2022 IL App (1st) 182531-U

THIRD DIVISION
June 30, 2022

No. 1-18-2531

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 16031
	)	
ROBERT MACIAS,	)	Honorable
	)	Maura Slattery Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Gordon and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in the second-stage dismissal of defendant's postconviction petition where (1) defendant's sentencing hearing complied with *Miller* because the trial court fully considered his age and its characteristics before imposing the sentence; (2) defendant's claim that his statement was involuntary due to a promise of leniency is barred by *res judicata*, and in the alternative, the claim was forfeited because defendant could have raised the claim on direct appeal; and (3) defendant has failed to set forth a substantial showing of ineffective assistance of counsel at his suppression hearing.

¶ 2 Defendant Robert Macias appeals the trial court's second stage dismissal of his postconviction petition, arguing he set forth a substantial showing that: (1) his 75-year sentence is an unconstitutional *de facto* life sentence under *Miller v. Alabama*, 567 U.S. 460 (2012),

because he was 17 years old when the offenses were committed; and (2) his trial counsel was ineffective for failing to advise him of his right to testify at the suppression hearing and had the trial court heard about an off-camera promise of leniency from the police, then his motion to suppress would likely have been granted.

¶ 3 Following a jury trial, defendant was found guilty of the March 2007 first degree murder of Victor Casillas, and the attempted murder and aggravated battery with a firearm of Lionel Medina. The trial court subsequently sentenced defendant to a term of 39 years for the first degree murder conviction with an additional 15-year firearm enhancement, 6 years for the attempted murder conviction, and 15 years for the aggravated battery conviction, to be served consecutively, for a total sentence of 75 years.

¶ 4 The shootings occurred around 8:30 p.m. on March 19, 2007, near West 30th Street and South Kildare Avenue in Chicago. Defendant was arrested on June 2, 2007, and held for approximately 46 hours at Area 3, located at West Belmont Avenue and North Western Avenue. Defendant gave a statement admitting his participation, specifically that he was driving the van when codefendant Oscar Flores shot the victims, after viewing a video recording of Flores's statement that incriminated defendant.

¶ 5 Defendant moved pre-trial to suppress his statements, arguing that (1) his *Miranda* rights were violated; (2) his request for an attorney was not honored; and (3) his statement was not voluntary because his will was overborne by the detectives. At the suppression hearing, defendant presented the following testimony of his mother Hermelinda Montoya.

> "Montoya testified that on the evening of June 2, 2007, she was informed by her daughter that defendant was missing. She went to the police station at West Ogden Avenue and South Kedzie Avenue, and asked if defendant was at the

police station. An officer stated that he was not there. Montoya asked to file a missing person report, but was told by the officer that defendant's father had already filed a report. She asked to file another report, but was told she could not. On June 4, she went to the police station at West Harrison Street and South Kedzie Avenue, and was directed to the Belmont and Western station. At the station, she was told that defendant was in custody and under investigation, but was not permitted to see defendant. Defendant was 17 years old in June 2007.

The DVD recordings from the electronic recording interview device (ERI) in the interview room were admitted into evidence. Defendant rested.

Detective Gregory Swiderek testified for the State. He stated he was assigned to investigate Casillas's homicide. He arrested defendant on June 2, 2007, at approximately 9 p.m. Defendant was brought to Area 3 for questioning. Detective Swiderek testified that he gave defendant his *Miranda* rights when he placed defendant under arrest, and later at 9:38 p.m., he readvised defendant of his *Miranda* rights in the interview room. Defendant indicated that he understood his rights. Defendant gave an inculpatory statement at approximately 7:30 p.m. on June 4, 2007, after viewing a portion of codefendant Flores's statement.

After reviewing the testimony and the DVD recordings, the trial court denied defendant's motion to suppress his statements." *People v. Macias*, 2015 IL App (1st) 132039, ¶¶ 4-7.

¶ 6 In October 2011, defendant and codefendant Flores were tried by simultaneous but separate juries. We outline the evidence presented at defendant's jury trial as necessary for our

disposition of this appeal. A full discussion of defendant's trial was set forth in *Macias*, 2015 IL App (1st) 132039, ¶¶ 8-35.

