2014 IL App (2d) 120996-U
No. 2-12-0996
Order filed June 24, 2014

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. 05-CF-3470
SCOTTIE CLEMONS,	)	Honorable Joseph G. McGraw,
Defendant-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices Schostok and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, as his claims were forfeited, barred by *res judicata*, or otherwise without merit.

¶ 2 Defendant, Scottie Clemons, appeals from the summary dismissal of his petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). We conclude that the court correctly ruled that all of defendant's postconviction claims were either *res judicata*, forfeited, or otherwise patently frivolous and without merit; we thus affirm.

¶ 3 I. BACKGROUND

¶ 4 A grand jury indicted defendant on two counts of first-degree murder (felony murder) (720 ILCS 5/9-1(a)(3) (West 2004)) based on defendant's participation in an October 5, 2005, armed robbery (720 ILCS 5/18-2(a) (West 2004)) in which Bernard Melton, Jr., was shot and killed. The difference between the counts was originally that the first alleged that defendant personally discharged the firearm whereas the second alleged that defendant was armed with a firearm. However, a later amendment of both counts removed both firearms references. The grand jury also indicted defendant on one count of unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2004)).

¶ 5 Defendant moved to suppress certain incriminating statements he had made to the Rockford police. The suppression motion was primarily based on the alleged failure of the police to respect defendant's invocation of his right to remain silent. The court denied the motion. Defendant waived his right to a jury trial after the State agreed to amend the indictment to remove the sentence-enhancing allegations relating to defendant's use of a firearm.

¶ 6 At trial, the State presented evidence that included defendant's incriminating statements. Sidney Price testified under the terms of a negotiated guilty plea. He testified that he and defendant committed the robbery together, but that defendant was the one who fired the shots.

¶ 7 The surviving robbery victim testified that he and Melton were together on the porch of a house. Two men approached the porch and brandished guns. The witness thought that the weapon pointed at him was a 9-mm or possibly a .45 semiautomatic and that the weapon pointed at Melton was a revolver, probably a .38. (Other evidence also put a semiautomatic in one robber's hands and a revolver in the other robber's hands.)

¶ 8 The robber with the semiautomatic demanded money, and the witness handed over $6 or $7. Melton, however, told the gunman with the revolver to "get out of his face," pushed aside

the revolver, and started to walk away. The witness then started to walk into the house. As he went in, he heard three or four gunshots. He turned and saw Melton falling. Because it was very dark, he never got a good look at either gunman.

¶ 9 The autopsy of Melton showed that he had suffered three gunshot wounds, but the medical examiner recovered only two bullets from Melton's body. At the scene of the shooting, the police recovered one cartridge case.

¶ 10 David Welte of the State Police Crime Laboratory in Rockford testified that he had examined both the cartridge case and the bullets.

¶ 11 The cartridge case was from a .40-caliber Smith & Wesson round and had extractor marks, which showed that it had been fired from a semiautomatic. Welte later examined a .40-caliber Smith & Wesson semiautomatic handgun that he identified as the gun from which the cartridge case had been ejected.

¶ 12 The two bullets were soft metal consistent with lead and both were of a size consistent with ammunition types including .38-caliber and 9-mm, but not .40-caliber. Both bullets had five lands and grooves—marks from the rifling in the gun's barrel—and the marks showed that the rifling had a right-hand twist. Based on these characteristics, Welte could not exclude the possibility that both could have come from the same gun. However, the bullets were too damaged for the examiner to look for specific characteristics that might justify a positive statement that the same gun fired both.

¶ 13 Defendant rested without presenting any evidence. The State argued in closing that the bullets that killed Melton came specifically from a .38-caliber firearm. The court found defendant guilty of both counts of murder. It said that the evidence established that "defendant and his co-offender were engaged in the commission of an armed robbery" and thus defendant

was guilty of felony murder. It found defendant not guilty of the unlawful-possession-of-a-weapon-by-a-felon count. It imposed sentences on both murder convictions.

¶ 14 Defendant appealed, asserting that the court erred in refusing to suppress his incriminating statements and that his dual murder convictions for one killing violated one-act, one-crime principles. We held that the court did not err in admitting the statements, but did err in entering two convictions. We affirmed one conviction and vacated the other. *People v. Clemons*, No. 2-09-0286 (2010) (unpublished order under Supreme Court Rule 23). The Office of the State Appellate Defender (OSAD), and not trial counsel, represented defendant in that appeal.

¶ 15 Defendant filed a petition under the Act on July 13, 2012.

¶ 16 He first argued that he ought to be entitled to have newer forensic testing techniques applied to the recovered projectiles to better identify what gun fired the fatal shots. The State reads the petition to claim that counsel was ineffective for failing to seek further testing of the bullets and cartridge case. Its reading might be correct. The petition is not a model of clarity. In any event, we agree that defendant argues that further testing of that evidence would benefit his case. He did not, however, state what techniques he believed would be helpful or what evidence he expected that testing to provide.

