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SIXTH DIVISION
September 14, 2012

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. 02 CR 29874
)	
LAZAREK AUSTIN,)	The Honorable
)	Clayton J. Crane,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justices Garcia and Robert E. Gordon concurred in the judgment.

ORDER

¶ 1 HELD: Defendant's postconviction petition did not present a meritorious claim for ineffective assistance of appellate counsel for failing to challenge the admission of prior inconsistent statements made by a State witness; therefore, summary dismissal was proper.

¶ 2 Defendant, Lazarek Austin, appeals the summary dismissal of his *pro se* petition filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2.1 (West 2002)).

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Defendant contends the trial court erred in summarily dismissing his postconviction petition as frivolous and patently without merit where he presented a sufficient claim of ineffective assistance of appellate counsel for failing to challenge the admission of prior statements of a State witness. Based on the following, we affirm.

¶ 3 FACTS

¶ 4 We thoroughly detailed the evidence presented at trial on defendant's direct appeal. *People v. Austin*, No. 1-06-0198 (September 4, 2009) (unpublished pursuant to Supreme Court Rule 23). We, therefore, recite only those facts necessary for the disposition of this appeal.

¶ 5 Defendant was convicted of two counts of first degree murder under a theory of accountability as a result of his involvement in the January 3, 2002, robbery of the Economy Auto Repair Shop, and subsequent kidnapping and murder of two of the shop's employees. We affirmed defendant's conviction on appeal. *Id.* The trial evidence demonstrated that defendant assembled a group of men to rob the repair shop and gathered the equipment used to execute the offense. Defendant and one of his codefendants, Craig Lomax, borrowed a van from Shaun Glover to use in the robbery. On the date in question, Olaudén Slaughter and Lomax entered the repair shop and demanded money at gunpoint, restrained a number of shop employees, and ultimately left the shop with Jamie Flores, the shop owner, and Rene Tapia, an employee. Flores and Tapia were taken to the van and driven away from the shop. The trial testimony does not establish defendant's presence at the kidnapping.

¶ 6 Cornell and Lydelle Cardine, brothers, were driving around on January 3, 2002, and encountered defendant and Lomax. Lydelle stepped out of the car to talk to defendant and

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Lomax, and, when he returned, he began following a green van that had pulled out from an alleyway. Approximately five minutes later, the van stopped and Slaughter and Dwayne Harrison¹ exited. Slaughter and Harrison then entered Lydelle's car. The vehicles continued to drive until the van stopped near railroad tracks close to Kenton Avenue. At that point, Slaughter instructed Lydelle to drive the car some distance away from the van and park. Lydelle complied, and Slaughter exited the car and walked toward the van. Shortly thereafter, three or four gunshots were fired. Slaughter then reappeared in the car and instructed Lydelle to drive to a designated carwash. When the van driven by Lomax arrived at the carwash, Lomax parked and exited, and then entered Lydelle's car. The group eventually separated, but defendant and his codefendants reunited later that day to discuss the offenses.

¶ 7 The van was left at the carwash where Glover was instructed to retrieve it. Lydelle complied. When he did, Glover discovered blood inside the van.

¶ 8 On January 4, 2002, the bodies of Flores and Tapia were found, deceased, near a railroad trestle. Forensics testing revealed that DNA from the blood in the van matched that of Tapia and that a cigarette butt found on the scene at Kenton Avenue revealed DNA matching Tapia and Slaughter.

¶ 9 On August 23, 2010, defendant filed a *pro se* postconviction petition, arguing, *inter alia*, that his appellate counsel was ineffective for failing to challenge the admission of prior

¹The trial court's October 22, 2010, order dismissing defendant's postconviction petition indicates the individual's name is Harris; however, trial testimony indicates the individual's name is Harrison. We will use Harrison in this order.

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statements made by State witness Cornell. The trial court summarily dismissed the petition on October 22, 2010, finding the challenged statements were properly admitted pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Criminal Code) (725 ILCS 5/115-10.1 (West 2002)). This appeal followed.

