2012 IL App (2d) 110724-U
No. 2-11-0724
Order filed October 30, 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. 06-CF-1674
FARAMARZ KIASI,	)	Honorable Blanche H. Fawell,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition at the first stage where defendant's allegations, taken as true, did not present even an arguable basis for a claim of ineffective assistance of counsel.

¶ 2 On February 22, 2008, following a jury trial, defendant, Faramarz Kiasi, was convicted of one count of being an organizer of a continuing financial crimes enterprise (count I) (720 ILCS 5/16H-55 (West 2006)) and two counts of forgery (counts II and III) (720 ILCS 5/17-3(a)(1), (a)(2) (West 2006)). The trial court sentenced defendant to 12 years' imprisonment on count I and 5 years' imprisonment each on counts II and III, all sentences to run concurrently. This court affirmed

defendant's conviction and sentence on direct appeal. *People v. Kiasi*, No. 2-08-1097 (2010) (unpublished order under Supreme Court Rule 23). Now, defendant appeals from the trial court's first-stage dismissal of his *pro se* postconviction petition alleging ineffective assistance of trial counsel. Defendant contends that counsel was ineffective for failure to investigate and call as a witness Robert Betor, a codefendant who could have provided allegedly exculpatory testimony. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On July 6, 2006, a grand jury indicted defendant on one count of being an organizer of a continuing financial crimes enterprise (count I) and two counts of forgery (counts II and III). Count I alleged a violation of section 16H-55 of the Criminal Code of 1961 (Code) (720 ILCS 5/16H-55 (West 2006)) in that, between January 26, 2006, and March 20, 2006, defendant, as an organizer of the conspiracy and with the intent to commit forgery and identity theft, agreed on at least three separate occasions within an 18-month period to commit those offenses with Robert Betor, Gary Young, Jennifer Dubois-Fortenbery, and Kimberly Lebo. The indictment referenced Du Page county criminal cases pending against Betor, Young, Lebo, and Dubois-Fortenbery, in which those individuals were charged with a total of approximately 91 counts of forgery and identity theft. Count II alleged that defendant violated section 17-3(a)(2) of the Code (720 ILCS 5/17-3(a)(2) (West 2006)) when he, with the intent to defraud, knowingly delivered to Washington Mutual Bank a deposit ticket capable of defrauding another in that it was purported to be made by an individual by the name of Sara Paquette. Count III alleged that defendant violated section 17-3(a)(3) of the Code (720 ILCS 5/17-3(a)(2) (West 2006)) when he, with the intent to defraud, knowingly made the deposit ticket capable of defrauding another.

¶ 5 At defendant's jury trial, the State presented evidence showing that, between January 2006 and March 2006, defendant enlisted Betor, Young, Lebo, and Dubois-Fortenbery to obtain virtual offices, business licenses, and bank accounts for fake businesses. The four codefendants used false identification. Of the four, only Lebo and Young testified at defendant's trial, pursuant to negotiated plea deals. According to Lebo and Young, and as the other evidence corroborated, defendant arranged and paid for flights to and from the Chicago area, hotel accommodations, and transportation while in Illinois. Defendant directed his codefendants where to open virtual offices and under which fake business names, where to obtain business licenses, and where to open bank accounts. Defendant also provided the codefendants with the money necessary to open the virtual offices and to fund the accounts. Defendant later provided forged checks to be deposited into the accounts. Before the banks discovered that the checks were fraudulent, defendant directed his codefendants to withdraw funds totaling tens of thousands of dollars from the bank accounts.

¶ 6 As stated above, the jury found defendant guilty of all three counts and the trial court sentenced defendant to concurrent prison terms of 12 years (count I), 5 years (count II), and 5 years (count III). On direct appeal, defendant argued, *inter alia*, that the evidence was insufficient to prove him guilty beyond a reasonable doubt and that he received ineffective assistance of counsel. We rejected defendant's various ineffective-assistence-of-counsel claims, all of which differed from the one claim of ineffective assistance that is the subject of this appeal. Regarding the sufficiency of the evidence, we rejected defendant's argument that there was no direct evidence linking him to the crimes. In particular, we noted that both Lebo and Young testified in detail concerning how defendant enlisted them and then orchestrated the process of traveling to Chicago, opening virtual offices using false identification under fake business names, obtaining business licenses, and opening

bank accounts. We further noted that defendant's fingerprint was found on one of the deposit slips that Young used to deposit a forged check into one of the fraudulent accounts. *Kiasi*, No. 2-08-1097 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 On April 14, 2011, defendant filed a postconviction petition in which he raised three claims. First, defendant argued that the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose Betor's statements to police, which allegedly would have exculpated defendant. Second, defendant argued that trial counsel was ineffective for failing to investigate or interview Betor or call him as a witness. Defendant attached Betor's affidavit, in which Betor stated that defendant had merely "tagged along" during the trips to Chicago and had "no knowledge" of what his codefendants were doing. Betor further stated,"Mr. Sammy was the mastermind on all activities, as I previously stated to the detective upon my interrogation on June 13, 2006." Third, defendant argued that he was entitled to postconviction relief because Betor's affidavit was newly discovered evidence establishing defendant's actual innocence. As he argued on direct appeal, defendant asserted that "no physical evidence of his involvement was ever proven."

