

**NOTICE**

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2014 IL App (4th) 120667-U

NO. 4-12-0667

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

**FILED**

February 7, 2014

Carla Bender

4<sup>th</sup> District Appellate

Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

SEAN D. ELLIS,

Defendant-Appellant.

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Appeal from

Circuit Court of

Champaign County

No. 09CF176

Honorable

Thomas J. Difanis,

Judge Presiding.

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JUSTICE KNECHT delivered the judgment of the court.

Presiding Justice Appleton and Justice Holder White concurred in the judgment.

**ORDER**

¶ 1 *Held:* No meritorious issues can be raised on appeal and, therefore, the motion of the State Appellate Defender to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551 (1987), is granted.

¶ 2 This case comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground no meritorious issues can be raised.

We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 In March 2009, defendant, Sean D. Ellis, was charged with unlawful possession of a stolen or converted motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)), a Class 2 felony subject to Class X sentencing based on his criminal history. See 730 ILCS 5/5-5-3(c)(8) (West 2008)). The indictment alleged defendant, in November 2008, possessed a 2001 Mitsubishi

Galant, knowing it was stolen or converted.

¶ 5 A jury trial was held in October 2009. Bryan Parr, a sales manager at a car dealership, testified when he arrived at the dealership on November 24, 2008, he found a broken window in the used-car building. Parr called the police. After the police arrived, Parr entered the building. He determined a 2001 Mitsubishi Galant had been taken.

¶ 6 Jeff Thomas, a Champaign police officer, testified he responded to Parr's call. Officer Thomas entered the building and gathered evidence, including two fingerprints. The fingerprints were not further tested.

¶ 7 Thomas Petrilli, a Champaign police officer, testified on November 29, 2008, he was dispatched to a local residence where the missing 2001 Mitsubishi Galant was found in the driveway. Officer Petrilli knocked on the front door of the residence and a female, whom Officer Petrilli knew as "Falana," answered. After speaking with Falana, Officer Petrilli spoke with defendant.

¶ 8 According to Officer Petrilli, defendant first identified himself as "Sean Williams." Defendant told Officer Petrilli he rented the car from his brother-in-law and had been driving it for approximately five days. Officer Petrilli told defendant the vehicle had been stolen. He asked defendant for the keys, which defendant handed to him. On cross-examination, Officer Petrilli testified defendant did not have the keys on his person but retrieved them from inside the home. Defendant was not arrested at that time.

¶ 9 Defendant testified on his own behalf. According to defendant, the residence where he was found was his girlfriend's house. Defendant did not reside there, but he stayed overnight occasionally. Defendant stated Officer Petrilli lied throughout his testimony.

Defendant testified he did not know about the Galant and had not been inside it. Defendant further stated his girlfriend gave Officer Petrilli the keys to the Galant.

¶ 10 The jury found defendant guilty of unlawful possession of a stolen or converted motor vehicle (625 ILCS 5/4-103(a)(1) (West 2008)). Due to his criminal history, defendant was sentenced as a Class X offender to 25 years' imprisonment.

¶ 11 In November 2009, defendant filed a *pro se* document with the trial court, arguing his counsel provided ineffective assistance. The court appointed counsel to represent defendant. In April 2010, appointed counsel filed a motion for a new trial or reduction in sentence. In this motion, defendant alleged his trial counsel, Harvey Welch, was ineffective. Defendant also summarized the procedural history in two of his cases. Specifically, defendant alleged when he was arraigned on unlawful possession of a stolen vehicle, a public defender was appointed. A public defender represented him in another case, No. 08-CF-1609. In No. 08-CF-1609, defendant pleaded guilty to possession of a stolen vehicle. The State agreed to dismiss two traffic matters and stated specifically defendant's case No. 09-CF-176, the case in this appeal, would be dismissed. Shortly after entering that plea agreement, defendant hired Welch. In June 2009, defendant was sentenced to nine years' imprisonment in No. 08-CF-1609. Defendant, represented by Welch, unsuccessfully sought to withdraw his guilty plea in Case No. 08-CF-1609.

¶ 12 Defendant further alleged in his posttrial motion Welch was ineffective on multiple grounds. According to defendant, Welch did not adequately prepare for trial, stating the two met only briefly on several occasions. Defendant asserted he also believed this case had been dismissed as part of his plea deal in No. 08-CF-1609. Defendant alleged Welch (1) failed

to cross-examine officers about whether fingerprints found in the vehicle were sent to the crime lab; (2) ineffectively argued in the alternative defendant was not proved guilty "[e]ven if he were in the car"; (3) did not contact "Falona" Jackson, who would testify defendant was not guilty; (4) made no attempt to prevent the police from testifying he lied about his name; and (5) made no attempt to keep out a prior obstructing-justice conviction. Defendant emphasized the State commented on the alleged lie about his name and his prior conviction during closing argument.

