2013 IL App (2d) 121057-U
No. 2-12-1057
Order filed December 23,2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 02-CF-2813
LEMONT STEWART,	)	Honorable James C. Hallock,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Jorgensen and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition at the second stage where the record rebutted defendant's claim that he was denied a public trial; reversal was not required where the trial court relied on an unpublished order.

¶ 2

¶ 3 Defendant, Lemont Stewart, appeals from an order of the circuit court of Kane County dismissing his postconviction petition at the second stage. We affirm.

¶ 4 Following a jury trial, defendant was convicted of two counts of attempted first-degree murder (720 ILCS 5/8-4(a), (9-1(a)(1) (West 2002)), three counts of aggravated

discharge of a firearm (720 ILCS 5/24-1.2(a)(3) (West 2002)), and one count of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2002)). He was sentenced to concurrent terms of 17 and 18 years' imprisonment for the attempted first-degree murder convictions. This court affirmed the convictions and sentences on direct appeal. On September 8, 2008, appointed counsel filed an amended petition for postconviction relief on defendant's behalf. Relevant to this appeal, the amended petition alleged that defendant's sixth amendment (U.S. Const. Amend. VI) right to a public trial was violated when his family members were excluded from the courtroom during *voir dire*:

¶ 5 "[D]efendant-petitioner was denied his right to an open and public trial as guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 8 of the Constitution of the State of Illinois where petitioner's family members were denied access to the courtroom during the jury selection process."

¶ 6 ¶ 4 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)) provides a procedural mechanism by which a person imprisoned in the penitentiary can assert that there was a substantial denial of a federal or state constitutional right in the proceeding that resulted in his or her conviction. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 26. At the first stage, the circuit court reviews the petition to determine whether the petition is frivolous and patently without merit. *Lofton*, 2011 IL App (1st) 100118, ¶ 27. At the second stage, the circuit court may appoint counsel for the defendant, and the State may move to dismiss the petition. *Lofton*, 2011 IL App (1st) 100118, ¶ 27. At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Lofton*, 2011 IL App (1st)

110118, ¶ 27. If a petition is not dismissed at the second stage, it proceeds to the third stage where the court conducts an evidentiary hearing. *Lofton*, 2011 IL App (1st) 110118, ¶ 27. At both the second and third stages, the defendant bears the burden of making a substantial showing of a constitutional violation. *Lofton*, 2011 IL App (1st) 110118, ¶ 28. At the second stage, all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Lofton*, 2011 IL App (1st) 110118, ¶ 28. The circuit court does not engage in fact-finding or credibility determinations at the dismissal stage. *Lofton*, 2011 IL App (1st) 110118, ¶ 28. Here, defendant's petition was dismissed at the second stage. We review a second-stage dismissal *de novo*. *Lofton*, 2011 IL App (1st) 110118, ¶ 28.

¶ 7 ¶ 5 The sixth amendment to the United States Constitution guarantees a defendant the right to a speedy and public trial. U.S. Const. Amend. VI. The entitlement to a public trial extends to *voir dire* proceedings. *Press-Enterprise Co. v. California*, 464 U.S. 501, 511 (1984). There are two types of trial closures, total and partial. *People v. Taylor*, 244 Ill. App. 3d 460, 465 (1993). A partial closure occurs when the public is not totally excluded or where, in certain cases, only the press is allowed to remain. *Taylor*, 244 Ill. App. 3d at 465. A closure is permissible if it advances an overriding interest that is likely to be prejudiced without the closure; the closure is no broader than necessary to protect that interest; the trial court considered reasonable alternatives to closing the proceeding; and the trial court made findings adequate to support the closure. *Waller v. Georgia*, 467 U.S. 39, 47-48 (1984); *Taylor*, 244 Ill. App. 3d at 468. The standard to determine whether there is a sufficient record to support a trial judge's grounds to exclude spectators from a courtroom is abuse of

discretion. *People v. Seyler*, 144 Ill. App. 3d 250, 252 (1986).