¶ 8 On June 28, 2011, the trial court entered a written order dismissing defendant's postconviction petition. The court found the petition to be frivolous and patently without merit. Regarding defendant's claims of a *Brady* violation, the court noted that, in its disclosures to defendant, the State identified Betor as a potential witness and turned over an audio tape of Betor's interview with police. The court rejected defendant's claim that trial counsel was ineffective, pointing out that, in defendant's own statement contained in his presentence report, defendant asserted that his trial strategy had been to call Betor but that, at the last minute, "we" could not locate him. Finally, the court rejected defendant's claim of actual innocence, reasoning that Betor's

affidavit was not newly discovered evidence, as the subject matter of Betor's proposed testimony was known to defendant at the time of trial. Defendant timely appealed.

¶ 9 ANALYSIS

¶ 10 On appeal, defendant argues that the trial court improperly dismissed his postconviction petition at the first stage. Defendant limits his argument to only one of the constitutional claims he raised in his petition, namely, that trial counsel was ineffective for failing to investigate or interview Betor or call him as a witness.

¶ 11 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2010)) 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). A postconviction proceeding " 'is not a substitute for, or an addendum to, direct appeal,' " and, accordingly, the scope "is limited to constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003) (quoting *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Any issues that could have been raised on direct appeal but were not are considered procedurally defaulted, and any issues that were adjudicated on direct appeal are barred by the doctrine of *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010).

¶ 12 Once past the procedural bars, postconviction proceedings are then divided into three stages. *Hodges*, 234 Ill. 2d at 10; *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, if the trial court determines that a petition "is frivolous or is patently without merit," it can summarily dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Hodges*, 234 Ill. 2d at 10. At this stage, the allegations in the petition, taken as true and liberally construed, need only

present the "gist" of a constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). This means the petition need only have an " 'arguable basis either in law or in fact.' " *Brown*, 236 Ill. 2d at 184-85 (quoting *Hodges*, 234 Ill. 2d at 16). A petition has no arguable basis in law when it is based upon an "indisputably meritless legal theory," such as one which is "completely contradicted by the record." *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based upon "[f]anciful factual allegations," such as "those that are fantastic or delusional." *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 17. If a petition survives to the second stage, counsel will be appointed to represent an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4 (West 2010); *Hodges*, 234 Ill. 2d at 10-11. If the defendant makes a "substantial showing" of a constitutional violation, the petition will proceed to the third stage, at which the trial court will conduct an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *Edwards*, 197 Ill. 2d at 246. We review *de novo* the first-stage dismissal of a postconviction petition. *Brown*, 236 Ill. 2d at 184.

¶ 13 We begin by addressing the State's procedural default argument. The State argues that defendant procedurally defaulted his claim of ineffective assistance of counsel arising out of counsel's failure to call Betor as a witness, because defendant could have raised the issue on direct appeal. While we agree with the State that defendant arguably could have raised the issue on direct appeal, we decline to conclude that it is procedurally defaulted. The procedural default rules "are relaxed *** where the facts relating to the issue of [counsel's alleged] incompetency do not appear on the face of the record." *People v. Eddmonds*, 143 Ill. 2d 501, 528 (1991). Here, although the record suggests that defendant and defense counsel were aware of Betor's potential testimony, nothing in the original trial record indicates what Betor's testimony would have been had he been

called as a witness. As the trial judge noted, the record reflects that the State disclosed to defendant that it might call Betor as a witness and that the State turned over an audio tape of Betor's interview. However, the record contains neither the audio tape nor a transcript of the interview. Additionally, defendant submitted to the probation officer who completed his presentence report a written statement in which defendant stated that "the reason [defendant] chose to have a jury trial was because Robert Betor was supposed to come and tell the truth about everything but at the last minute we could not located [*sic*] him." Yet, again, the original trial record contains no affidavits, testimony, or other statements from Betor. Because the evidence on which defendant bases his postconviction claim of ineffective assistance of counsel—namely, Betor's proposed testimony as detailed in his affidavit—does not appear on the face of the original trial record, we will relax the procedural default rules and address the sufficiency of his postconviction claim. See *Eddmonds*, 143 Ill. 2d at 528 (addressing the merits of the defendant's postconviction claims, even though already raised on direct appeal, where the original trial record did not include the evidence which the defendant now relied on to substantiate his claims); *People v. Owens*, 129 Ill. 2d 303, 308-09 (1989) ("As the record does not show that the mitigation evidence which the defendant now presents was on the face of the record and available to defendant's counsel on direct appeal, we will consider the merits of the defendant's ineffective-assistance claim.").

