2012 IL App (1st) 110412-U

FIFTH DIVISION
August 3, 2012

No. 1-11-0412

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	05 CR 18294
	)	
EDWARD LEAK,	)	
	)	Honorable
Defendant-Appellant.	)	Diane Cannon,
	)	Judge Presiding.

JUSTICE McBRIDE delivered the judgment of the court.
Presiding Justice Epstein and Justice Howse concurred in the judgment.

O R D E R

¶ 1 HELD: The trial court properly dismissed defendant's postconviction petition as frivolous and patently without merit at the first stage of postconviction proceedings.

¶ 2 Defendant Edward Leak appeals the first-stage dismissal of his postconviction petition, arguing that the trial court erred in finding the petition to be frivolous and patently without merit because he raised the gist of a meritorious claim of ineffective assistance of trial counsel and the violation of his right of confrontation. Specifically, defendant contends that his trial counsel was

ineffective for failing to present evidence to the trial court about the bias of one of the State's witnesses, Charmain Ankum, premised on a lawsuit concerning the victim's life insurance policy and the trial court violated defendant's confrontation right by not allowing him to cross-examine her about this bias.

¶ 3 Following an October 2007 jury trial, defendant was found guilty of the first degree murder of Fred Hamilton and that defendant had procured another to commit that murder for money or something of value. The trial court sentenced defendant to a term of 75 years. The evidence presented at trial was discussed at length in this court's opinion on defendant's direct appeal, *People v. Leak*, 398 Ill. App. 3d 798 (2010), and we will only discuss the facts necessary for the disposition of defendant's current postconviction petition.

¶ 4 The record on appeal consists only of the common law record for defendant's postconviction proceedings and has not been supplemented with any transcripts from defendant's trial. Accordingly, since we are unable to review the transcripts of defendant's trial, including the challenged witness testimony, our examination of the relevant testimony is limited to the facts as stated in this court's previous opinion and the trial court's order.

¶ 5 Defendant was a Chicago police officer and the nephew of the owner of Leak and Sons funeral home. Defendant also worked at the funeral home. Fred Hamilton was employed as a dispatcher at the funeral home from 1996 to 2003. Hamilton left his position at the funeral home around the time other employees began to investigate missing funds. In January 2003, Hamilton obtained a $500,000 life insurance policy in which defendant was named as the beneficiary. The parties stipulated that an employee from the insurance agency would have testified that she

received a claim for benefits on Hamilton's life insurance policy in March 2004 from defendant. Defendant contacted her approximately 11 times between March 5, 2004, and August 5, 2004, regarding the claim status.

¶ 6 Alfred Marley testified that he pled guilty for his involvement in Hamilton's murder in exchange for a sentence of 27 years. In January 2004, Marley was contacted by John Brown, who offered to pay Marley $1,500 for his help in performing a hit on someone. Brown told Marley the hit was for a police officer named Ray and the money was to come from the officer. Brown also mentioned an insurance policy. Marley agreed to help and later learned the intended victim was Hamilton.

¶ 7 On the day of the murder, February 3, 2004, Marley and Brown went to a location near Hamilton's girlfriend's job. They found the girlfriend's vehicle and Marley punctured the tire. He and Brown then waited for Hamilton. While they waited a maroon or red car pulled up, Brown said that was the police officer in the car. Marley was unable to see the person's face. A friend of Brown's joined them as well. Brown entered the maroon car and left while Marley stayed with Brown's friend. Brown soon called and told Marley to come to the alley near Hamilton's girlfriend's vehicle. As Marley went there, he heard several shots. He moved toward the victim and saw Brown moving in a nearby gangway. Marley then shot Hamilton two or three times. Marley learned that Brown had been arrested that night, but Marley was not arrested until April 2005.

¶ 8 The State also presented the testimony of Assistant State's Attorney (ASA) Robert Heilingoter. ASA Heilingoetter interviewed defendant, who agreed to speak with the ASA after

receiving his *Miranda* rights. Defendant admitted that he knew Hamilton and said they had a falling out in June 2003. He believed that Hamilton had two cars belonging to either defendant or the funeral home. Defendant also admitted that he was the beneficiary of a $500,000 life insurance policy on Hamilton, but denied making a claim after Hamilton died.

