

No. 1-10-2606

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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. 03 CR 2692
)	
RONALD THOMPSON,)	Honorable
)	Marcus R. Salone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Cunningham concurred in the judgment.

ORDER

- ¶ 1 *Held:* Second-stage dismissal of defendant's postconviction petition affirmed where the fourth amendment and ineffectiveness of counsel claims had been forfeited, and there was no prejudice in light of the overwhelming evidence of guilt.
- ¶ 2 Defendant, Ronald Thompson, appeals from an order of the circuit court of Cook County granting the State's motion to dismiss his petition for relief under the Post-Conviction Hearing Act (Act) at the second stage. 725 ILCS 5/122-1 *et seq.* (West 2010). Defendant contends he made a substantial showing of a constitutional violation of his fourth amendment rights by the warrantless entries of police into his apartment. Defendant also contends he was denied effective assistance of trial counsel by counsel's withdrawal of his *pro se* motion to quash and suppress (motion to suppress) and failure to refile and argue a motion to suppress the evidence obtained from those warrantless searches. Defendant also contends his appellate counsel was ineffective for failing to raise the ineffective assistance of trial counsel claim on direct appeal. We affirm.

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¶ 3 The record shows that on March 8, 2004, defendant was sentenced to seven years' imprisonment after a bench trial for the aggravated domestic battery of his girlfriend, Debra Kim Timmons. The victim and defendant, at the time of the incident, lived together in an apartment which was next door to defendant's mother's apartment.

¶ 4 The evidence at trial included the testimony of the victim, Ms. Timmons, who identified defendant as her attacker. Ms. Timmons testified that defendant slapped, punched, kicked, stomped on her, grabbed her by the throat, and put a pillow on her face. During the incident, she lost consciousness and awoke in the hospital emergency room. The victim suffered extensive injuries including rib fractures, a lacerated kidney, liver, and pancreas, a collapsed lung, and three broken vertebrae. Most of the victim's shoulder-length hair had been pulled from her head. The neighbor, who lived across the hall from defendant and the victim, testified to looking through the peephole of her apartment door to see a male repeatedly stomping on another person.

¶ 5 Chicago police Officer Walczak testified to finding the victim lying in the hallway outside the apartment where the victim and defendant lived. Officer Walczak found the victim bruised, bleeding, and without much of her hair. The victim told the officer that "Ron" had caused her injuries. She also told the officer "Ron" was her boyfriend. Evidence was introduced that DNA testing found traces of the victim's blood on defendant's shoes and on carpet samples from their apartment. Officer Walczak also testified as to police searches of the apartment where defendant and the victim lived after conversations with defendant's mother, Clemmie Banks, who lived in the apartment next door.

¶ 6 Defendant called Ms. Banks as a witness. Ms. Banks testified that the lease for defendant's apartment was in the name of another son, that she paid the rent, and that when defendant moved into the apartment, defendant gave her rent money. She said she had a key to the apartment. Ms. Banks also testified to allowing officers to enter the apartment on the night of the victim's attack.

¶ 7 Defendant filed a direct appeal from the judgment entered on his conviction and, in April

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2007, this court affirmed that judgment after allowing appointed counsel leave to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). *People v. Thompson*, No. 1-04-1434 (2007) (unpublished order under Supreme Court Rule 23).

¶ 8 In April 2005, defendant filed a *pro se* postconviction petition. The petition included an argument that police had violated his fourth amendment rights by searching his apartment.¹ Defendant was later appointed postconviction counsel.

¶ 9 On June 25, 2009, defendant's appointed postconviction counsel filed an amended petition contending *inter alia*: that police made warrantless entries into defendant's apartment without valid consent; that trial counsel was ineffective for withdrawing his *pro se* motion to suppress challenging the searches; and that trial counsel failed to refile a motion to suppress the evidence recovered from the warrantless searches. Defendant further argued that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel issue on direct appeal.

¶ 10 In support of this petition, postconviction counsel attached the affidavits of defendant and his mother. In his affidavit, defendant averred: that he lived with the victim in apartment 312 at 1625 West Howard Street in Chicago; that the lease for apartment 312 was in his brother's name; that defendant gave rent money to his mother who then paid the landlord; and that his mother called him for permission before she went to his apartment. Defendant further averred that he did not give his trial attorney consent to withdraw his motion to suppress.