¶ 13 In May 2010, the trial court held a hearing on defendant's motion. At the hearing, both defendant and Welch testified. According to defendant, he believed the unlawful-possession charge in this case was dropped. Defendant hired Welch for the purpose of withdrawing his plea in No. 08-CF-1609. Welch also served as defendant's trial counsel in this case. Defendant met with Welch one time and received a letter dated August 11, 2009, from Welch, telling defendant his unlawful-possession case would be dismissed. Despite the letter, Welch later denied telling defendant his case would be dismissed. Defendant did not learn he was going to trial until the day of trial.

¶ 14 Defendant testified Welch did not read the discovery to defendant before trial. Defendant also did not have the opportunity to review the police reports, relate his version of the events, or request witnesses, including Jackson. Defendant stated Welch, during trial, told defendant he should testify because the jury would not hear his side of the story and he would look guilty if he did not. Defendant did not intend to testify until this recommendation. Defendant believed his testimony hurt his case, because Welch stated to the jury, even if defendant was in the car, he did not know it was stolen and the State told the jury defendant was a convict.

¶ 15 According to defendant, he did not have the opportunity to discuss sentencing matters with Welch. Defendant did not inform Welch of witnesses he may have wanted to testify. Defendant told Welch he was not in the vehicle.

¶ 16 In contrast, Welch testified he discussed possible defenses with defendant in detail. The two also discussed defendant's right not to testify. Welch informed defendant the decision to testify belonged to defendant. Welch advised defendant not to testify.

¶ 17 According to Welch, he reviewed the police reports and knew about Jackson, defendant's girlfriend. The stolen vehicle was found in front of Jackson's residence. The discovery indicated Jackson told police defendant drove the car for several days, which corresponded with when the car was stolen. Welch decided not to call Jackson to testify. He reasoned she would be confronted with her statement to the police and would be unable to explain it.

¶ 18 Welch further recalled the State offered a plea deal of six years' imprisonment to be served consecutively to the nine-year sentence in No. 08-CF-1609. Defendant did not take it. When asked about the defense strategy, Welch testified "[t]hat he wasn't in the car was the best that we could come up with." Welch stated the biggest problem with this defense was the car and defendant were found in the same place.

¶ 19 Upon questioning by the trial court, Welch stated he recalled when the officers knocked on the door, Jackson answered. After the officers told Jackson they were at her residence because of the car in her driveway, Jackson called for or retrieved defendant. When he came to the door, he had the keys in his pocket. At trial, however, defendant stated he picked up the keys and did not have them in his pocket.

¶ 20 The trial court denied defendant's motion. The court noted the stolen car was sitting in the driveway, Jackson told the police defendant had been driving it for days, defendant had the keys, and defendant lied about his name to the police. The court noted the defense was no one saw defendant driving the car. The court expressly found "Welch did the best he could given what he had" and the court found Welch's performance was not in any way deficient.

¶ 21 Defendant pursued a direct appeal of his conviction, arguing the State failed to prove him guilty beyond a reasonable doubt. This court affirmed his conviction. *People v. Ellis*, 2011 IL App (4th) 100407-U, ¶ 2.

¶ 22 In June 2012, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2012)). In his petition, defendant alleged he was denied the right to the effective assistance of counsel because Welch failed to (1) prepare for the case, (2) inform defendant this case was not dismissed pursuant to his plea bargain in another case, (3) keep the jury from hearing about his earlier obstructing-justice conviction, (4) contact Jackson to testify or sign a statement on defendant's behalf, (5) cross-examine the police on the issue of whether fingerprints were sent to the crime lab, (6) file a motion to suppress, (7) contact another witness for the sentencing hearing, (8) cross-examine the police on the failure to ask Jackson for a signed statement defendant used the vehicle, (9) object to the State's Attorney's testimony defendant lied to the police, (10) put on a serious defense, and (11) cross-examine an officer about a signed confession or recorded statement made showing defendant drove the car. Defendant further alleged counsel provided ineffective assistance by (1) forcing him to testify; (2) telling the jury if it believed the officer's statement, then the defendant is guilty of possession of a stolen vehicle; and (3) advising defendant to take the

State's offer of six years' imprisonment when the defendant's plea was "not guilty."