¶ 9 Defendant initially denied knowing John Brown or having received any calls from Brown. ASA Heilingoetter told defendant that the police had recovered a cell phone from Brown at the time of his arrest and found numerous phone calls to a phone number the police believed belonged to defendant. Defendant admitted the phone number was his and that he knew Brown. Defendant said that Hamilton had introduced him to Brown. The ASA confronted defendant with the fact that phone records showed many calls between Brown and defendant on the day of the murder, defendant responded that could not elaborate. Defendant said he was at his girlfriend's home at the time of the murder and she lived approximately 50 blocks from the site of the homicide. The ASA told defendant the cell phone records indicated that defendant's cell phone was hitting a cell tower near the location of the homicide, not near defendant's girlfriend's residence. Defendant declined to memorialize his statement. *Leak*, 398 Ill. App. 3d at 801-15.

¶ 10 At trial, the State presented the testimony of Charmain Ankum. Ankum's testimony was detailed in *Leak* as follows.

> "Charmain Ankum, Corey Ankum's sister, testified that she was the victim's girlfriend and that they had one child together, Jaylin Hamilton.[1] In the summer of 2003, Charmain learned that

[1] We note that Jaylin Hamilton's name is also spelled Jaelin Hamilton in the record.

the victim was fired from the funeral home and she testified that he thereafter began to act 'paranoid' and 'scared of certain things,' such as 'phone calls' and 'people.' Around Thanksgiving of 2003, Charmain saw defendant circling the house in which she and the victim lived. She recognized defendant's vehicle and its personalized license plates, which said 'drop cop,' because on several occasions she had seen defendant getting out of that car in front of the funeral home where he and the victim both worked. She related this information to the victim.

On February 3, 2004, Charmain spent the day with the victim at the daycare center where she worked. At approximately 6:30 p.m., Charmain and the victim were leaving the daycare center when Charmain noticed a brown van with a beige stripe and a broken headlight parked across the street from her vehicle. Charmain could not see inside of the van because it had tinted windows. Charmain testified that it was dark outside at the time and that there was snow on the ground. When Charmain and the victim got to her car, Charmain noticed 'an antenna of some sort' sticking out of the vehicle's front passenger tire. The victim also looked at the tire and then he and Charmain walked back to the daycare center and called for a tow truck. When the tow truck

company called to say the tow truck was in the area, Charmain and the victim left the daycare center and the victim asked Brian Miller, who also worked at the daycare center, to accompany them to the car because the victim was concerned about the brown van. The victim got into the tow truck and rode to Charmain's car while Charmain and Miller walked in that direction. The victim pulled the car into the street so it could be loaded onto the tow truck and then Charmain observed the brown van circling the block and asked the victim if he had seen it as well. The victim asked Charmain if she could see the license plates, but she could not because the van was too far away. The victim then walked over and stood in front of Charmain and Miller.

The victim subsequently looked down the block and then told Miller and Charmain to 'walk away' and 'run' because 'it doesn't look right.' A man then came from a nearby gangway, bumped into Charmain, and went directly toward the victim while pulling a black gun out of his pocket. Charmain described this person as wearing a black ski mask that covered his face, gloves, mustard colored pants, and a black jacket. The armed man fired three or four shots at the victim as he chased the victim around the tow truck. The shooter knelt over the victim, who was trying to

shield himself by climbing under a car, and then rolled the victim onto his back. The victim was saying, 'no,' 'don't shoot me, don't do this,' and 'just go back and tell him I'm sorry,' and then the armed man shot him again. Charmain and Miller turned and ran away and Charmain turned and saw the man shooting the victim again. Charmain called the police as she was running away and heard more shots when she got to the corner of the street. She hailed a cab and was driven back to the scene, where the police had already arrived. The paramedics were trying to resuscitate the victim, but he died at the scene. Charmain was later taken to the police station, where she related these events to the police. She also identified the clothing worn by the man whom she saw shoot the victim.

On cross-examination, Charmain testified that she only saw one person shooting the victim but that she was on the side of a building when some of the shots were being fired and that she 'wasn't really looking that way' because she was on the phone calling the police. She never saw the victim with a person named John Brown. Charmain also testified that the funeral home where defendant worked is several blocks away from the daycare center. After the victim's death, Charmain learned that there was an

> insurance policy on the victim and that defendant was the beneficiary. Charmain further testified that the victim drove various cars, including a Lexus, a Mercedes, and a Range Rover. After the victim died, Charmain also learned that the victim had obtained a life insurance policy on himself that would pay for the note on one of his vehicles." *Leak*, 398 Ill. App. 3d at 802-03.