¶ 7 Detective Swiderek was assigned to investigate Casillas's homicide in March 2007. Almost three months later, at approximately 9 p.m. on June 2, 2007, Detective Swiderek placed defendant under arrest, advised defendant of his *Miranda* rights, and transported him to Area 3, where he was placed in an interview room. The ERI was turned on at 9:33 p.m. At 9:37 p.m., Detective Swiderek and his partner, Detective Roberts, entered the room and told defendant he was there for the homicide of Casillas. He also told defendant that he would be placed in multiple lineups. Detective Swiderek then advised defendant of his *Miranda* rights a second time. Defendant initially denied his involvement in the March 19, 2007, shootings.

¶ 8 At approximately 6:30 p.m. on June 4, 2007, Detective Swiderek, with Detective Roberts, had a conversation with defendant. Detective Swiderek asked defendant if he would like to view a portion of codefendant Flores's statement. After defendant viewed a video of Flores's statement, the interview resumed between the detectives and defendant. A portion of defendant's videotaped statement was played for the jury.

¶ 9 In the video, defendant said a person called "Sonic" picked him up in a van and they later picked up Flores. "Sonic" parked the van at West 26th Street and South Drake Avenue, and they left the vehicle. Later, defendant agreed to drive Flores home. When Flores returned to the van, he showed defendant that he had a gun inside a white sock. Defendant said Flores encouraged him to drive into the territory of their gang rivals, the Two-Sixes. In the area near South Karlov Avenue and West 30th Street, defendant saw someone he described as a "little kid" walking on the sidewalk. Defendant stepped on the brakes and slowed the van down. Defendant "threw up the bunny," the boy responded and "threw down the crown," which is a sign of disrespect to the

Latin Kings, which was defendant and Flores's gang. Flores then said, "What's up b***?" and fired three shots. Defendant stepped on the gas and then heard a fourth gunshot.

¶ 10 Defendant initially denied knowledge of a second shooting which occurred that day but later admitted that, after the first shooting, as he drove down 30th Street, they encountered another individual. Defendant ducked down in the driver's seat and could not tell if the gunshots were coming from inside the van or from outside at the van.

¶ 11 Detective Swiderek admitted that at the time of his statement at 7:30 p.m. on June 4, 2007, defendant had been in custody for 46 hours. Detective Swiderek denied telling defendant that if he gave a statement, then he would be released. Detective Swiderek stated that defendant did not make any incriminating statements until he watched a portion of Flores's statement. Over the course of his time in custody, defendant was interviewed multiple times by the detectives regarding his involvement in the case. During this same time frame, defendant also appeared in five separate lineups in front of witnesses to the shootings but was not identified. A polygraph examination was also conducted while defendant was in custody.

¶ 12 On March 19, 2007, Lionel Medina was near 28th Street and Kildare when he saw a two-tone blue and gray van at a stop sign. The passenger pulled out a gun and fired. Medina was shot but survived. Medina was not able to make any identifications in two lineups. He admitted that he was a member of the Two-Six gang.

¶ 13 Also on March 19, 2007, Leonardo Gonzalez was walking with Casillas on 30th Street when they heard gunshots. Both Gonzalez and Casillas were members of the Two-Six gang. They continued walking until Gonzalez heard a vehicle behind them. He saw a blue and white van. According to Gonzalez, Casillas made a gang sign disrespectful to the Latin Kings. The passenger in the van fired two shots. Casillas started to run, and Gonzalez fell down. He then saw

that Casillas had been shot. Gonzalez was unable to make an in-court identification of either defendant. He viewed a lineup in May 2007, and he said he identified Casillas's killer, but he did not know if he identified codefendant Flores. Gonzalez admitted that he gave a statement to an assistant State's Attorney (ASA) and that ASA later testified at trial that Gonzalez identified Flores as the shooter.

¶ 14 Gabriel Navarro testified for the defense. In March 2007, defendant and defendant's father were living with Navarro. On March 19, 2007, Navarro was with defendant most of the day. They were together at home from 6:30 p.m. to 10:30 p.m., when Navarro went to bed.

¶ 15 Following deliberations, the jury found defendant guilty of the first degree murder of Casillas and the attempted murder and aggravated battery with a firearm of Medina.