¶ 23 In his postconviction petition, defendant further alleged his rights were violated because (1) he was not tried by a jury of his peers, (2) the trial judge was biased, and (3) he was improperly indicted by the grand jury.

¶ 24 In June 2012, the trial court dismissed defendant's petition, finding the claims frivolous and patently without merit. The court observed it had conducted a hearing in May 2010 on defendant's motion for a new trial and or a reduction of sentence and this hearing addressed the same issues as on postconviction review. The court found the other issues frivolous.

¶ 25 Defendant filed timely notice of appeal. The trial court appointed OSAD to represent defendant. OSAD moved to withdraw as counsel under *Pennsylvania v. Finley*, 481 U.S. 551. Notice of OSAD's motion was sent to defendant. This court gave defendant time to file additional points and authorities, which he did. The State filed a reply brief.

¶ 26 II. ANALYSIS

¶ 27 The Act creates a three-stage process through which an inmate may obtain postconviction review of a claim his conviction led to a substantial denial of his constitutional rights. *People v. Dopson*, 2011 IL App (4th) 100014, ¶ 17, 958 N.E.2d 367. At the first stage, a trial court examines the petition to determine whether a constitutional deprivation, unrebutted by the record, renders the petition neither frivolous nor patently without merit. *People v. Andrews*, 403 Ill. App. 3d 654, 658, 936 N.E.2d 648, 652 (2010). A petitioner need only present the gist of a constitutional claim to avoid a finding the petition is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418, 675 N.E.2d 102, 106 (1996). Petitions that do not meet

this threshold, however, must be dismissed. 725 ILCS 5/122-2.1(a)(2) (West 2012). Frivolous and patently without merit petitions include those with claims barred by the doctrines of *res judicata*, which bars claims previously raised and adjudicated, and forfeiture, which bars claims that could have been raised but were not. *People v. Blair*, 215 Ill. 2d 427, 442-44, 831 N.E.2d 604, 614-15 (2005). This court reviews first-stage dismissals *de novo*. *People v. Couch*, 2012 IL App (4th) 100234, ¶ 13, 970 N.E.2d 1270.

¶ 28 OSAD argues a large portion of defendant's postconviction ineffectiveness claims were raised and adjudicated before the trial court, which were then part of the record at the time of his direct appeal, meaning defendant has no colorable argument these claims prevent a first-stage dismissal. We agree. The postconviction claims raised before the trial court and resolved after a hearing on the posttrial motion are Welch (1) failed to prepare for trial, (2) forced defendant to testify, (3) failed to tell defendant his case was not dismissed as part of a plea agreement in No. 08-CF-1609, (4) did not prevent the jury from hearing he had an obstructing-justice conviction, (5) failed to contact Jackson to testify, (6) did not cross-examine the police on whether fingerprints were sent to the crime lab, (7) failed to put on a serious defense, (8) failed to keep out the fact he lied about his name, and (9) failed to object when the State commented on his conviction and his lying about his name during closing argument. These claims are barred by *res judicata* and are frivolous and patently without merit.

¶ 29 OSAD argues no colorable argument can be made defendant was denied the effective assistance of counsel when Welch failed to cross-examine a police officer regarding his testimony defendant admitted driving the car. Defendant claimed in his petition defense counsel should have emphasized the absence of a signed confession or a recorded statement in his cross-

examination

¶ 30 An ineffective-assistance-of-counsel claim is resolved under the framework set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). In *Strickland*, the Supreme Court outlined a two-factor test for evaluating such claims. A defendant must show counsel's performance was deficient and that deficient performance substantially prejudiced defendant. *Id.* at 687.

¶ 31 Defendant's argument lacks merit. The jury knew Officer Petrilli's testimony involved a conversation with defendant where defendant allegedly admitted driving the car and allegedly used another name. It would serve little purpose to cross-examine the officer about failing to get a signed statement from defendant at that juncture in the investigation.

¶ 32 OSAD also contends defendant's argument Welch was ineffective for not cross-examining the police on their failure to secure a signed statement from Jackson lacks merit. We agree and discovery indicated she confirmed defendant had been driving the car. Welch explained not calling her as a witness, which in turn explains why he did not inject her comments to the police into his cross-exam. Any attempted cross-examination by Welch on this matter would not have been helpful.