¶ 11 Brian Miller and Ernest Sanders, the tow truck driver, testified to substantially the same sequence of events as Ankum. *Leak*, 398 Ill. App. 3d at 803-05.

¶ 12 Defendant raised several issues on direct appeal. In one of those issues, defendant argued that "the trial court erred by prohibiting him from cross-examining Charmain regarding her knowledge and interest in an alleged lawsuit filed by the victim's family seeking the proceeds of the life insurance policy that defendant held on the victim." *Leak*, 398 Ill. App. 3d at 821. Our opinion then discussed defendant's argument and Ankum's testimony in the record.

> "The record shows that during her cross-examination, defense counsel asked Charmain if after the victim's death she became aware that there was a life insurance policy covering the victim. Charmain responded in the affirmative. Counsel then asked Charmain if she also learned that defendant was the beneficiary of that policy, and Charmain responded that she learned this information after the victim died. Counsel then attempted to ask Charmain if she believed that Jaylin, the son she had with the

victim, might have some right to the proceeds of that policy. The trial court sustained the prosecutor's objection to this question on the grounds of relevance.

Subsequently, defense counsel again raised the issue and told the court that the bias of any witness was not collateral and was a proper subject for cross-examination. Counsel then argued:

> 'We tried to establish that since this incident, Miss Ankum's minor son, who was the offspring of Fred Hamilton, has a matter pending to challenge Mr. Leak's right to the insurance proceeds. And if he's convicted, her son will become very wealthy. He will get maybe half a million dollars. And I think that goes to her bias in testifying. We wanted to establish that. That would be our offer of proof.'

The trial court responded to counsel's argument and explained its reasoning for limiting cross-examination on this matter:

> 'For the record, that not only is collateral, but there is no evidence that she has changed her testimony from the time that she spoke to the police and the time that she found out about the existence

> of the life insurance policy that she testified to she was unaware of and her son nor her were the beneficiaries of. So, your objection is noted.' "
>
> *Leak*, 398 Ill. App. 3d at 821-22.

¶ 13 Defendant had contended on appeal that Ankum had a financial motive to testify against defendant because if defendant was convicted and became ineligible to receive the life insurance benefits, Ankum's son, as Hamilton's heir, would be eligible for the benefits. He asserted that the trial court deprived him of his right to cross-examine Ankum about this alleged bias. *Leak*, 398 Ill. App. 3d at 822. This court held that the trial court did not abuse its discretion. We found that the offer of proof was "lacking." *Leak*, 398 Ill. App. 3d at 822.

> "For example, defendant offered no evidence to substantiate his claim that the victim's son had filed a lawsuit challenging defendant's right to the proceeds of the insurance policy. Defendant did not provide a case name or number associated with this alleged lawsuit. Defendant also did not explain how the victim's son might have a right to the proceeds of the insurance policy given that the policy did not name him as a beneficiary. We are aware of no authority, and none has been provided by defendant, which would allow the victim's son to step into the shoes of the named beneficiaries and collect on that policy. Even if defendant had offered the above explanations, Charmain's son, not

> Charmain, would be the person who stood to benefit financially from defendant's conviction. Moreover, defendant offers nothing to rebut the trial court's conclusion that there was no evidence establishing that Charmain had changed her testimony in any way from the time she spoke to the police after the murder until when she discovered that defendant held a life insurance policy on the victim. Under these circumstances, we find that any alleged incentive on Charmain's part to testify falsely against defendant based upon this alleged lawsuit was simply too remote and uncertain." *Leak*, 398 Ill. App. 3d at 822-23.

¶ 14 This court in *Leak* also found that defendant was not denied his right to confront Ankum.

> "Our review of the record in this case establishes that defendant was given more than sufficient opportunity to confront, cross-examine, and test Charmain's credibility as a witness. The jury was informed that Charmain dated the victim, that the two had a child together, and that Charmain knew that defendant was the person who allegedly hired two men to murder her boyfriend. The jury was also told that prior to her testimony at defendant's trial, Charmain became aware that defendant obtained an insurance policy on the victim that listed defendant as the beneficiary and defendant's children as successor beneficiaries. These facts

> sufficiently placed before the jury the issue of Charmain's potential bias and credibility as a witness. The trial court placed no other meaningful restriction on defendant's cross-examination of Charmain and therefore, under these circumstances, we cannot say that the trial court's ruling violated defendant's right to confront the witnesses against him." *Leak*, 398 Ill. App. 3d at 824.