¶ 16 The trial court conducted defendant's sentencing hearing in May 2013. In aggravation, the State presented evidence of multiple infractions defendant committed while he was incarcerated. Specifically, while at the Cook County Jail, defendant was found in possession of a shank on multiple occasions, including one in a body cavity. He also set a fire in his cell. Casillas's mother presented a victim impact statement. The State further cited defendant's gang involvement, which included the circumstances of the offense in which defendant drove with Flores into rival gang territory seeking a victim. The State argued that defendant's behavior satisfied many of the aggravating factors under section 5-5-3.2 of the Unified Code of Corrections (730 ILCS 5/5-5-3.2 (West 2012)) and requested the maximum sentence. The State noted that the minimum sentence was 56 years.

¶ 17 In mitigation, defense counsel focused on defendant's age at the time of the offenses.

> "I think the mitigating factor here, I think, is a very significant mitigating factor, is that he was barely 17 years old when he was arrested for this offense. The

United States Supreme Court has started really looking into the issue about whether or not housing juveniles – and I realize that you know in those cases the juveniles were 14 and 15, but I think the trend of the law is that, you know, these juveniles who are under 18, to basically warehouse them for the rest of their life, and 56 would be close to *** life, but anything more than that would certainly be life, is just wrong and it really deprive [*sic*] him of any kind of ability to be a good inmate in IDOC because eventually, you know, eventually Mr. Macias sits here as a 23-year old. We have to predict what he is going to be like 10 years from now, 20 years from now, 40 years from now. I think we can all agree that he is very likely to be a very different person. There are lots of programs in jail and he should be given that opportunity. I think he is going to have no incentive whatsoever to comply with all the regulations and to get out and be a good citizen while in jail if he is looking at essentially a life sentence, whereas if he's given some hope and some opportunity, even if he's an older person, to get out, I think it's going to make him a much more compliant inmate down the road. And also too, you know, we also have to consider the resources. I mean, 30, 40, 50 years from now this state is going to be in crisis economically if we have prisoners who are 70 and 80 years old that we continue to have to care for, and I think, you know, giving them some hope, some hope that even as an elderly person they'll get out, is okay, I think rather than just life itself. Especially [for] someone who is barely 17 when he was arrested and who never fired a gun. I realize that the law said he is accountable for the actions of others, but now we are talking about sentencing and now we are talking about what's right. What's right here is not to

> put a young man, a kid who was only just over 17, away for essentially the rest of his life, and that's what anything above the 56 would be."

¶ 18 Defense counsel further argued that defendant has a supportive family, with his mother and aunt present in court, although his father died while defendant was in custody. Counsel asserted that defendant's conduct in prison was out of self-defense because he "was scared of dying and had some shanks."

¶ 19 In sentencing the defendant, the trial court observed that it remembered the facts of the case and recounted the decisions of defendant and Flores to take a van, drive into rival Two-Six territory, and then shoot one victim and kill a 15-year-old. The court noted that defendant had a good upbringing, until the recent death of his father, and was raised in a loving environment without abuse. The trial court recounted that defendant and Flores "decided to open gun fire and treat the people of the City of Chicago as objects of hatred and contempt and a shooting gallery" with "a lack of humanity."

> "Just the nature in which they did this, how gleeful, how to go among in the streets of Chicago and ride around in a van and just pop off guns like they have some -- I mean, it is mind numbing to me that in this day at 17 -- it doesn't take a 17-year old to appreciate the fact of riding around in a van, being the driver, unloading a weapon of the type of devastation that will happen, not only to those hit, to the community and to what it does to this city and to people. But not only that, as I recall quite vividly, that [defendant] was living, up until that point, those My Space pictures of him proudly representing who he was affiliated with, the guns, the signs that he was throwing up, of what his contempt was for life and for other people. His belief that somehow he had the right to inflict this on other

people. And, [defense counsel], I understand you are concerned about his rehabilitative nature, and for the most part human nature dictates that if you are in a position where you're trying to portray yourself in the best light, are usually on your best behavior. And I can understand that you are indicating that there might be a dangerous environment inside because he's a Latin King and opposing gangs, but two incidents in this were pointed out to me that he purposefully, willfully, without question, in a cell, by himself set that cell on fire. No one else did it. For no reason, he did that. And then when the shank was recovered, as it fell out of his *** body cavity to the floor, I mean, there's no question his lack of in any way trying to portray himself to me or anybody else in a particular light, he was, if anything, portraying himself and wanted to be known that he wasn't going to be messed with. He wasn't going to tolerate it. He has no respect for the rules. He has no respect for anyone. He has no respect for humanity. He has continuously demonstrated it each and every step of the way.

