2010 IL App (2d) 101262-U
No. 2-10-1262
Order filed February 22, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. FREDDIE DE LA SANCHA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Kane County. No. 05-CF-1568 Honorable Thomas E. Mueller, Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court, with opinion.
Justices Burke and Schostok concurred in the judgment and opinion.

ORDER

Held: Trial court's second-stage dismissal of defendant's postconviction petition alleging ineffective assistance of appellate counsel was proper because trial testimony did not establish that defendant was entitled to a withdrawal instruction.

Held: Trial court's third-stage dismissal of defendant's postconviction petition, alleging ineffective assistance of trial counsel for failure to call defendant's sister to refute the prosecutor's argument that defendant fled, was not manifestly erroneous, because her testimony could have also supported the prosecutor's argument.

¶ 1 Freddie De La Sancha appeals the trial court's dismissal of his amended postconviction petition. Defendant argues that the trial court erred by dismissing his amended postconviction

petition because: (1) trial counsel was ineffective by failing to request the pattern jury instruction on withdrawal and appellate counsel was ineffective by failing to raise the issue on direct appeal; and (2) trial counsel was ineffective by failing to investigate and present credible evidence that defendant did not flee to Mexico. We affirm.

¶ 2 I. BACKGROUND

¶ 3 The facts are well known by all parties and have been extensively recounted by this court in its Rule 23 order affirming defendant's conviction on direct appeal. *People v. De La Sancha*, No. 2-07-0225 (2009) (unpublished order under Supreme Court Rule 23). Therefore, only those facts necessary for a complete understanding of the issues before this court appear below. Defendant was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2004), and sentenced to 23 years' imprisonment. On December 23, 2009, defendant filed a petition for postconviction relief. After his petition survived the first stage of the postconviction proceeding, defendant filed an amended petition. Defendant alleged that: (1) trial counsel was ineffective by failing to request the pattern jury instruction on withdrawal and appellate counsel was ineffective by failing to raise the issue on direct appeal; and (2) trial counsel was ineffective by failing to investigate and present credible evidence that defendant did not flee to Mexico. The State filed a motion to dismiss.

¶ 4 Regarding defendant's first allegation, the trial court granted the State's motion to dismiss during the second stage of the proceeding. Regarding defendant's second allegation, the trial court granted the State's motion to dismiss after an evidentiary hearing during the third stage of the proceeding. Defendant appealed.

¶ 5 II. ANALYSIS

¶ 6 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2010)) provides a procedural mechanism by which a defendant may challenge his conviction by contending that he was substantially deprived a federal or state constitutional right in the proceeding that resulted in his conviction. 725 ILCS 5/122-1(a) (West 2010); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). A defendant begins a postconviction proceeding by filing a petition in the trial court in which the conviction took place. 725 ILCS 5/122-1(b) (West 2010). A postconviction proceeding is limited to constitutional issues that have not been, or could not have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124.

¶ 7 In noncapital cases, postconviction proceedings may consist of up to three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). During the first stage, a petition must present "the gist of a constitutional claim." *Harris*, 224 Ill. 2d at 126. The trial court must dismiss petitions that are frivolous and patently without merit. *Id.* If the petition advances to the second stage, an indigent defendant may be appointed counsel. 725 ILCS 5/122-4 (West 2010); *People v. Perkins*, 229 Ill. 2d 34, 42 (2007). Counsel may file an amended postconviction petition and the State may move to dismiss it. 725 ILCS 5/122-4, 122-5 (West 2010); *Pendleton*, 223 Ill. 2d at 472. A petition that is not dismissed at the second stage proceeds to the third stage where the trial court conducts an evidentiary hearing. *Harris*, 224 Ill. 2d at 126.

¶ 8 At both the second and third stages of postconviction proceedings, the defendant must make substantial showing of a constitutional violation. *Pendleton*, 223 Ill. 2d at 473. At the second stage of the proceedings, all well-pleaded facts not positively rebutted by the trial record are taken as true. *Id*. The trial court does not engage in fact-finding or credibility determinations at the dismissal stage; rather, such determinations are made at the third, evidentiary stage. *People v. Coleman*, 183 Ill. 2d

366, 385 (1998). We review a trial court's dismissal of a postconviction petition at the second stage *de novo*. *Pendleton*, 223 Ill. 2d at 473.

¶ 9 Defendant argues that the trial court erred by dismissing his amended postconviction petition at the second stage because trial counsel provided ineffective assistance by failing to request the pattern jury instruction on withdrawal. The State argues that defendant has forfeited this issue because he failed to raise it on direct appeal. We agree with the State. A postconviction petitioner forfeits issues that could have been raised on direct appeal, but failed to do so. See *People v. Scott*, 194 Ill. 2d 268, 274 (2000). Because defendant failed to raise this issue in his direct appeal, it is forfeited here.