¶ 15 On November 24, 2010, defendant filed his postconviction petition. This initial filing consisted of an affidavit from defendant's postconviction counsel asserting that (1) defendant was denied his right to confrontation and cross-examination when the trial court refused to permit defendant to inquire of Ankum whether she or her family members expected to benefit financially from Hamilton's death and (2) defendant was denied his right to confrontation when the trial court permitted the State to introduce hearsay statements of his codefendant John Brown, who was tried simultaneously with defendant with a separate jury.

¶ 16 Defendant later filed a first amended postconviction petition with exhibits. The amended petition asserted that defendant received ineffective assistance of trial counsel because trial counsel failed to present documentation that a case was pending at the time of trial in the chancery division of the circuit court, brought by State Farm Insurance Company and "Jaelin Hamilton, a minor" was named as a defendant. The amended petition also alleged that defendant was deprived of his right of confrontation and cross-examination by the trial court's refusal to allow him to examine Ankum about her knowledge of and bias toward defendant, including "her aspirations for her son Jaelin Hamilton's receiving a large sum of money upon the conviction of

the defendant for the murder of Fred Hamilton."

¶ 17 Defendant attached three exhibits to his amended petition. Exhibit A was an order for deposit, entered April 1, 2005, in the chancery case, showing that the circuit court ordered $520,516.09, comprised of a life insurance benefit, interest and premium refund. The caption stated that State Farm Insurance Company was the plaintiff and included "Jaelin Hamilton, a minor" as a defendant. Exhibit B was an "agreed order of distribution," entered May 1, 2008, in the same chancery case stating that 50% of the held funds plus interest were "payable to John Tellis and Charmaine Ankum, Guardian of the Estate of Jaelin Hamilton, a minor." Exhibit C was a disbursement order, entered May 8, 2008, in the chancery case to disburse $279,759.32, to "John Tellis and Charmaine Ankum, Guardian of the Estate of Jaelin Hamilton, a minor."

¶ 18 On January 13, 2011, the trial court entered its written order dismissing defendant's amended postconviction petition as frivolous and patently without merit. Specifically, the trial court found that defendant had previously raised the issues in his petition on direct appeal and his claims were barred as *res judicata*.

> "On direct appeal, the appellate court determined that the issue regarding the prohibited cross-examination regarding Charmain Ankum's bias was without merit on two grounds: (1) [defendant] provided no documentation that a lawsuit was pending or that Jaelin Hamilton was a beneficiary; and (2) Ankum's testimony had not changed in any way from the time of the incident and trial. While [defendant] has attached to the instant petition,

> proof that Jaelin was a beneficiary and that a lawsuit was filed, the claim is still without merit since Ankum's statement to the police following the incident was the same as her testimony. Therefore, the trial court's reasoning, which was affirmed by the appellate court, for prohibiting the cross-examination, remains the same."

¶ 19 This appeal followed.

¶ 20 On appeal, defendant argues that his claims are not barred by *res judicata* because his petition established that a lawsuit was pending when Ankum testified, the exhibits attached to the petition were available to defense counsel and that these matters have never been presented to the trial court. Defendant maintains that his petition set forth claims of ineffective assistance of counsel and a violation of his right to confrontation.

¶ 21 The Illinois Post-Conviction Hearing Act (Post-Conviction Act) (725 ILCS 5/122-1 through 122-8 (West 2008)) 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 2008); *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 which could have been presented on direct appeal, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-47 (2005); *Barrow*, 195 Ill. 2d at 519. The standard of review for dismissal of a postconviction petition is *de novo*. *Coleman*, 183 Ill. 2d at 389.

¶ 22 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 2002). A petition is frivolous or patently without merit only if it has no arguable basis in law or fact. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law or fact if it is "based on an indisputably meritless legal theory," such as one that is "completely contradicted by the record," or "a fanciful factual allegation," including "those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 16-17.

¶ 23 If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. 725 ILCS 5/122-2.1(a)(2) (West 2002). At the dismissal stage of a postconviction proceeding, the trial court is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity that would necessitate relief under the Act. *Coleman*, 183 Ill. 2d at 380. At this stage, the circuit court is not permitted to engage in any fact-finding or credibility determinations, as all well-pleaded facts that are not positively rebutted by the original trial record are to be taken as true. *Coleman*, 183 Ill. 2d at 385.