What he did out there that day to Victor Casillas while he was with Oscar Flores, up until this very moment, shows he has no regard for the victim and the family, that he has no regard for his own family, he has no regard for humanity and that is never going to change. That aspect or his belief of somehow nothing applies to him, he does not have to follow, is never going to change because even after all these years of incarceration, since 2007, he still hasn't modified his behavior. He hasn't indicated or taken part in my knowledge of any programs that shows he is willing to change his behavior. Rather, it's quite the contrary. He is still intent on being destructive. No matter where, no matter how he's housed, no

> matter under what rules, he is in no way going to attempt to rehabilitate himself to make himself a productive member of society."

¶ 20 The court concluded that defendant's conduct "continuously" demonstrated his lack of rehabilitative nature. The court then sentenced defendant a term of 39 years for the first degree murder conviction with an additional 15-year firearm enhancement, 6 years for the attempted murder conviction, and 15 years for the aggravated battery conviction, to be served consecutively, for a total sentence of 75 years. Defendant moved to reconsider his sentence, which the trial court denied.

¶ 21 On direct appeal, defendant argued that: (1) the trial court erred in denying his motion to suppress statements because defendant was given defective *Miranda* warnings, and his statement was involuntary as a result of his will being overborn by police detectives; (2) his trial counsel was ineffective for failing to object to harmful inadmissible evidence, failing to introduce favorable evidence to explain why defendant confessed, failing to raise missing portions of the videotaped interrogation in his motion to suppress, and failing to submit a jury instruction that the jurors could not consider defendant's decision not to testify at trial; (3) defendant was denied a fair trial when the trial court admitted prejudicial photographs from a MySpace page without proper foundation or authentication; and (4) the trial court committed reversible error by not permitting defendant to introduce evidence from the videotaped interrogation that explained why he confessed and by failing to ensure the jury was properly instructed on the law. *Macias*, 2015 IL App (1st) 132039, ¶ 2. After a thorough review of all of these issues, this court affirmed defendant's convictions and sentence. *Id*. ¶ 115.

¶ 22 In August 2016, defendant, through counsel, filed his postconviction petition and an amendment was filed in February 2017. Defendant asserted that: (1) his trial counsel was

ineffective on multiple grounds, including the failure to advise defendant of his right to testify at the suppression hearing; (2) defendant's statements were the result of coercion and an "overpowering of his will"; and (3) his 75-year sentence violated the eighth amendment of the United States Constitution and proportionate penalties clause of the Illinois Constitution. He also argued that appellate counsel was ineffective for failing to raise these claims on direct appeal. In his attached affidavit, defendant stated that his counsel at the suppression hearing failed to inform him that he could testify. If he had been informed, defendant would have testified that Detective Swiderek promised him that he could go home if he cooperated with the police.

¶ 23 In June 2018, the State moved to dismiss defendant's postconviction petition. Following arguments, the trial court entered a written order in November 2018 dismissing defendant's postconviction petition for failing to make a substantial showing of a constitutional violation to warrant an evidentiary hearing. With respect to defendant's ineffective assistance claim, the court observed that defendant never alleged that he informed his attorney of Detective Swiderek's off-camera promise, nor that counsel failed to interview him regarding the circumstances of his interrogation. The court further found that defendant's allegation about a promise from Detective Swiderek did not make a substantial showing that his confession was unconstitutionally coerced.

¶ 24 In reviewing defendant's sentencing challenge, the trial court observed that *Miller* had already been decided at the time defendant was sentenced and trial counsel "presciently argued" that a discretionary sentence in excess of the 56-year mandatory minimum could violate *Miller*. The court then detailed how it considered all the relevant factors prior to imposing defendant's sentence, including his age, family and home environment, his degree of participation, incompetence, and rehabilitative potential. Since the court considered the relevant factors, it

found that defendant's sentence did not violate the eighth amendment and defendant failed to establish a substantial violation of a constitutional right. As for the proportionate penalties argument, the court found this claim was forfeited because the Illinois Supreme Court had recognized these claims for juvenile offenders prior to *Miller*. The court further held that the claim failed on the merits because the court considered defendant's character at sentencing and defendant failed to make a substantial showing that his sentence violated the proportionate penalties clause.