¶ 11 In her affidavit, Ms. Banks averred: that she did not live in apartment 312; that she rented the apartment with another son; and that defendant would give her rent money for the apartment which she would then give to the landlord. Ms. Banks also averred that she had a key to apartment 312, however, before entering apartment 312, she would call defendant and ask for his permission or

¹On March 16, 2009, while defendant's *pro se* postconviction petition was still pending, he informed the circuit court that he had just been released from prison. Although not raised by the parties, we find that defendant's release from prison does not render the timely-filed petition moot. *People v. Jones*, 2012 IL App (1st) 093180, ¶¶ 5-10; *contra People v. Henderson*, 2011 IL App (1st) 090923.

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knock before entering. Ms. Banks also averred that she rarely entered defendant's apartment and, that usually, she would stand at the doorway. Ms. Banks also averred that she used defendant's apartment to store items in the spare bedroom. Additionally, Ms. Banks averred that she would not have opened the door to apartment 312 for police if they had not represented to her that they had reason to fear her son was hurt. Postconviction counsel filed a certificate of compliance pursuant to Supreme Court Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. April 26, 2012)).

¶ 12 On February 25, 2010, the State filed a motion to dismiss defendant's petition. Postconviction counsel filed a memorandum of law in opposition to the State's motion.

¶ 13 The court conducted a hearing on the State's motion to dismiss. The trial court granted the State's motion finding it was clear that defendant was the offender, and the evidence against him was overwhelming. The trial court, thus, concluded defendant did not satisfy the second prong of the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984), as to the ineffectiveness of trial counsel. The court also found that defendant, "after conferring with trial counsel, did not object" to withdrawal of his motion to suppress. Defendant appeals from the dismissal of his postconviction petition.

¶ 14 The Act sets forth a means by which a conviction may be challenged where there has been a substantial deprivation of a defendant's federal or state constitutional rights. *People v. Gacho*, 2012 IL App (1st) 091675 ¶ 16. Generally, proceedings under the Act have three stages. *Id.* At the second stage, the State may move to dismiss the petition. *People v. Graham*, 2012 IL App (1st) 102351 ¶ 31.

¶ 15 At the second stage of postconviction proceedings, the trial court must determine whether the petition, affidavits, and other supporting documentation make a substantial showing of a constitutional violation. *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). In determining whether defendant has made such a showing, all well-pleaded facts in the petition and affidavits are to be taken as true. *People v. Rissley*, 206 Ill. 2d 403, 412 (2003). However, nonfactual and nonspecific

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assertions which merely amount to conclusions are insufficient to require a hearing under the Act. *Id.* If defendant meets this threshold, the petition advances to the third stage, where an evidentiary hearing is conducted. *Edwards*, 197 Ill. 2d at 246. However, if a defendant fails to make a substantial showing of a constitutional violation, the petition is dismissed. *Id.* We review *de novo* the dismissal of a postconviction petition at the second stage. *Gacho*, 2012 IL App (1st) 091675 ¶ 16.

¶ 16 Defendant, on appeal, first argues the trial court erred in dismissing his postconviction petition because he set forth a substantial showing of a fourth amendment violation based on the unauthorized, warrantless entries of the police into his apartment. Defendant, however, forfeited his fourth amendment claim.

¶ 17 The record shows defendant filed a *pro se* motion to suppress as to the entries into his apartment. However, defendant's later appointed *pro bono* trial counsel withdrew that motion without objection by defendant, who stood by and continued with the proceedings. Additionally, defendant did not raise this fourth amendment issue posttrial.

¶ 18 Because "[a] post-conviction action is a collateral attack on a prior conviction and sentence *** [t]he scope of the proceeding is limited to constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Jefferson*, 345 Ill. App. 3d 60, 67 (2003) (quoting *Rissley*, 206 Ill. 2d at 411-12 (2003)). Issues which could have been raised but were not are considered forfeited and are barred from postconviction consideration. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005). Since defendant's claim of illegal searches is based on facts ascertainable from the record (*Jefferson*, 345 Ill. App. 3d at 70-71), he could have but did not raise this issue below and, thus, has forfeited it for review. Moreover, and contrary to defendant's contention, the affidavits he attached to his petition—namely his mother's affidavit and his own—do not preclude forfeiture where defendant's mother testified at trial to the matters presented in her affidavit. See *People v. Schaff*, 281 Ill. App. 3d 290, 296 (1996).