¶ 10

DECISION

¶ 11 The Act provides a convicted defendant with a means to raise constitutional challenges to the proceedings underlying his conviction and sentence. 725 ILCS 5/122-1(a) (West 2002). A postconviction petition may be summarily dismissed by a trial court if the court determines the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2002). A postconviction petition is considered frivolous or patently without merit when the petition contains no "arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16, 912 N.E.2d 1204 (2009). "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record." *Id.* We review the summary dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶ 12

I. Ineffective Assistance Of Counsel

¶ 13 Claims of ineffective assistance of counsel, like that in this case, are governed by the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). To successfully assert an ineffective assistance claim, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at

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694. "At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17. The *Strickland* standard applies equally to claims for ineffective assistance of appellate counsel. *People v. Scott*, 2011 IL App (1st) 100122, ¶27. With respect to claims for ineffective assistance of appellate counsel, an appellate counsel's decision not to raise an issue on appeal is prejudicial only where the issue was meritorious. *People v. Easley*, 192 Ill. 2d 307, 329, 736 N.E.2d 975 (2000). "Thus, the inquiry as to prejudice requires that a reviewing court examine the merits of the underlying issue, for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." *Scott*, 2011 IL App (1st) 100122, ¶28.

¶ 14 Defendant contends that his appellate counsel was ineffective for failing to challenge the admission of Cornell's prior statements, namely, Cornell's handwritten police statement and grand jury testimony.

¶ 15 At the outset, we address the issue of waiver. The State argues defendant has waived review of his contention because he failed to object at trial to the substantive admission of Cornell's handwritten statement and grand jury testimony. The State concedes that defendant objected to the publication of the statements at trial and challenged the substantive admission of the statements in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (in order to preserve an issue for appellate review, a defendant must contemporaneously object and raise the alleged error in a posttrial motion). We find defendant sufficiently preserved

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his challenge for our review. To the extent defendant's trial objections did not precisely match the challenges raised in his posttrial motion, waiver is considered a limitation on the parties, not the court. *People v. Brookins*, 333 Ill. App. 3d 1076, 1081, 777 N.E.2d 676 (2002).

¶ 16 However, we must further address the issue of forfeiture to the extent the trial court concluded defendant's postconviction claim was waived because it was not raised on direct appeal. On direct appeal, we held that the evidence was sufficient to find defendant guilty of first degree murder of Flores and Tapia under a theory of accountability. *Flores*, No. 1-06-0198, slip op. at 25. Specifically, we found the trial testimony sufficiently established evidence from which it was reasonable to infer defendant's participation in the planning and execution of the kidnapping by obtaining the tools used in the course of the crime. *Flores*, No. 1-06-0198, slip op. at 25-26. We further found the evidence established defendant's presence during the course of the crime, namely, in the interim between the kidnapping and murder. *Flores*, No. 1-06-0198, slip op. at 27. Moreover, the trial testimony demonstrated that defendant subsequently met with codefendants the same day of the offenses. *Flores*, No. 1-06-0198, slip op. at 28. We additionally held defendant could not establish he suffered prejudice as a result of his counsel's failure to impeach two witnesses. *Flores*, No. 1-06-0198, slip op. at 40, 42.

¶ 17 It is well established that issues that could have been raised on direct appeal, but were not, are considered forfeited. *Scott*, 2011 IL App (1st) 100122, ¶21. There is no question that the claim was based on the record. Notwithstanding, the trial court considered the merits of defendant's postconviction claim. We, too, will consider the merits of defendant's claim despite forfeiture, especially where defendant contends his appellate counsel was ineffective for failing

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to raise the forfeited claim.