¶ 25 This appeal followed.

¶ 26 The Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2016)) provides a tool by which those under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both. 725 ILCS 5/122-1(a) (West 2016); *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). Postconviction relief is limited to constitutional deprivations that occurred at the original trial. *Coleman*, 183 Ill. 2d at 380. "A proceeding brought under the [Post-Conviction Act] is not an appeal of a defendant's underlying judgment. Rather, it is a collateral attack on the judgment." *People v. Evans*, 186 Ill. 2d 83, 89 (1999). "The purpose of [a postconviction] proceeding is to allow inquiry into constitutional issues relating to the conviction or sentence that were not, and could not have been, determined on direct appeal." *People v. Barrow*, 195 Ill. 2d 506, 519 (2001). Thus, *res judicata* bars consideration of issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *People v. English*, 2013 IL 112890, ¶ 22.

¶ 27 At the first stage, the circuit court must independently review the postconviction petition within 90 days of its filing and determine whether "the petition is frivolous or is patently without

merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the circuit court advances the petition to the second stage, counsel is appointed to represent the defendant, if necessary (725 ILCS 5/122-4 (West 2018)) and the State is allowed to file responsive pleadings (725 ILCS 5/122-5 (West 2018)). At this stage, the circuit court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. See *Coleman*, 183 Ill. 2d at 381. If no such showing is made, the petition is dismissed. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a *de novo* standard." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). If, however, a substantial showing of a constitutional violation is set forth, then the petition is advanced to the third stage, where the circuit court conducts an evidentiary hearing. 725 ILCS 5/122-6 (West 2018).

¶ 28 Defendant first argues on appeal that his 75-year sentence is unconstitutional under both the eighth amendment to the United States Constitution and the proportionate penalties clause of the Illinois Constitution because he was 17 years old at the time of the offenses. Specifically, he contends that the trial court imposed the sentence without considering his youth and its characteristics. The State responds that the trial court sufficiently considered defendant's age prior to imposing the sentence and no violation occurred.

¶ 29 The sentencing of juvenile defendants has been evolving in the country over the last several years. Beginning with *Roper v. Simmons*, 543 U.S. 551 (2005), the United States Supreme Court weighed in and set forth new constitutional parameters for the sentencing of juvenile offenders. See also *Graham*, 560 U.S. 48, *Miller*, 567 U.S. 460, and *Montgomery v. Louisiana*, 577 U.S. 190, 209-12 (2016). "[T]he United States Supreme Court has advised that

'children are constitutionally different from adults for purposes of sentencing.' " *People v. Lusby*, 2020 IL 124046, ¶ 32 (quoting *Miller*, 567 U.S. at 471). In *Miller*, the Court barred mandatory life sentences for juveniles who commit murder. *Id*. *Miller* has since been held to apply retroactively. *Montgomery*, 570 U.S. at 212; see also *People v. Holman*, 2017 IL 120655, ¶ 38 (recognizing that *Miller* applied retroactively). Most recently, the Supreme Court held that the eighth amendment allows juvenile offenders to be sentenced to life without parole as long as the sentence is not mandatory, and the sentencing court had discretion to consider youth and attendant characteristics but that no factfinding by the sentencer is required. *Jones v. Mississippi*, 593 U.S.____, ____, 141 S. Ct. 1307, 1314-15 (2021).

¶ 30 The Illinois Supreme Court further held that for a claim based on *Miller* and its progeny to succeed, (1) a juvenile defendant must have been subject to a life sentence, mandatory or discretionary, natural or *de facto*, and (2) the sentencing court failed to consider the defendant's youth and attendant characteristics before imposing the sentence. *People v. Buffer*, 2019 IL 122327, ¶ 27 (citing *Holman*, 2017 IL 120655, ¶ 40, and *People v. Reyes*, 2016 IL 119271, ¶ 9).