¶ 24 Defendant contends that the trial court erred in dismissing his postconviction petition

because he presented arguable claims of ineffective assistance of trial counsel and a violation of his right of confrontation. However, both of these issues were previously raised on appeal and rejected. The violation of defendant's right of confrontation was explicitly raised on direct appeal and is barred by *res judicata*. On direct appeal, this court concluded that defendant was given a sufficient opportunity to question Ankum about any potential bias and the jury was made aware that Ankum had a child with Hamilton and that Hamilton held a life insurance policy in which defendant was the beneficiary. *Leak*, 398 Ill. App. 3d at 824.

¶ 25 Defendant previously raised a claim challenging his right to question Ankum about her possible bias based on her son as a beneficiary to Hamilton's life insurance policy, but now presents this issue under a different theory, ineffective assistance of counsel. "Defendant cannot obtain post-conviction relief merely by rephrasing a claim which was previously addressed on direct appeal." *People v. Enis*, 194 Ill. 2d 361, 379 (2000). Defendant attempts to avoid *res judicata* by pointing out that this court on direct appeal found the offer of proof to be "lacking" because the offer failed to provide any information, including case number or name, about Ankum's son's status as a beneficiary of Hamilton's life insurance policy. However, this court also noted that Ankum's son, not Ankum herself, was the potential beneficiary and held that defendant offered "nothing to rebut the trial court's conclusion that there was no evidence establishing that Charmain had changed her testimony in any way from the time she spoke to the police after the murder until when she discovered that defendant held a life insurance policy on the victim." *Leak*, 398 Ill. App. 3d at 823. Accordingly, this court has already considered and rejected the issue of Ankum's alleged bias based on her son's status as beneficiary of Hamilton's

life insurance policy and the claim is barred as *res judicata*.

¶ 26 However, even if defendant's claim of ineffective assistance of counsel was not barred by *res judicata*, defendant has not shown how he was arguably prejudiced by his trial counsel's failure to present documentation of the pending chancery case.

¶ 27 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). 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.

¶ 28 At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be dismissed if: (1) counsel's performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*,

234 Ill. 2d at 17.

¶ 29 Defendant argues that his trial counsel was ineffective for failing to investigate and discover documentation of the pending chancery case with Ankum's son named as a defendant. As support, defendant attached three exhibits to his amended postconviction petition. We first note that the orders comprising exhibits B and C were entered after defendant's trial and could not have been discovered by trial counsel and presented at trial.

¶ 30 Defendant contends that "there are two general aspects to the question of attorney representation which may be examined under the general rubric 'incompetence'. These are 1) the duty to investigate, and 2) adequacy of trial performance." Defendant later quotes the two-pronged *Strickland* test, but continues to assert that the duty to investigate is its own basis for an ineffective assistance of counsel claim. Defendant has misapprehended the *Strickland* test for ineffective assistance of counsel. A lapse in an attorney's duty to investigate is part of the first prong under *Strickland*, deficient performance. See generally *Wiggins v. Smith*, 539 U.S. 510, 521-23 (2003) ("In assessing counsel's investigation, we must conduct an objective review of their performance, measured for 'reasonableness under prevailing professional norms,' *Strickland*, 466 U.S., at 688, which includes a context-dependent consideration of the challenged conduct as seen 'from counsel's perspective at the time' ").

¶ 31 Defendant fails to argue how he was arguably prejudiced by his trial counsel's failure to investigate and present documentation of the pending chancery case. Defendant offers no discussion concerning whether there is a reasonable probability that the outcome of his trial would have been different. Since this is a required component of an ineffective assistance of

counsel claim under *Strickland*, by failing to argue any prejudice, defendant's claim of ineffective assistance of counsel fails.

¶ 32 Further, this court on direct appeal concluded that there was no evidence that Ankum's testimony changed in any way from the day of the incident until she testified at trial. Thus, "any alleged incentive on Charmain's part to testify falsely against defendant based upon this alleged lawsuit was simply too remote and uncertain." *Leak*, 398 Ill. App. 3d at 823. Additionally, the State presented two additional witnesses at trial whose testimony corroborated Ankum's sequence of events. In *Leak*, we recounted that both Miller, Ankum's coworker, and Sanders, the tow truck driver, were present when Hamilton was shot and gave substantially similar testimony to Ankum. *Leak*, 398 Ill. App. 3d at 803-05. Moreover, Ankum's testimony did not identify or implicate defendant in Hamilton's death.

¶ 33 Accordingly, we affirm the trial court's dismissal of defendant's postconviction petition as frivolous and patently without merit.

¶ 34 Affirmed.