an investigation involving a solicitation for murder. Garlisch had spoken to Michael Wassmund,[1] who informed Garlisch that, for about six weeks, he and defendant had been housed in the same pod in the Du Page County jail. While housed together, defendant and Wassmund spoke about defendant's problems and court cases. In particular, defendant expressed his displeasure with Daniel Russo, the then-current boyfriend of defendant's ex-girlfriend. Defendant informed Wassmund that he wanted Russo " 'taken care of' " and inquired whether Wassmund would be able to assist him in doing so. Wassmund indicated that he might be able to help defendant.

¶ 4 Garlisch stated that Wassmund said that defendant continued speaking with Wassmund about his problems with Russo, asking Wassmund what he could do about Russo. Wassmund "claimed that he had a brother-in-law" who was a gang member and might be able to help. Defendant told Wassmund that he wanted Russo kidnapped and beaten. Defendant asked how to reach Wassmund's brother-in-law and whether the brother-in-law would be willing to commit the crime without being paid first. In response to Wassmund's observation that beating Russo might not be a good idea because Russo might be able to identify his attacker, defendant agreed and told Wassmund that Russo should be " 'wacked.' "

[1]In the applications, Garlisch referred to Wassmund under the alias of Mark Calhoun and noted that Calhoun was not Wassmund's real name. Because the parties on appeal refer to Wassmund by his real name, we will do the same.

¶ 5 Garlisch's sworn statement continued that defendant asked Wassmund if he had spoken to his brother-in-law. Defendant indicated that he was unsure of his financial situation, but that the brother-in-law could have Russo's Rolex watch and any other items that were found in Russo's house. Wassmund directed defendant to provide the necessary information for the brother-in-law. Defendant later showed Wassmund a yellow piece of paper that contained handwritten information about Russo and defendant's ex-girlfriend, including their home and work addresses, physical descriptions, phone numbers, vehicle information, and daily routines (the note). Defendant attempted to give Wassmund the note but Wassmund did not take it. Wassmund was subsequently transferred out of defendant's pod. The following day, another inmate housed in defendant's pod passed Wassmund the note. Over the next few days, defendant and Wassmund communicated about getting the information to the brother-in-law. Wassmund told defendant that his brother-in-law had copied only half of the information defendant had provided, but that he would be visiting again.

¶ 6 Based upon the above information, Garlisch requested that the trial court enter an order authorizing the use of an eavesdropping device to record conversations between Wassmund and defendant. The trial court entered an order as requested, effective from June 20 to July 19, 2005.

¶ 7 On June 21, 2005, Garlisch executed a supplemental application for an order authorizing the use of an eavesdropping device (supplemental application), in which he restated the information from the initial application. In addition, Garlisch stated that, following the issuance of the initial authorization order, Wassmund engaged in further conversation with defendant. Wassmund informed defendant that he had a phone number for his brother-in-law and that defendant could contact the brother-in-law if he chose. Defendant told Wassmund that he wanted Russo "terminated, his teeth pulled, and his body burned[] *** [and] buried with lye." In response to Wassmund's

comment that defendant had put a lot of thought into the matter, defendant told Wassmund that he had a lot of time. Wassmund told defendant that he would call the brother-in-law on June 21, 2005, and defendant agreed.

¶ 8 The supplemental application requested authorization to use an eavesdropping device to record conversations between Tony Davis and defendant. Although not disclosed in the supplemental application, Davis was a deputy with the Du Page County Sheriff's Office who would pose as Wassmund's brother-in-law. The trial court entered an order as requested, effective from June 21 to July 20, 2005.

¶ 9 On July 26, 2005, defendant was indicted. Prior to trial, defendant filed two motions to suppress, one alleging that Wassmund was a paid investigator in violation of the Employment of Detectives by Public Officials Act (5 ILCS 305/1 (West 2004)) and the other alleging that the initial and supplemental applications were not supported by reasonable cause. The trial court denied both motions. Defendant was tried before a jury in April 2007. The jury returned a verdict of guilty of solicitation of murder for hire. The trial court sentenced defendant to 25 years' imprisonment.

¶ 10 Defendant, *pro se*, filed a direct appeal, arguing that the trial court erred in denying his motions to suppress and that he received ineffective assistance of counsel for counsel's failure to file a motion to suppress on the bases that the initial and supplemental applications violated Article 108A of the Code of Criminal Procedure of 1963 (725 ILCS 5/108A-1 through 108A-11 (West 2004)) and that material facts were misrepresented or omitted in the applications. In particular, defendant argued that the applications failed to disclose that they were comprised solely of Wassmund's hearsay statements, that there was no corroboration of Wassmund's statements, and that Detective

Garlisch falsely stated that an independent investigation had been conducted. We affirmed. *People v. Kaspar*, No. 2-07-0596 (2009) (unpublished order under Supreme Court Rule 23).

¶ 11 Defendant subsequently filed a lengthy *pro se* postconviction petition consisting of approximately 20 claims. The trial court dismissed the petition, concluding that defendant failed to present the gist of a meritorious constitutional claim, that the issues raised were unsupported by affidavit or were barred by the doctrine of *res judicata*, and that the petition was frivolous and patently without merit. Defendant timely appeals.