¶ 17 Defendant further asserted that the State had withheld exculpatory evidence in that it had failed to disclose that Smith & Wesson produced a .40-caliber handgun with rifling having a right-hand twist.

¶ 18 Next, he asserted that his conviction rested on unreliable statements to the police and on Price's equally unreliable testimony, but did not provide specifics. On this point, he implied that

the evidence, properly analyzed, suggested that Price had fired the bullet that struck Melton in the face, which was the bullet identified as the direct cause of death.

¶ 19 He argued further that the State's closing argument had overstated the evidence.

¶ 20 Finally, he asserted that his inculpatory statements were involuntary and should have been suppressed for the reasons argued on appeal, but also because, given that he was 17 years old when the police arrested him, he lacked capacity to agree to speak to the police.

¶ 21 The court summarily dismissed defendant's petition on August 17, 2012. It "note[d] that the defendant [was] attempting to relitigate matters that were already litigated, and thus *res judicata*, collateral estoppel, and waiver appl[ied]," and that, further, "the petition is frivolous and patently without merit, and does not raise a gist of a constitutional claim."

¶ 22 Defendant timely appealed, and OSAD was appointed to represent him. We allowed OSAD to withdraw pursuant to *Pennsylvania v. Finley*, 481 U.S. 551 (1987), and *People v. Lee*, 251 Ill. App. 3d 63 (1993). However, we granted defendant leave to file his own brief, which he has done.

¶ 23 II. ANALYSIS

¶ 24 Defendant now argues that the State improperly "bolstered" Welte's testimony and "vouch[ed for] the credibility of State witnesses[,] Micheal Jackson [*sic*]and Cordell Lee[,] who did not testify at trial." He also argues that defense counsel was ineffective for failing to object to the State's mischaracterization of the evidence. He further argues that the State failed to prove his guilt adequately and that the State's occurrence witnesses were unreliable. He again argues that the evidence was more consistent with Price having fired the fatal shot.

¶ 25 We hold that the court did not err in dismissing defendant's petition. Most of defendant's claims are forfeited and the remaining claims fail for other reasons. The claims based upon the

sufficiency of the evidence and upon improper argument by the State are forfeited, as are any claims of ineffective assistance of counsel. Except to the extent that his claims duplicate his unsuccessful argument on direct appeal, so too are the claims rooted in the idea that his inculpatory statements were involuntary. To the extent that that claim does duplicate the argument he made on direct appeal, that claim is barred as *res judicata*. Finally, the claims relating to firearms evidence are meritless.

¶ 26 "[A] *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be *** dismissed [at the first stage] as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). In a postconviction petition, "[i]ssues decided on direct appeal are barred by *res judicata*; issues that could have been raised, but were not, are forfeited." *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). However, when postconviction claims are based on evidence that was not part of the original proceedings, the claims are not barred. See *People v. Enis*, 194 Ill. 2d 361, 375-76 (2000) (a claim is not forfeited where it relies on evidence *dehors* the record). We review *de novo* a first-stage dismissal. *Hodges*, 234 Ill. 2d at 9.

¶ 27 Defendant has forfeited his claims based on the sufficiency of the evidence and the State's allegedly improper arguing of the evidence. He could have raised these claims on direct appeal; they are based entirely on the record. So too his claim that the court should have suppressed his inculpatory statements on the basis that, as a 17-year-old, he lacked capacity to waive his rights; his age was not new evidence. The same is also true of any claim of ineffective assistance of trial counsel as such are based on evidence of record in the trial court.

¶ 28 The remainder of defendant's claim that the trial court erred in admitting his inculpatory statements appears to duplicate the argument he made on direct appeal. It is thus *res judicata* and so barred.

¶ 29 Defendant's final claims, concerning scientific evidence relating to the firearms, are without merit. Defendant claims that the State wrongfully failed to disclose Smith & Wesson's production of a .40-caliber handgun with right-handed rifling. That such a firearm existed is irrelevant here. The police did not locate any bullets consistent with .40-caliber ammunition. Although Welte could not specifically identify the ammunition type from which the recovered bullets came, he could limit their source to a group that did not include .40-caliber ammunition. Defendant also suggested that some unspecified new testing method (or testing that defense counsel should have sought) would generate exculpatory evidence from the recovered bullets. Defendant implies that such evidence would show that the fatal bullet came from a weapon other than the one that witnesses placed in his hand. More specifically, defendant hints that such evidence would implicate Price as the person who fired the fatal shot. As the State argues, however, under the felony murder rule embodied in section 9-1(a)(3) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(3) (West 2004)), this is legally irrelevant given that the indictment was amended to drop the allegation that defendant personally shot Melton. See *People v. Hudson*, 222 Ill. 2d 392, 403-04 (2006) (the defendant's having personally committed the killing is unnecessary for a conviction under section 9-1(a)(3)). Moreover, because defendant gave no details of the kind of testing he thought should have been done or what he believed it would show, the claim is vague to the point of meaninglessness.

¶ 30 III. CONCLUSION

¶ 31 For the reasons stated, we affirm the dismissal of defendant's postconviction petition.

¶ 32 Affirmed.