> "Those characteristics include, but are not limited to, the following factors: (1) the juvenile defendant's chronological age at the time of the offense and any evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences; (2) the juvenile defendant's family and home environment; (3) the juvenile defendant's degree of participation in the homicide and any evidence of familial or peer pressures that may have affected him; (4) the juvenile defendant's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys; and (5) the juvenile defendant's prospects for rehabilitation." *Holman*, 2017 IL 120655, ¶ 46 (citing *Miller*, 567

U.S. at 477-78).

¶ 31 Since defendant was a juvenile at the time of the offenses, the question before us is whether defendant's sentencing hearing comported with the *Miller* protections, *i.e.*, the sentencing court considered his youth and attendant circumstances before imposing the sentence. The same trial judge that presided over defendant's sentencing hearing considered defendant's postconviction petition. In her written order dismissing defendant's petition, the judge detailed how she considered the *Holman* factors at defendant's sentencing hearing.

> "As to the first *Holman* factor – Macias's age at the time of the offense and evidence of his particular immaturity, impetuosity, and failure to appreciate risks and consequences - as quoted above, counsel argued Macias's age in mitigation. There was no evidence presented that Macias was particularly immature or impetuous for the court to consider. The court considered Macias's age, but found it unavailing in light of the depravity of his offence.
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> As to the second *Holman* factor – Macias's family and home environment – the court noted that Macias 'had a loving family environment' and did not suffer any childhood abuse or trauma.
>
> As to the third *Holman* factor – Macias's degree of participation in the offense and any evidence of familial or peer pressures that may have affected him - Macias was not the shooter. However, the evidence showed that Macias was a member of a Latin King 'kill team'. Macias drove into rival gang territory with his co-defendant Flores for the express purpose of killing other gang members. The court noted 'how gleeful' Macias was at the prospect of 'rid[ing] around in a van' to 'pop off guns'.

> As to the fourth *Holman* factor – Macias's incompetence, including his inability to deal with police officers or prosecutors and his incapacity to assist his own attorneys - evidence was presented of Macias's lack of education. However Macias was no stranger to the criminal justice system due to his history of prior arrests for misdemeanors.
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> As to the fifth *Holman* factor – Macias's rehabilitative prospects - the evidence at the sentencing hearing showed that, during Macias's time in pre-trial custody, from 2007 through 2013, he had been cited for several infractions, including an incident where he set his jail cell on fire and attempted to conceal a 'shank' in his body cavity. Defense counsel argued that Macias was 'very likely to be a very different person' in the future, that he had access to programs in prison, that a lesser sentence gave him an incentive to work towards being a better citizen and inmate. The court acknowledged these arguments, but noted that Macias had not availed himself of any such programs. The court considered the depravity of the offence as well as Macias's conduct while in custody and found that 'he is in no way going to attempt to rehabilitate himself to make himself a productive member of society.' "

¶ 32 We agree with the trial judge, and the record amply supports, that she considered defendant's age, as well as the other factors later outlined in *Holman* before imposing defendant's sentence. The judge was keenly aware of defendant's age, his level of involvement, family background, and rehabilitative potential at the time of sentencing.

¶ 33 We further find the supreme court's decision in *Lusby* to be analogous. There, the defendant was convicted of first degree murder, aggravated criminal sexual assault, and home

invasion, and was 16 years old at the time of the offense. *Id*. ¶ 10. At the sentencing hearing, the trial court sentenced the defendant to "100 years' imprisonment on the first degree murder conviction, followed by concurrent 30-year sentences for aggravated criminal sexual assault and home invasion, totaling 130 years' imprisonment." *Id*. ¶ 18.

¶ 34 In 2014, the defendant filed a *pro se* motion for leave to file a successive postconviction petition, arguing that his *de facto* natural life sentence violated the eighth amendment under *Miller*, which the trial court denied. *Id*. ¶ 22. The Third District reversed the trial court and remanded for resentencing. *Id.* ¶ 23.

¶ 35 Before the supreme court, the State contended the trial court sufficiently complied with *Miller* and considered the relevant youth-related factors at the defendant's initial sentencing hearing. *Id.* ¶ 30. The defendant argued that the trial court did not comply with *Miller* at sentencing and "made only a generalized statement about the poor judgment of adolescents." *Id*. ¶ 31.