¶ 18 The question before us is whether prevailing norms arguably required a reasonable attorney (*People v. Cathey*, 2012 IL 111746, ¶26) to raise a challenge to the substantive admission of Cornell's handwritten police statement and grand jury testimony? Section 115-10.1 of the Criminal Code provides, in relevant part, that prior inconsistent statements are admissible as hearsay exceptions if: (1) the statement is inconsistent with the trial testimony; (2) the witness is subject to cross-examination on the statement; and (3) the statement was made under oath, or narrates, describes, or explains an event of which the witness had personal knowledge and the statement is written and signed by the witness or the witness acknowledged under oath having made the statement. 725 ILCS 5/115-10.1 (West 2002). Defendant argues that Cornell's prior statements were not admissible where: (1) the State failed to establish the inconsistency of the statements prior to their admission; (2) the State failed to establish Cornell had personal knowledge of the entirety of the statements; and (3) the statements were repetitive, thereby improperly bolstering their credibility. We address each of defendant's arguments in turn.

¶ 19 At trial, Cornell testified that he was arrested on a warrant in connection with the underlying case when he failed to appear on a subpoena. Cornell testified that, in January 2002, he had a brother named Lydelle, who had since died. Cornell further testified that, as of January 3, 2002, he knew defendant, Slaughter, and Lomax, as well as Harrison. The State then asked: "I want to bring your attention to January 3, 2002, in the early evening hours, were you driving around with your brother on that day?" Cornell responded, "I don't remember." The State further inquired, "[y]ou don't remember if you were driving around with your brother on that day?"

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Cornell responded, "[n]o, sir." The State proceeded by asking, "[n]ow [do] you remember testifying in front of the grand jury in November of 2002, right?" Cornell responded, "[y]es, sir."

¶ 20 Cornell then testified that, in November 2002, he was serving time in boot camp when the police picked him up for questioning. The State asked, "[d]id [the police] ask you questions regarding the kidnapping and shooting of two Mexican men?" Cornell responded, "[y]es, sir." The State followed up by inquiring, "[w]hen you spoke to these detectives about the kidnapping and murder of these two Mexican men, did they ask you questions regarding January of 2002 right after New Years?" Cornell responded that the police did not ask him any questions. The State further inquired, "[t]hey didn't ask you any questions about driving with your brother?" Cornell replied, "no, un-uhn."

¶ 21 Cornell proceeded to deny having told the police the following: that, in early January of 2002, he and Lydelle were driving in the area of Kedzie and Franklin; that his brother drove a Saturn and he was the passenger; that he observed defendant near an alley at the intersection of Kedzie and Franklin; that Lydelle pulled the car over to speak to defendant and Lomax; that Cornell did not hear the subsequent conversation, which took place outside of the car; that Cornell observed Lomax and defendant walk into the alley and out of sight; that Lomax then pulled out of the alley driving a green van and motioned for Lydelle to follow; that, near the area of Kedzie and Cicero, Slaughter and [Harrison] exited the van and entered Lydelle's car, instructing Lydelle to follow the van; that they drove for a few more blocks when the van pulled over at Kenton Avenue and Slaughter told Lydelle to park the car down the street in front of the van; that, once parked, Slaughter exited the car and walked toward the van, but returned to the

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car; that Cornell heard gunshots coming from the direction of the van; that Slaughter exited the car and walked toward the van again; that Cornell heard one additional gunshot; that Slaughter reentered the car and instructed Lydelle to drive to a carwash at a specified location; that, once at the carwash, Cornell observed Lomax drive the van into the carwash parking lot and exit the van; that Lomax entered the car with the others and drove from the area; and that, shortly thereafter, Lydelle stopped the car and he and Cornell exited, while Lomax drove Slaughter and Harrison away.

¶ 22 Contrary to defendant’s argument on appeal, namely, that the State improperly introduced his prior statements after Cornell merely denied remembering “driving around” with Lydelle on the date in question, the record demonstrates that Cornell offered directly contradictory responses to the State’s inquiry whether the police questioned him regarding the shooting of “two Mexican men.” Only after Cornell provided evasive responses to the events on the date in question did the State begin a line of questioning related to Cornell’s police statement. “The prior testimony need not directly contradict testimony given at trial to be considered ‘inconsistent’ [citation], and is not limited to direct contradictions but also includes evasive answers, silence, or changes in position. [Citation.]” *People v. Martinez*, 348 Ill. App. 3d 521, 532, 810 N.E.2d 299 (2004). Whether a witness’ prior testimony is inconsistent with the present testimony is a decision within the sound discretion of the trial court. *People v. Flores*, 128 Ill. 2d 66, 87-88, 538 N.E.2d 481 (1989).