¶ 8

¶ 6

Here, prior to *voir dire*, while making a motion to exclude witnesses, defendant's counsel off-handedly mentioned the lack of accommodation of some of defendant's family members, as follows:

¶ 9 "There is [*sic*] some family members that the bailiffs have asked me—I have about [10] family members out there. I am going to try—not the bailiff, the deputy asked me to be selective of the number of people present in the courtroom during jury selection because of the chair

¶ 10

Without waiting for a response from the judge, defense counsel then proceeded to address continuing a subpoena on one of her witnesses. She did not make an objection that the family members' exclusion due to the "chair situation" violated defendant's right to a public trial. The only other time the subject of some of the family's exclusion was raised was well after *voir dire* had begun, when defense counsel noticed that a police officer was present in the courtroom. Counsel raised the subject, as follows:

¶ 11 "I didn't realize the officer from Aurora would still be here when the jury selection process resumed. I am objecting to him being present. I was asked by the deputies to lower the number of family members because there weren't enough chairs. While my family members are sitting outside in the hallway[,] *** the State is

asking that this officer be allowed to sit in on the jury selection process.

¶ 12 [The Court]: How many officers are there?

¶ 13 [The prosecutor]: There are four chairs.

¶ 14 [The Court]: Why is that a problem?

¶ 15 [The Prosecutor]: He has every right to be here. He is not a witness. He is from the Aurora Police Department, but he is not a witness.

¶ 16 [The Court]: I can see your point. Quite frankly, if the family members were all out and there is 18 police officers—

¶ 17 [Defense Counsel]: I see it as a form of intimidation.

¶ 18 [The Court]: Your request is denied. I don't see that as a problem."

¶ 19

¶ 6

The State filed a motion to dismiss the postconviction petition, which the trial court granted. Defendant appealed, and this court reversed and remanded for a determination of whether defendant's postconviction counsel had a conflict of interest. (*People v. Stewart*, No. 2-09-0256 (December 21, 2010) (unpublished order pursuant to Supreme Court Rule 23(b)). On remand, the trial court determined that counsel did not have a conflict, and the trial court, after a non-evidentiary hearing, again dismissed the postconviction petition. Defendant filed a timely appeal.

¶ 20

¶ 7

Defendant raises two issues. The first is whether he was deprived of a public trial in violation of the sixth amendment to the United States Constitution. The second is whether reversal is required because the trial court, in finding the public-trial issue to be meritless, relied on an unpublished decision.

¶ 2 1

¶ 8

The State in our case maintains that defendant forfeited the issue by failing to object and failing to include the issue in his posttrial motion. The State additionally argues that defendant procedurally defaulted the issue, because it could and should have been raised on direct appeal. Ordinarily, a defendant must make a contemporaneous objection and then include the alleged error in a posttrial motion. *People v. Lewis*, 234 Ill. 2d 32, 40 (2009). Issues that could have been raised and were not are forfeited. *People v. Myers*, 386 Ill. App. 3d 860, 864 (2008). In response, defendant contends that the right to a public trial may be relinquished only upon a showing that the defendant knowingly and voluntarily waived the right. Defendant cites *Walton v. Briley*, 361 F. 3d 431 (7th Cir. 2004), which applied a "heightened standard of waiver" because the right to a public trial also concerns the right to a fair trial. *Walton*, 361 F. 3d at 433-34. We decline to follow *Walton*, as the appellate court has held that the issue of denial of a public trial is waivable. *People v. Webb*, 267 Ill. App. 3d 954, 958 (1994). However, forfeiture is a limitation on the parties, not on the court, and the court can overlook forfeiture where necessary to obtain a just result or maintain a sound body of precedent. *Our Savior Evangelical Lutheran Church v. Saville*, 397 Ill. App. 3d

1003, 1028 (2009). Consequently, we elect to review the allegation of error.

¶ 2 2

¶ 9

The denial of a defendant's right to a public trial requires some affirmative act by the trial court meant to exclude persons from the courtroom. *United States v. Al-Smadi*, 15 F.3d 153, 154 (10th Cir. 1994). Here, the trial court did not order either a total or a partial closure. Rather, a deputy asked defense counsel to be "selective" in the number of family members who were present in the courtroom, apparently because of space limitations. Defendant asserts that the deputy's actions had the same effect as if the trial court had ordered a closure. However, the record demonstrates that there was no closure resulting from the deputy's request. The record is sparse, but it is clear that some of defendant's family was in the courtroom. Defense counsel related that "some" of defendant's family was in the hallway because of the "chair situation," indicating that not all of the family was in the hallway. The judge alluded to some of the family being present when he said that the officer's presence might be a problem if all of defendant's family had been excluded. Therefore, the record positively rebuts defendant's claim that his family was excluded. Unjustifiably excluding all of a defendant's family from *voir dire* proceedings violates the right to a public trial (*People v. Willis*, 274 Ill. App. 3d 551, 554 (1995)), but that is not what occurred here. Members of defendant's family were present in the courtroom.[1]

[1] Defendant states that a "majority" of his family members were excluded. There is no basis in the record for that statement.