¶ 36 The supreme court started its analysis by reviewing *Miller* and the considerations of mandatory sentences for youthful offenders, including the factors set forth in *Holman.* The *Lusby* court observed that "[n]o single factor is dispositive. Rather, we review the proceedings to ensure that the trial court made an informed decision based on the totality of the circumstances that the defendant was incorrigible and a life sentence was appropriate." *Id*. ¶ 35. The court then reviewed the defendant's sentencing proceeding for each of the five factors set forth in *Holman.* The court concluded that the defendant's sentence was constitutional under *Miller* and observed that "the trial court presided over the case from beginning to end and considered the defendant's youth and its attendant characteristics before concluding that his future should be spent in prison." *Id.* ¶ 52.

¶ 37 As in *Lusby*, the sentencing hearing complied with *Miller*. The trial court in this case considered the mitigating circumstances of defendant's age and its attendant characteristics, as required under *Miller* and its progeny. Accordingly, defendant's sentence is not unconstitutional under the eighth amendment or the proportionate penalties clause. The trial court properly dismissed this claim at the second stage.

¶ 38 Next, defendant contends that he made a substantial showing that his trial counsel was ineffective for failing to advise him of his right to testify at the suppression hearing. He maintains that he would have testified that his confession was coerced by Detective Swiderek's off-camera promise that defendant could go home if he provided a statement admitting his involvement in the shootings. Because his attorney did not inform him of his right to testify, the trial court did not hear this evidence at the suppression hearing. The State responds that defendant's claims are barred by *res judicata* and are forfeited.

¶ 39 As previously observed, *res judicata* bars consideration of postconviction issues that were raised and decided on direct appeal, and issues that could have been presented on direct appeal, but were not, are considered forfeited. *English*, 2013 IL 112890, ¶ 22.

¶ 40 On direct appeal, defendant argued that the trial court erred in denying his motion to suppress and that his trial counsel was ineffective. This court detailed defendant's suppression claims.

> "Defendant further contends that he was subject to deceit, trickery, and promises of leniency. Defendant references the detectives' description of the evidence against him, including physical evidence, and eyewitnesses, which was used to suggest the evidence was stronger than what was presented at trial.

> Defendant also claims that the detectives suggested that he would be released from custody, as Flores had been, if he implicated Flores in the shootings.
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> ***
>
> Defendant also argues that the detectives implicitly made false promises to get him to confess. Specifically, defendant contends that the detective more than suggested he would be released if he said Flores was the shooter. Defendant points to the comments after viewing Flores's statement and returning to the interrogation room. At that time, Detective Swiderek stated that Flores was 'out of here,' and if defendant wanted Flores to remain out, 'keep saying you don't know nothing.' The implication of these statements was not that defendant would be released but, rather, that if defendant said Flores was the shooter, then Flores would be taken back into custody." *Macias*, 2015 IL App (1st) 132039, ¶¶ 64, 67.

¶ 41 After reviewing all of defendant's arguments, this court found that the weight of the factors fell against suppression. *Id*. ¶ 70. This court rejected defendant's contentions that his statement was the result of police coercion, but rather defendant gave a statement after hearing and viewing Flores's statement. Thus, this claim was already considered on direct appeal and barred by *res judicata*.

¶ 42 Defendant attempts to avoid the bar of *res judicata* by contending that there is additional off-camera evidence that Detective Swiderek explicitly told him that if he made a statement, he would be able to go home. However, even if this claim was not barred, defendant has forfeited it by failing to raise this allegation in his suppression proceedings. Defendant has not asserted that he informed his counsel of this promise by Detective Swiderek, nor does he allege that his counsel was ineffective for failing to raise this claim at the suppression hearing. Defendant raised

similar claims during his suppression hearing and again on direct appeal and he could have raised this claim in both prior proceedings. Therefore, this claim has been forfeited.

¶ 43 Defendant further argues that his allegation of an off-camera promise of leniency implicates a different argument raised on direct appeal that "his statement should have been suppressed under section 103-2.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/103-2.1 (West 2006)) because two portions of his custodial interview were not recorded." *Macias*, 2015 IL App (1st) 132039, ¶ 71. In that argument, defendant noted that portions of his interview when he went to view Flores's statement were unrecorded. Defendant did "not assert that he made any statement or that any questioning occurred during this unrecorded portion of his custody." *Id*. ¶ 76. This court rejected defendant's claim.