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¶ 19 Even if the fourth amendment issue was not forfeited and the searches were unconstitutional, as we discuss below, the evidence against defendant was overwhelming. Thus, the introduction of the evidence relating to the searches was harmless, and the trial court did not err in dismissing the petition on this basis. See *People v. Wilder*, 356 Ill. App. 3d 712, 719 (2005); *People v. Farley*, 37 Ill. App. 3d 178, 185 (1978).

¶ 20 Defendant also argues that the dismissal of his petition was erroneous because he made a substantial showing that his trial counsel was ineffective for withdrawing his *pro se* motion to suppress and for failing to refile and argue a motion to suppress the evidence obtained from the warrantless entries into his apartment. Defendant maintains: there was a reasonable probability that such a motion would have been successful; that he was prejudiced because the State relied on the evidence defendant sought to suppress (evidence as to the condition of apartment 312); and that the trial court also relied on the evidence in convicting him. Defendant further asserts his appellate counsel was ineffective for failing to raise this meritorious issue of ineffectiveness of trial counsel on direct appeal.

¶ 21 At the second stage of postconviction proceedings, a petitioner must make a substantial showing that trial counsel's performance was both deficient and that it prejudiced the defendant. *People v. Tate*, 2012 IL 112214 ¶ 19 (citing *Strickland*, 466 U.S. at 687-88).

¶ 22 The State argues that defendant cannot claim ineffective assistance of trial counsel where he agreed to the withdrawal of his *pro se* motion to suppress. We agree. Although defendant claims the record is unclear regarding this matter and that, in any event, his averment that he did not consent to his trial counsel's withdrawal of his *pro se* motion must be taken as true, we find the record positively rebuts defendant's claim and account. The record reveals that trial counsel specifically conferred with defendant as to whether to withdraw his motion to suppress, then informed the court that defendant did wish to withdraw the motion and that defendant was doing so "right now." The court then stated for the record that the motion to suppress was withdrawn. In dismissing the

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petition, the trial court confirmed that the motion to suppress had indeed been withdrawn. *Jefferson*, 345 Ill. App. 3d at 73-73 ("dismissing of a postconviction petition may be upheld when record from the original trial proceedings contradicts the allegations in the defendant's petition"). The accused may not request to proceed in one manner, then later contend on appeal that the course of action was erroneous. See *People v. Velez*, 388 Ill. App. 3d 493, 503 (2009).

¶ 23 Notwithstanding, we find defendant has not made a substantial showing that he was prejudiced by his trial counsel's failure to pursue a motion to suppress the evidence uncovered during the warrantless entries. The evidence, aside from the evidence relating to the searches, overwhelmingly supports the conclusion that the victim was attacked by defendant. The victim testified in detail as to defendant's attack. The responding officer testified that the victim, who she found severely beaten and moaning, immediately identified defendant as the offender. The victim's injuries were consistent with her description of defendant's aggression. Her blood was found on defendant's shoes.

¶ 24 Accordingly, defendant was not prejudiced by the decision not to pursue a motion to suppress. See *People v. Woods*, 2011 IL App (1st) 092908, ¶ 38. Because we can dispose of defendant's claim of ineffectiveness of counsel on the ground that he did not suffer prejudice, we need not address whether trial counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 25 In sum, we find defendant has failed to make a substantial showing of ineffectiveness of counsel under the prejudice prong of the *Strickland* test, and his claim of ineffective assistance of trial counsel is, therefore, without merit.

¶ 26 The *Strickland* two-prong test also applies to questions of ineffectiveness of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). Thus, "[a] defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced

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defendant." *Id.*

¶ 27 Since we have found defendant's underlying claim of ineffective assistance of trial counsel to be meritless, his claim of ineffective assistance of appellate counsel also fails. *Id.* at 223; *People v. Childress*, 191 Ill. 2d 168, 174-75 (2000).

¶ 28 For all of the reasons stated above, we affirm the order of the circuit court of Cook County.

¶ 29 Affirmed.