¶ 23

¶ 10

Perhaps recognizing this, defendant enlarges his grounds on appeal and now argues that *de minimis* seating violated his right to a public trial, saying that only four chairs were available to the public.

¶ 24

¶ 11

Again, we need not linger over whether *de minimis* seating constitutes a denial of a public trial, because the record rebuts defendant's assertion that only four chairs were available to the public. When defense counsel complained that the Aurora police officer was allowed to be in the courtroom, the judge said, "How many officers are there?" The prosecutor stated, "There are four chairs." From this, defendant concludes that there were only four chairs in the courtroom for the accommodation of the public. We know that the officer, a member of the public, was already seated in one chair and that an unknown number of defendant's family members, also members of the public, were seated. It appears from the prosecutor's statement that there were four vacant chairs in addition to those that were already occupied. It is possible that the deputy requested defense counsel to be selective in the number of family members present in the courtroom because other members of the public had already filled the available spaces. Moreover, defense counsel requested that the officer be removed because she considered his presence intimidating, not because the courtroom had been closed to all of defendant's family. The test is not whether the courtroom is large enough to seat

everyone who wants to attend, but whether the public has freedom of access to it. *State v. Jones*, 281 N.W.2d 13, 17 (Sup. Ct. Iowa, 1979). A public trial is one in which the doors of the courtroom are open and the public is admitted. *State v. Cyrulik*, 214 A. 2d 382, 383 (Sup. Ct. R.I., 1965). Here, defendant does not claim that the courtroom doors were closed. The record shows only that a deputy requested defense counsel to be selective in the number of family members who entered the courtroom during *voir dire*. There is no question but that the public was admitted at that stage. After *voir dire* was completed and the jury was sworn, the trial began without further comment about who was in the courtroom.

¶ 25

¶ 12

The present case is distinguishable from *State v. Torres*, 844 A. 2d 155, 159-60 (2004), a case relied on by defendant, where the trial judge excluded both of the defendant's family members and where they were the only members of the public who sought access to the *voir dire* proceedings. Moreover, defense counsel had requested of the court that it admit the defendant's two sisters, and the judge denied the request. *Torres*, 844 A. 2d at 159-60. Here, defense counsel merely noted that some of the family was in the hallway without requesting their presence. Accordingly, we hold that defendant was not denied a public trial.

¶ 26

¶ 13

Defendant raised the alternative issue of ineffective assistance of trial and appellate counsel for failing the raise the issue in a posttrial motion or on direct appeal in the event that we

declined to review the issue of whether defendant was deprived of a public trial because of forfeiture. Because we did not apply the forfeiture doctrine, we will not address defendant's alternative argument.

¶ 2 7

¶ 1 4

Defendant next asserts that the judgment must be reversed because the trial court relied on an unpublished order. Before the trial court, the State cited *People v. Smith*, No. 1-05-1535 (March 31, 2008), a First District unpublished order. According to defendant, once the references to *Smith* are stricken from the record, there is nothing left to support the trial court's judgment. Illinois Supreme Court Rule 23(e) (eff. July 1, 2011) provides in pertinent part:

¶ 28 "Effect of Orders. An unpublished order of the court is not precedential and may not be cited by any party except to support contentions of double jeopardy, *res judicata*, collateral estoppel or law of the case."

¶ 2 9

We agree with defendant that the State cited *Smith* for no proper purpose and that the trial court should not have relied on it. See *In re Marriage of Schmitt*, 391 Ill. App. 3d 1010, 1016-17 (2009) (portion of reply brief that relied on an unpublished order was stricken). However, as we demonstrated above, ample reasons support the judgment. Accordingly, for the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 30 ¶ 15 Affirmed.

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