¶ 23 Here, Cornell was evasive and contradictory before completely disavowing the substance of his handwritten police statement. In fact, after testifying that he did not remember “driving

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around” with his brother on the date in question and providing contradictory responses to whether the police asked him about the underlying murders, Cornell testified that he spoke to an Assistant State’s Attorney (ASA) after having been questioned by the police. Cornell admitted that the ASA memorialized his statement in writing, and that he signed each page of the statement and initialed corrections made to the statement. Cornell, however, testified that his statement contained information provided to him by the police. Cornell said that the police brought him to the police station under the guise of assisting them with a case involving an individual that they believed had something to do with Cornell’s brother’s murder. The police “jotted down statements to remember” for when he spoke to the ASA. According to Cornell, he agreed to cooperate once the police forced him to take a lie detector test and threatened his placement in boot camp. Cornell testified that the entire statement was fabricated except for his name and birth date. At that point, the State read Cornell’s police statement line by line, allowing him to confirm the inaccuracies. Cornell further testified that he repeated the same fabrication when he testified before the grand jury. The State presented Cornell’s grand jury testimony. Cornell recalled having given 93 of the 121 answers and testified that he was unable to recall the remaining answers.

¶ 24 We, therefore, conclude that Cornell’s handwritten statement and grand jury testimony were admissible as inconsistent with his evasive and contradictory trial testimony. As a result, defendant’s ineffective assistance claim is not meritorious on this basis and, therefore, he could not prove resulting prejudice for his appellate counsel’s failure to raise the issue on appeal.

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¶ 25 Turning to defendant's second argument, we address whether Cornell's handwritten statement was based on personal knowledge. Defendant acknowledges that Cornell's grand jury testimony need not be based on personal knowledge pursuant to section 115-10.1 of the Criminal Code. See 725 ILCS 5/115-10.1 (West 2002). Defendant, however, contends "key portions" of Cornell's handwritten statement were not based on personal knowledge and, therefore, were not admissible hearsay exceptions under the statute. Specifically, defendant takes issue with that portion of Cornell's statement providing he learned from Lydelle that Lomax wanted them to follow the van, and that, after the date in question, he "read about" two men who were kidnapped from a garage or auto repair shop and murdered and that it happened on Kenton and involved a green van.

" 'Personal knowledge' has been defined by this court *** to mean having actually perceived the events that are subject of the statement. Excluded from this definition are statements made to the witness by a third party, where the witness has no firsthand knowledge of the event that is the subject of the statements made by the third party. [Citation.] This includes a statement made to a witness by a third party that is an admission; for so long as the witness lacks 'personal knowledge' of the subject of the statement, the statement is not admissible under this exception to section 115-10.1. [Citation.] In other words, to satisfy the personal-knowledge requirement of the statute, 'the witness must have observed, and not merely heard, the subject matter underlying the statement.' [Citation.]" *People v. Morgason*, 311 Ill. App. 3d 1005, 1011, 726 N.E.2d 749 (2000).

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¶ 26 There is no doubt the first challenged statement was not based on Cornell's personal knowledge. We, however, conclude the admission of the statement was harmless error. The substance of the statement provided that defendant and Lomax instructed Lydelle to follow the van. Even if the statement had not been admitted, Cornell further provided, in his handwritten statement and in his grand jury testimony, that codefendants repeatedly motioned and told Lydelle to follow the van until the van stopped near railroad tracks at Kenton Avenue. At that point, Lydelle was instructed to park the car some distance in front of the van. Cornell had personal knowledge of these events. Accordingly, Cornell's additional statements essentially provided the substance of the improperly admitted statement, in that he followed the van in a car driven by Lydelle.