¶ 10 Defendant also argues that appellate counsel was ineffective by failing to raise the issue that trial counsel was ineffective by failing to tender the withdrawal instruction at trial. Claims of ineffective assistance of counsel are resolved under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test also applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). Under *Strickland*, a defendant must establish that: (1) "counsel's representation fell below an objective standard of reasonableness"; and (2) counsel's "deficient performance prejudiced" the defendant. *Strickland*, 466 U.S. at 688. 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. Because both prongs must be established, a case may be disposed of on the ground of lack of sufficient prejudice, and the court need not consider the quality of the attorney's performance. *Strickland*, 466 U.S. at 697.

¶ 11 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 defendant. *Rogers*, 197 Ill. 2d at 223. Appellate counsel is not required to raise every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). "Thus, the inquiry as to prejudice requires that the reviewing court examine the merits of the underlying issue [citation] for a defendant does not suffer prejudice from appellate counsel's failure to raise a nonmeritorious claim on appeal." *Simms*, 192 Ill. 2d at 362. Appellate counsel's choices concerning which issues to pursue are entitled to substantial deference. *Rogers*, 197 Ill. 2d at 223. Trial counsel's choice of jury instructions, and her decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy. *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). Therefore, trial counsel's decision not to tender a jury instruction can support a claim of ineffective assistance of counsel only if that choice is objectively unreasonable. *Sims*, 374 Ill. App. 3d at 267.

¶ 12 Defendant argues that appellate counsel was deficient by failing to argue that trial counsel was ineffective because she failed to request the pattern jury instruction on withdrawal. The pattern jury instruction on withdrawal provides, in pertinent part:

> "A person is not legally responsible for the conduct of another, if, before the commission of the offense charged, he terminates his effort to promote or facilitate the commission of the offense charged and [(wholly deprives his efforts of effectiveness in the commission of that offense) *** [or] (makes proper effort to prevent the commission of that offense)]." Illinois

Pattern Jury Instructions, Criminal, No. 5.04 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 5.05). See also, 720 ILCS 5/5-2(c)(3) (West 2004).

¶ 13 At trial, defendant testified as follows. On July 3, 2005, at 10 p.m., defendant and his friend Raja Borja, went to the Azteca de Oro (Azteca) nightclub. At some point during the evening Raja told defendant "about a fight that was probably going to occur." Later, Rafa told defendant that he and the victim were going outside to fight. Defendant followed Rafa outside where Rafa argued with the victim. The victim asked defendant, "What the F are you doing here?" Defendant testified, "I just told [the victim] don't put me in here, it was nothing related to me, I was just watching." The victim pushed defendant, defendant pushed the victim back and he fell down. The victim stood up and Rafa and the victim began punching each other. The victim fell and kicked Rafa. Rafa kicked him back. Defendant testified that Rafa "beat" the victim and that "I seen that [the victim] had enough, so I tried to stop Rafa." Defendant testified that he never punched or kicked the victim.

¶ 14 In this case, the record indicates that trial counsel's decision not to tender the withdrawal instruction was one of sound trial strategy. If trial counsel had raised the issue of withdrawal, it would have been an admission that defendant was originally accountable for murder. *People v. Lykins*, 65 Ill. App. 3d 808, 812 (1978) (The withdrawal instruction does not apply unless one becomes originally accountable under section 5-2 of the Code). See also, IPI Criminal 4th No. 5.05 (2000) (The withdrawal instruction admits that a defendant initially "promote[d] or facilitate[d] the commission of the offense charged".) In this case, the instruction at issue was inconsistent with defendant's testimony because he essentially testified that he was not involved in the fight and that he tried to stop it. Thus, the instruction would have undermined defendant's testimony and raised doubts about his credibility.

¶ 15 Defendant also argues that the testimony of Antonio Hernandez and Rebecca Aguilar supports his argument that trial counsel should have tendered the withdrawal instruction. Both witnesses testified that defendant told Rafa to stop beating the victim and that defendant physically stopped Rafa from beating the victim. However, the witnesses testified these actions occurred after defendant participated in the beating of the victim.

¶ 16 Hernandez testified that, while outside the Azteca, he saw defendant and Rafa fighting with the victim. Defendant and Rafa hit the man in the face with their fists. Both defendant and Rafa wore pointed cowboy boots. Hernandez also testified as follows:

> "Q. [Assistant State's Attorney]: When the Defendant and Rafa were kicking the young man on the ground, at some point did you do something?
>
> A. [Hernandez]: No, Well, I told them to leave him alone already.
>
> Q. And did you do that from where you where at?
>
> A. No. I walked forward a few steps, a little bit closer.
>
> Q. And the first time you did that, did they stop?
>
> A. No.
>
> Q. Did they keep kicking the young man who was on the ground?
>
> A. Yes. But *later* the Defendant told [Rafa] no more, for them." [Emphasis added.]