¶ 14 To succeed on an ineffective assistance of counsel claim, a defendant must show both (1) that counsel's performance fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *People v. Manning*, 241 Ill. 2d 319, 326 (2011). At

the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance of counsel is sufficient if it is "arguable" that both *Strickland* prongs were met. *Brown*, 236 Ill. 2d at 185; *Hodges*, 234 Ill. 2d at 17. Ultimately, however, both prongs must be met, and the failure to satisfy either prong will preclude a finding of ineffective assistance of counsel. *People v. Theis*, 2011 IL App (2d) 091080, ¶ 13 (citing *People v. Patterson*, 192 Ill. 2d 93, 107 (2000)).

¶ 15 After reviewing the record, we conclude that, even taking as true the well-pleaded allegations contained in defendant's postconviction petition and in Betor's affidavit, it is not even "arguable" that defendant could satisfy *Strickland*'s prejudice prong. To establish prejudice, a defendant must show that, but for trial counsel's ineffective assistance, there is a reasonable probability that the result of the proceeding would have been different. *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *Strickland*, 466 U.S. at 694). "A reasonable probability that the result would have been different is a probability sufficient to undermine confidence in the outcome of the proceeding." *Colon*, 225 Ill. 2d at 135 (citing *Strickland*, 466 U.S. at 694).

¶ 16 Here, as the trial judge noted during defendant's sentencing hearing, the State presented "a mountain of evidence" establishing defendant's guilt. Both Lebo and Young testified in great detail as to how defendant directed them throughout the process of traveling to the Chicago area, opening virtual offices under fake business names, obtaining business licenses, and opening fraudulent bank accounts. According to both Lebo and Young, defendant drove them to each location, provided them with the forged documents and false identification cards, and concocted stories to justify the suspicious activities and to keep the conspiracy going. In addition, there was substantial evidence corroborating Lebo's and Young's testimonies, including that defendant's thumb print was located on one of the forged deposit slips utilized by Young and that flight reservations for the codefendants

were made using a credit card issued in defendant's name and under the e-mail address associated with defendant's frequent flyer account. Inga Humbarger—the operations manager at the location of HQ Global Workplace in Lisle, Illinois, where Lebo opened a virtual office for the fake business "Whole Body Healing" using the false name "Allison Christine Martin"—testified that a man assisted Lebo in filling out the necessary paperwork. She later identified defendant in a photo line-up as that man.

¶ 17 Given the overwhelming evidence of guilt, even if an individual by the name of "Mr. Sammy" were involved in the conspiracy, "clearly the defendant was, if not the main architect of this enterprise, one of the main architects of this financial crimes enterprise," as the trial judge noted at defendant's sentencing hearing. The statute under which defendant was charged did not require defendant to be *the* organizer of the conspiracy but, rather, to be "*an* organizer" of the conspiracy and to occupy "*a* position of organizer, supervisor, or financier or other position of management." (Emphases added.) 720 ILCS 5/16H-55 (West 2006). Lebo's and Young's testimonies, at a bare minimum, inculpated defendant as a supervisor of the conspiracy, if not also as an organizer and financier. We also note that, during redirect examination, Sergeant John McAnally from the Naperville police department testified that none of the codefendants—including Betor, Lebo, Young, and Dubois-Fortenbery—indicated during their interviews with police that the individual named "Sammy" was in the Chicago area when the crimes took place. Thus, even accepting as true Betor's statement in his affidavit that "Mr. Sammy was the mastermind on all activities," given the overwhelming evidence of defendant's involvement as *an* organizer of the conspiracy, it is not even "arguable" that defendant's postconviction claim of ineffective assistance of counsel could satisfy *Strickland*'s prejudice prong. In other words, there is not a reasonable

probability that, but for defense counsel's failure to call Betor as a witness, the result of the proceeding would have been different. At most, Betor's testimony could have inculpated "Mr. Sammy" as a co-organizer of the fraudulent scheme, but it could not have exculpated defendant.

¶ 18 We note that, in reaching our conclusion, we disregard Betor's conclusion in his affidavit that "Mr. Kiasi had no knowledge of what we were doing." An affidavit must set forth facts establishing that it is based upon personal knowledge. *People v. Brown*, 371 Ill. App. 3d 972, 984 (2007). Although Betor stated in his affidavit that "[w]e were instructed by Sammy not to talk about business in [defendant's] presence," this cannot establish that Betor had personal knowledge of what defendant knew or did not know about the conspiracy, a matter which was solely within the purview of defendant's personal knowledge.

¶ 19 Because we have determined that it is not even "arguable" that defendant's postconviction claim of ineffective assistance of counsel satisfied *Strickland*'s second prong, we need not address whether it arguably satisfied *Strickland*'s first prong. See *People v. Harris*, 206 Ill. 2d 293, 304 (2002) ("If this court concludes that defendant did not suffer prejudice, the court need not decide whether counsel's performance was constitutionally deficient.").

¶ 20 CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Du Page County.

¶ 22 Affirmed.