¶ 12 ANALYSIS

¶ 13 Defendant maintains that the trial court erred in dismissing his postconviction petition at the first stage. He limits his argument on appeal to only one of his postconviction claims—that his counsel was ineffective for failing to file a motion to suppress based on the applications' "material misstatements and omissions of fact, thereby leading to improper authorization." Specifically, defendant argues that the initial application did not disclose that Wassmund's brother-in-law was fictitious and that the supplemental application did not disclose that Tony Davis was a Du Page County detective who would be posing as Wassmund's brother-in-law. Defendant contends that, had the issuing judge been aware of these facts, Wassmund's reliability would have been suspect because it would have been reasonable to assume that Wassmund was attempting to entrap defendant to obtain concessions in his own (Wassmund's) pending cases.

¶ 14 The Act provides a method by which a criminal defendant can assert that a conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2010); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The Act contemplates three stages of proceedings. *Hodges*, 234 Ill. 2d at 10. At the

first stage, the trial court shall dismiss the petition in a written order if it determines that the petition "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 11-12. If a petition survives to the second stage, counsel is appointed to an indigent defendant, and the State may answer or move to dismiss. 725 ILCS 5/122-4, 122-5 (West 2010); *People v. Youngblood*, 389 Ill. App. 3d 209, 213 (2009). If the defendant makes a "substantial showing" of a constitutional violation, the petition will proceed to the third stage for an evidentiary hearing. *Hodges*, 234 Ill. 2d at 11, n.3; 725 ILCS 5/122-6 (West 2010). Our review of the dismissal of a postconviction petition at the first stage is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 15 The State argues that defendant forfeited his argument regarding the omission of Detective Davis's identity as a detective from the supplemental application because it could have been, but was not, raised on direct appeal. We agree and also conclude for the same reason that defendant forfeited his contention regarding the initial application's omission of the fact that Wassmund's brother-in-law was fictitious. A postconviction petition is not an appeal from the judgment of conviction; rather, it is a collateral attack on the trial court proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010). Therefore, issues that could have been raised on direct appeal, but were not, are forfeited. *Petrenko*, 237 Ill. 2d at 499. However, if a postconviction claim depends upon matters outside the record, the forfeiture rule does not apply because matters outside the record may not be raised on direct appeal. *Youngblood*, 389 Ill. App. 3d at 214.

¶ 16 In his opening brief, defendant asserts that the initial and supplemental applications were not part of the record on direct appeal but concedes in his reply brief that he "[g]enerally[] *** agrees

with the State's observations about the record on direct appeal." As the State observes, both applications were included in the record on appeal. However, defendant urges that Detective Garlisch's report, which revealed the fictitious nature of Wassmund's brother-in-law, was not part of the record on direct appeal and that, even assuming defendant's knowledge of Davis's identity as a detective at the time of direct appeal, what was relevant was the issuing judge's knowledge at the time each eavesdropping authorization order was entered.

¶ 17 Defendant's argument misses the mark. Relevant to forfeiture is what arguments were possible on direct appeal, based on what was contained in the record. As defendant concedes, the record on direct appeal, including the trial testimony, contained information that Davis was a detective; indeed defendant's own motion to suppress and quash identified Davis as a detective. Thus, because the applications were also contained in the record, defendant could have argued on direct appeal that the supplemental application's silence in this regard withheld a material fact from the issuing judge.

¶ 18 With respect to defendant's argument about the initial application's omission of the fictitious nature of Wassmund's brother-in-law, although the State does not point this out, our review of the trial testimony reveals that it contained testimony about Davis's role in playing the fictitious brother-in-law. Wassmund testified that he had told defendant about his real brother-in-law "from the south side of Chicago, he is a gang banger, he is a black guy." After Wassmund spoke to detectives, they decided to use a fictitious brother-in-law in their undercover investigation. Garlisch explained:

> "We decided to have Michael Wassmund place a phone call to a fictitious brother-in-law who was going to be the hit man in the case. In order to do that, we obtained a supplemental

> eavesdrop order allowing him to record the conversation between [defendant] and our undercover detective who was going to pose as that person."

Detective Davis testified that Garlisch asked him to assist in the investigation by playing the role of the hit man. Garlisch testified that Davis was chosen for the role because Davis's physical appearance was consistent with Wassmund's physical description of his brother-in-law.

¶ 19 Because the record on direct appeal included the applications as well as trial testimony indicating both the fictitious nature of the brother-in-law and Davis's identity as a detective, Garlisch's report was not necessary to defendant's claim of ineffective assistance of counsel. Thus, on direct appeal, defendant could have raised the ineffective assistance of counsel claim that he later asserted in his postconviction petition. Defendant's failure to do so results in forfeiture. See *Petrenko*, 237 Ill. 2d at 499 (stating that issues that could have been raised on direct appeal but were not are forfeited). Although the trial court's summary dismissal was not based on forfeiture principles, we may affirm the trial court's order on any basis supported by the record. See *People v. Carrera*, 394 Ill. App. 3d 368, 373 (2009). Accordingly, we affirm the trial court's summary dismissal of defendant's postconviction petition. See *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) (noting that forfeiture can be a proper basis to summarily dismiss a postconviction petition) (citing *People v. Blair*, 215 Ill. 2d 427, 443 (2005)).

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

¶ 21 Affirmed.