¶ 33 Next, OSAD contends defendant has raised no colorable argument Welch provided ineffective assistance by not filing a motion to suppress. We agree. Defendant's postconviction petition does not indicate on what basis Welch should have filed a motion to suppress. The record does not reveal one. This argument is frivolous.

¶ 34 OSAD argues defendant's allegation he was denied the effective assistance of counsel when counsel recommended a 6-year plea deal lacks merit. OSAD simply points to

defendant's 25-year sentence as establishing Welch's recommendation was correct and not incompetent. We agree.

¶ 35 In his petition, defendant asserted Welch was ineffective for not contacting an unspecified witness for the sentencing hearing. This argument lacks merit on appeal because defendant neither identified a witness nor provided an affidavit of the witness's offered testimony. See *People v. Enis*, 194 Ill. 2d 361, 380, 743 N.E.2d 1, 13 (2000) ("A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness.").

¶ 36 OSAD contends it can make no colorable argument defendant stated the gist of a claim Welch was ineffective for failing to seek testing of the two fingerprints found in the car. We agree. Even if the two fingerprints were shown not to be defendant's, this evidence would not exculpate him. The testimony established the car was found in defendant's girlfriend's driveway, defendant was in his girlfriend's house at the same time the car was found there, defendant handed the keys over to the police, and defendant admitted to a police officer he drove the car. The vehicle was not a new car, meaning other individuals had been in the car. In addition, Welch's failure to seek testing is presumed strategic. *People v. Manning*, 241 Ill. 2d 319, 334, 948 N.E.2d 542, 551 (2011). The facts of this case support this presumption. If testing resulted in identifying defendant as having been in the car, defendant would have been left with no defense.

¶ 37 Defendant, in his petition, argues Welch provided ineffective assistance by telling the jury if it believed Officer Petrilli's testimony, then the defendant is guilty. This argument lacks merit on appeal. First, the argument is forfeited as it could have been brought on direct

appeal, but was not. See *Blair*, 215 Ill. 2d at 443-44, 831 N.E.2d at 615. Second, defendant has not stated the gist of a claim he suffered prejudice by the statement. The jury heard Officer Petrilli testify to evidence that placed defendant in a vehicle he knew was stolen, such as testimony defendant was found at the location where the vehicle was parked, defendant gave Officer Petrilli the keys, and defendant lied about his identity. The State relied on Officer Petrilli's testimony in closing argument as establishing defendant's guilt. Given these circumstances, Welch did not tell the jury something it did not already know.

¶ 38 OSAD contends defendant has made no colorable argument he was denied a jury of his peers. Defendant, in his petition, states his jury contained "no blacks" because "they had been taken of[f] or put last bias [(sic)] on the court." We agree with OSAD. The record does not show the racial makeup of the jury or the venire. No objections or claims of racial bias were made during jury selection. Defendant has provided no corroborating evidence to support his claim or explain why such evidence could not be attached. See *People v. Collins*, 202 Ill. 2d 59, 68, 782 N.E.2d 195, 200 (2002). There is no basis on which an appeal of merit can be made.

¶ 39 OSAD further maintains defendant's argument he was not properly admonished of his term of mandatory supervised release lacks merit. OSAD contends no error occurred because defendant did not enter a guilty plea but was convicted by a jury. We agree. The case upon which defendant relies, *People v. Whitfield*, 217 Ill. 2d 177, 179, 840 N.E.2d 658, 660-61 (2005), involves guilty pleas and Illinois Supreme Court Rule 402 (eff. Jul. 1, 1997). Neither apply to defendant.

¶ 40 Defendant's two remaining arguments, the trial judge was biased and he was improperly indicted by the grand jury, are forfeited. For his first argument, defendant relies on

the trial court's statements at the hearing on his posttrial motion. In particular, defendant points to the judge's statement, "I love the defendants when they say, 'My lawyer didn't give me no defense.'" This matter was on record and could have been raised on direct appeal, but was not. It is forfeited. *Blair*, 215 Ill. 2d at 443-44, 831 N.E.2d at 615. Defendant's argument the grand jury indictment did not contain "the seal" or the "grand jury names" was similarly of record and could have been raised on direct appeal but was not.

¶ 41 We note defendant, in his points and authorities, makes a new claim regarding his arrest. This claim was not in his postconviction petition and is thus not properly raised here.

¶ 42 III. CONCLUSION

¶ 43 We grant OSAD's motion to withdraw as counsel and affirm the trial court's judgment. As part of our judgment, we grant the State its statutory assessment of \$50 against defendant as costs of this appeal.

¶ 44 Affirmed.