¶ 27 To the extent that some or all of the second statement, namely, that Cornell heard a news story that a green van was involved in the kidnapping and murder of two men found near Kenton, was not based on personal knowledge, we similarly find the admission of the statement was harmless error. In fact, Cornell independently provided evidence, through his handwritten statement and grand jury testimony, that he personally observed codefendants drive a green van with stripes to an area near railroad tracks at Kenton Avenue and that he heard four gunshots coming from the direction of the parked van. Additional trial testimony established that defendant planned the robbery of the repair shop and that the victim's were kidnapped when codefendants were not satisfied with what they found while at the shop. Moreover, forensics evidence demonstrated the deceased victims were found near a railroad on Kenton Avenue. Accordingly, the substance of the statement was otherwise admitted.

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¶ 28 Defendant, therefore, has failed to demonstrate an arguably meritorious claim for ineffective assistance of appellate counsel where no prejudice resulted from the admission of the statements that were not based on Cornell's personal knowledge. Unlike the cases cited by defendant (*People v. McCarter*, 385 Ill. App. 3d 919, 930, 897 N.E.2d 265 (2008); *Morgason*, 311 Ill. App. 3d at 1011-13), neither of the challenged statements established any participation by defendant in the murders.

¶ 29 Turning to defendant's final challenge to the admissibility of his prior statements, defendant contends the statements were duplicitous and improperly bolstered the credibility of the statements. Defendant's contention has been repeatedly rejected. *People v. White*, 2011 IL App (1st) 092852, ¶51-¶54; *People v. Santiago*, 409 Ill. App. 3d 927, 932-33, 949 N.E.2d 290 (2011); *People v. Maldonado*, 398 Ill. App. 3d 401, 423, 922 N.E.2d 1211 (2010); *People v. Thomas*, 354 Ill. App. 3d 868, 882, 821 N.E.2d 628 (2004). Unlike the general prohibition against the admission of prior consistent statements, prior inconsistent statements can be admitted as substantive evidence pursuant to section 115-10.1 of the Criminal Code as a "vital tool to challenge witness credibility by contradicting and discrediting trial testimony." *White*, 2011 IL App (1st) 092852, ¶52. Therefore, "[w]hile a blanket prohibition (with limited exceptions) makes sense for prior consistent statements, applying that same general bar to inconsistent statements that are consistent with each other would frustrate the legislature's goal of discouraging recanting witnesses. [Citation.] A witness could be questioned as to prior inconsistent statements, but after one is admitted as substantive evidence, the witness would be free to deny other prior statements without a risk that those statements would be admitted as

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substantive evidence. We conclude that the underlying rationale for the rule against prior consistent statements does not justify obstructing the operation of section 115-10.1." *Id.* at ¶53. Accordingly, the law on this issue is established and defendant cannot demonstrate an arguable claim for ineffective assistance of appellate counsel based on the admission of both prior inconsistent statements.

¶ 30

II. Mittimus

¶ 31 The State contends defendant's mittimus must be corrected to accurately reflect his conviction of two counts of first degree murder. The record reflects that defendant was convicted of two counts of first degree murder and subsequently sentenced to a mandatory term of natural life in prison. "The oral pronouncement of the judge is the judgment of the court, and the written order of commitment is merely evidence of that judgment. [Citation.] When the oral pronouncement of the court and the written order are in conflict, the oral pronouncement controls." *People v. Jones*, 376 Ill. App. 3d 372, 395, 876 N.E.2d 15 (2007). Pursuant to Supreme Court Rule 615(b)(1) (eff. Aug. 27, 1999), we order the clerk of the circuit court to make the necessary corrections. *Id.*

¶ 32

CONCLUSION

¶ 33 We conclude defendant's postconviction petition failed to present an arguable claim for ineffective assistance of appellate counsel and, therefore, the trial court's summary dismissal of the petition was proper. We instruct the clerk to correct defendant's mittimus.

¶ 34 Affirmed; mittimus corrected.