During cross-examination, Hernandez repeated that he saw both defendant and Rafa kick the victim while the victim was on the ground.

¶ 17 At trial, the parties stipulated that an assistant State's Attorney would testify that Hernandez told him that defendant and Rafa kicked the victim five to eight times, while the victim was lying on the ground screaming to be left alone.

¶ 18 Similarly, Aguilar testified that defendant broke up the fight, but explained that "it was after [Rafa and defendant] hit [the victim that defendant] ended the fight." Thus, the testimony establishes that defendant's actions to terminate his efforts to promote or facilitate the commission of the offense charged did not occur until *after* he committed the offense. Accordingly, the testimony of Hernandez and Aguilar did not support the withdrawal instruction. See *Lykins*, 65 Ill. App. 3d at 813 (defendant was not entitled to withdrawal instruction where he attempted withdrawal after he had already hit the victim). Accordingly, defendant cannot establish that appellate counsel was ineffective by failing to raise this issue on direct appeal.

¶ 19 Defendant cites *People v. Rybka*, 16 Ill. 2d 394 (1959), to support the following proposition. An attempt to dissuade or discourage another from committing an offense is evidence of withdrawal. See *Rybka*, 16 Ill. 2d at 407. Defendant argues that his efforts to stop the fight was sufficient evidence that he attempted to dissuade or discourage Raja from committing the offense. However, defendant ignores that the testimony he relies upon indicated that he did not stop the fight until he had already participated in the offense. Thus, the withdrawal instruction was not available to him. See *Lykins*, 65 Ill. App. 3d at 813. We further note that, in *Rybka*, the supreme court held that the defendants were not entitled to the withdrawal instruction. *Rybka*, 16 Ill. 2d at 407. Thus, *Rybka* does not support defendant's argument.

¶ 20 Defendant also argues that, when he began his efforts to stop Raja from beating the victim, the offense of murder had not yet been committed; that at most the offense of battery had been committed. Defendant was convicted of first degree murder under section 9-1(a)(2) of the Criminal Code of 1961 which requires the State to prove, *inter alia*, that a defendant performs acts that cause the death of the victim knowing that the acts create "a strong probability of death or great bodily

harm to [the victim]" 720 ILCS 5/9-1(a)(2) (West 2004). The jury was instructed on the theory of accountability. At trial, a forensic pathologist testified that the victim died due to swelling of the brain caused by blunt force from a fist or being kicked with boots. The evidence established that defendant hit the victim in the face and kicked the victim before he stopped the fight. Defendant cites to no evidence in the record that excludes his strikes from the cause of the victim's death. Further, defendant cites to nothing in the record indicating that any one of Raja's strikes during defendant's participation caused the victim's death. Thus, defendant cannot establish that trial counsel's failure to tender the withdrawal instruction was objectively unreasonable. Accordingly, defendant is unable to establish ineffective assistance of appellate counsel. Therefore, the trial court properly granted the State's motion to dismiss defendant's petition regarding this issue.

¶ 21 Next, defendant argues that the trial court erred by dismissing his allegation of ineffective assistance of counsel after an evidentiary hearing. Initially, the State contends that defendant forfeited this issue because he failed to raise it on direct appeal. We disagree. Although issues a defendant could have raised on direct appeal but did not are considered forfeited (Scott, 194 Ill. 2d at 274), where a defendant relies on matters outside the record, forfeiture does not apply. *People v. Munson*, 206 Ill. 2d 104, 118 (2002). In this case, the second issue in defendant's postconviction petition is based on information outside the record; specifically, things trial counsel failed to tell defendant, things trial counsel failed to do, and conversations counsel had with defendant and defendant's sister. Therefore, defendant could not have raised these allegations on direct appeal, and thus he has not forfeited them. See *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010).

¶ 22 Defendant's argues that trial counsel was ineffective because she failed to investigate and present credible evidence that defendant did not flee to Mexico; such evidence would have

contradicted the prosecutor's statements that defendant's trip to Mexico indicated consciousness of guilt. Following a third-stage evidentiary hearing, where fact-finding and credibility determinations are made, the trial court's decision will not be reversed unless it is manifestly erroneous. *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009). A decision is manifestly erroneous if it contains error that is clearly evident, plain, and indisputable. *Id*. However, if the hearing presents only questions of law, review is *de novo*. *People v. Beaman*, 229 Ill. 2d 56, 72 (2008).

¶ 23 Decisions regarding whether to call a particular witness and whether to present certain other evidence is one of trial strategy. See *People v. West*, 187 Ill. 2d 418, 432 (1999).