> "Section 103-2.1 limits custodial interrogation to the portions in which questions are asked that could cause a defendant to make an incriminating statement. Defendant has not asserted that such questioning occurred during the unrecorded periods of time. Nor does the record suggest that any such questions were posed. Under the plain language of the statute, defendant was not subject to 'custodial interrogation' within the meaning of section 103-2.1 at that time. Accordingly, section 103-2.1 does not apply to these unrecorded portions of time of defendant's custody, and thus, defendant cannot show that trial counsel was ineffective for failing to raise this argument in a motion to suppress." *Id.* ¶ 78.

¶ 44 Defendant now claims that his allegations in his petition occurred off-camera and fall within section 103-2.1. Again, defendant could have raised this claim on direct appeal and it has been forfeited.

¶ 45 Defendant also argues his trial counsel was ineffective for failing to advise him of his right to testify at the suppression hearing. He contends this failure prevented him from testifying about the off-camera promise of leniency. As the State points out, defendant raised multiple claims of ineffective assistance in his direct appeal, including claims that counsel failed to introduce favorable evidence to explain why defendant confessed and to file a motion to suppress his statements based on the missing portion of the videotaped interrogation. See *id.* ¶ 79. However, defendant did not assert on appeal that his counsel failed to inform him of his right to testify at the suppression hearing. Since defendant could have raised this claim, but failed to do so, this claim has been forfeited.

¶ 46 Forfeiture aside, we find that defendant's claim lacks merit because he has not made a substantial showing of ineffective assistance of counsel. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court delineated a two-part test to use when evaluating whether a defendant was denied the effective assistance of counsel in violation of the sixth amendment. Under *Strickland*, a defendant must demonstrate that counsel's performance was deficient and that such deficient performance substantially prejudiced defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). "A defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent." *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). "Counsel's strategic choices are virtually unchallengeable. Thus, the fact that another attorney might have pursued a different strategy, or that the strategy

chosen by counsel has ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel." *Id*.

¶ 47 In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If a case may be disposed of on the ground of lack of sufficient prejudice, that course should be taken, and the court need not ever consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697. "*Strickland* requires actual prejudice be shown, not mere speculation as to prejudice." *People v. Bew*, 228 Ill. 2d 122, 135 (2008).

¶ 48 We first consider whether defendant can establish a substantial showing of prejudice under *Strickland*. Defendant offers the general assertion that there is a reasonable probability that his suppression motion would have been granted if the trial court had heard defendant's testimony of Detective Swiderek's off-camera promise of leniency with the other evidence presented at trial. He does not offer any further discussion of the evidence and, therefore, fails to show how his proposed testimony established a reasonable probability that the motion would have been granted. It is a "well-established rule that prejudice under *Strickland* cannot be based on 'mere conjecture or speculation.' " *People v. Johnson*, 2021 IL 126291, ¶ 58 (quoting *People v. Palmer*, 162 Ill. 2d 465, 481 (1994)). See also Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (requires an appellant to adequately develop his argument with the reasons therefor).

¶ 49 Moreover, as discussed above, this court on direct appeal rejected defendant's argument that he provided his statement after the police suggested he would be released or could receive a lower sentence. *Macias*, 2015 IL App (1st) 132039, ¶¶ 64-68. After reviewing all of defendant's claims relating to his statement, this court found that the trial court properly denied his motion to

suppress. *Id*. ¶ 70. Accordingly, we find that defendant has not established a reasonable probability that his testimony would have changed the result of his suppression motion. Therefore, he has failed to make a substantial showing that he was prejudiced by his counsel's alleged ineffectiveness under *Strickland*. The trial court properly dismissed this claim at the second stage of postconviction proceedings.

¶ 50 Finally, since defendant has not argued on appeal that his appellate counsel was ineffective, that claim has been forfeited. *People v. Munson*, 206 Ill. 2d 104, 113 (2002) (concluding that the petitioner abandoned several postconviction claims by failing to raise them on appeal); see also Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing").

¶ 51 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 52 Affirmed.