¶ 24 Defendant argues that, if trial counsel would have timely investigated and called his sister, the jury would have heard that the trip was a family vacation planned two months before defendant and his sister and children departed. Further, the jury would have seen evidence that the trip was planned two months before departure. Instead, according to defendant, the jury heard the prosecutor's version; that defendant fled and that, on September 6, 2005, defendant was arrested by United States customs service agents in Texas as he was attempting to cross into the United States from Mexico.

¶ 25 It is well settled that decisions regarding which witnesses to call at trial and what evidence to present on defendant's behalf ultimately rest with trial counsel. *Munson*, 206 Ill. 2d at139-40. Thus, these types of decisions are considered matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Our supreme court explained:

> "In recognition of the variety of factors that go into any determination of trial strategy, * * * claims of ineffective assistance of counsel must be judged on a circumstance-specific basis,

viewed not in hindsight, but from the time of counsel's conduct, and with great deference accorded counsel's decisions on review." *People v. Fuller*, 205 Ill. 2d 308, 330-31 (2002).

¶ 26 In this case, the record indicates, and the trial court found, that the affidavits filed in support of defendant's amended postconviction petition contained false statements. Defendant's affidavit stated that trial counsel never explained to him why she failed to call defendant's sister to testify that their trip to Mexico was a preplanned vacation. However, at the postconviction hearing, defendant testified that trial counsel explained that she did not call defendant's sister because "the State could explore it and attack from other angles."

¶ 27 Further, defendant's sister's affidavit stated that trial counsel never contacted her. However at the hearing, defendant's sister testified that trial counsel had contacted her. Defendant's sister testified that she told trial counsel on the first day of the trial that, in May 2005, she planned to drive with her children and defendant to Mexico on July 6, 2005. Defendant's sister also testified that she gave defense counsel a car permit that she had obtained in May 2005 allowing her to cross the border on July 5, 2006; however, they did not leave Illinois until the following day. In addition, defendant's sister testified that trial counsel sent her a subpoena to testify at trial.

¶ 28 Trial counsel testified at the postconviction hearing that she spoke with defendant on multiple occasions about his preplanned trip to Mexico; defendant told her that he left the day after the murder, July 5, 2005. Trial counsel testified that she and her co-counsel decided not to call defendant's sister because without her testimony the State would be unable to prove when defendant left for Mexico. Trial counsel testified that if she had called defendant's sister to testify it "would give the State an opportunity then to argue [defendant's] flight, which had not really come up to that point." Trial counsel testified that there was no evidence regarding when defendant departed.

¶ 29 At the close of the evidentiary hearing, the trial court concluded that trial counsel's strategy was reasonable and sound because evidence that defendant left the day after the beating would have been "highly prejudicial." Further, it would have been "a huge leap for a jury to have bought" that defendant's trip was preplanned, especially when "all his sister had was a car permit." We further note that, during the trial, defendant testified that he found out the victim had died the day after the beating. In light of the record before us, the trial court's finding that trial counsel's strategy was reasonable and sound was not manifestly erroneous. Therefore, the trial court properly dismissed this portion of defendant's amended postconviction petition.

¶ 30 Defendant notes that the prosecutor commented on defendant's "flight" during opening statement and closing argument, indicating consciousness of guilt. However, the record indicates that the trial court instructed the jury that, "Neither opening statements nor closing argument are evidence, and any statement made by the attorneys which is not based on the evidence should be disregarded." Trial counsel's decision not to call defendant's sister as a witness deprived the State of evidence that would have supported its argument of flight. Accordingly, even in hindsight, defendant cannot establish that trial counsel's strategy was unreasonable.

¶ 31 Defendant cites *People v. Wilcox*, 407 Ill. App. 3d 151 (2010), to support his argument. However, *Wilcox* is distinguishable from the case at bar. In *Wilcox*, the appellate court held that the trial court abused its discretion by admitting evidence of the defendant's alleged flight to establish consciousness of guilt. *Wilcox*, 407 Ill. App. 3d at 170. The appellate court held that the admission of the evidence was improper because there was no evidence that the defendant knew of the crime. *Id*. In this case, defendant is not challenging the admission of the evidence of his alleged flight to Mexico or trial counsel's failure to object to the admission of such evidence. Rather, defendant

challenges trial counsel's failure to investigate and her decision not to present defendant's sister's testimony. Further, the record indicates that defendant knew of the crime. Thus, *Wilcox* is distinguishable from this case.

¶ 32 Accordingly, after considering the arguments presented, including defendant's claims of ineffective appellate and trial counsels, we conclude that the trial court properly denied his amended postconviction petition.

¶ 33 III. CONCLUSION

¶ 34 The judgment of circuit court of Kane County is affirmed.

¶ 35 Affirmed.