SECOND DIVISION
September 20, 2016

No. 1-13-3732

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. 01 CR 29150
	)	
JERMAYNE THOMAS,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Hyman and Justice Pierce concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant has made a substantial showing in his post-conviction petition that his counsel rendered ineffective assistance in threatening to withdraw from the case if defendant did not waive his right to a jury trial and that he would not have otherwise waived that right. The circuit court's dismissal of defendant's petition is reversed and the case is remanded for an evidentiary hearing.

¶ 2 Jermayne Thomas, the defendant, appeals from the dismissal of his *pro se* petition at the second stage of proceedings under the Post-Conviction Hearing Act (the Act) 725 ILCS 5/122-1 *et seq*. (West 2008)). On appeal, defendant contends his case should be remanded for an evidentiary hearing under the Act because he made a substantial showing that his trial counsel

provided ineffective assistance. Specifically, defendant argues that his counsel coerced him to waive his right to a jury trial by threatening to withdraw his representation and by not informing him that the testimony of an expert witness would corroborate his version of events.

¶ 3 Defendant was charged with the 2001 first-degree murder of Demetri Kozup, the infant son of his girlfriend. Prior to trial, the trial court granted the State's motion *in limine* and allowed evidence of defendant's physical abuse of Demetri in a previous incident seven months earlier.

¶ 4 Defendant's case was set for a jury trial in 2008. On the day before trial was set to begin, defense counsel indicated that defendant wanted to waive his right to a jury trial. The trial court admonished defendant as to that right and accepted his waiver. Defendant also executed a written jury waiver that day.

¶ 5 At trial, paramedic Christian Howe testified that on November 3, 2001, he and another paramedic responded to a call of a child choking at a residence in Lynwood. The report of Howe's partner stated that defendant told the paramedics that Demetri fell in the bathtub. Defendant told police that he struck Demetri in the mouth and head because he would not eat his dinner and then put the child in the bathtub and left the room. Defendant said he returned to the bathroom, lifted Demetri and shook him, and the child fell to the ground. Defendant stated he put Demetri back in the tub and the child was gasping for air.

¶ 6 Dr. Lisa Ting Toerne, the treating emergency room doctor, described Demetri as "very battered and bruised" and stated his injuries were freshly inflicted and were caused by a severe beating. Additional testimony from State experts indicated that the child's brain was swollen due to blunt force trauma or asphyxia.

¶ 7 Dr. John Pless, the forensic pathologist who examined Demetri's body, testified that the child's bruises could not have been caused by a fall but instead resulted from being struck with a fist or being grabbed. Dr. Pless further stated that three bruises on the top of Demetri's head were not caused by a fall but were caused by three blows to the head. He testified that while drowning could not be ruled out as a cause of death, there was no water in Demetri's lungs or stomach.

¶ 8 Defendant later told police that he would discipline Demetri by pouring water over the child's head and face and on the night in question, he held the child's head underwater several times. The State introduced testimony of the April 2001 incident at a bowling alley where defendant struck Demetri two or three times in the head, causing the child's head to hit a wall, and where the child was found sweating under a pile of coats.

¶ 9 The defense presented two witnesses. Dr. Shaku Teas testified as an expert in forensic pathology and opined that Demetri "died as a result of drowning" with the bruises on his head and limbs playing a "contributing role." Dr. Teas testified that Demetri's bruises could have resulted from any type of blunt force trauma, including falling or hitting his head on the floor or wall.

¶ 10 Sharon Kozup, Demetri's mother, testified defendant previously struck the child and would discipline him by pouring water over the child's head in the bathtub. Sharon testified that on the night in question, defendant was upset because Demetri was not eating his food. She left to buy diapers and upon arriving home, defendant told her Demetri fell and hit his head.

¶ 11 The trial court found defendant guilty and sentenced him to 40 years in prison. On direct appeal, defendant challenged the trial court's ruling *in limine* allowing evidence of the bowling alley incident. This court affirmed defendant's conviction and sentence, finding the prior incident

was similar to the events preceding Demetri's death and was "properly admitted to show [defendant's] intent and the absence of mistake or accident." *People v. Thomas*, No. 1-08-1548 (2010) (unpublished order under Supreme Court Rule 23).

¶ 12 On June 29, 2011, defendant filed a *pro se* post-conviction petition, asserting, *inter alia*, that his trial counsel was ineffective for urging him to waive his right to a jury trial. In the petition, defendant asserted that counsel told him he would no longer represent him if he did not agree to waive his right to a jury trial. Defendant also stated that his counsel did not tell him that Dr. Teas would corroborate defendant's account that Demetri died as a result of a fall.

¶ 13 Defendant further asserted in the petition that had he "known of this testimony prior to being coerced to waive his right to a jury trial, [I] never would have waived that right." He stated in his petition: "By counselor coercing petitioner to waive his right to a jury trial, he effectively reduced petitioner's options of receiving a[n] involuntary manslaughter determination by having one trier of fact instead of twelve."

¶ 14 Along with defendant's verification affidavit, defendant attached to his petition a total of three affidavits from his mother and father, Ardella and Eastern Reed. Two of those affidavits are relevant in this appeal. [1] Those two affidavits are identical in content and are attested to separately by Ardella and Eastern Reed. The Reeds stated they were present on the scheduled first day of defendant's trial and that defendant told them the night before that jury selection would take place that day. The Reeds attested that defendant's attorney told them that morning that he spoke to defendant and that defendant had decided to have a bench trial, rather than a jury

[1] In the third affidavit attached to the petition, Ardella Reed describes how she learned of her son's arrest in November 2001.

trial. The Reeds further attested that they "later found[] out from Jermayne that his reason for the sudden change to a bench trial was solely based on the fact that Attorney Carr told him that he was no longer willing to represent him in front of a jury." The Reeds stated that they believed defendant's statement because they had provided defendant clothing for a jury trial and defendant had not mentioned the change to a bench trial when they spoke on the phone the previous night.

¶ 15 Counsel was appointed to represent defendant in October 2011. Post-conviction counsel made no amendments to defendant's *pro se* petition and filed a certificate pursuant to Supreme Court Rule 651(c) (eff. Dec. 1, 1984) in January 2013.

¶ 16 On April 5, 2013, the State moved to dismiss defendant's petition, asserting that the allegations of trial counsel's ineffectiveness lacked merit.[2] The State asserted that defendant's claim that his jury waiver was involuntary was forfeited by his failure to raise that claim on direct appeal and, thus, the claim cannot be raised in a post-conviction petition. The State also asserted that, as to the affidavits of defendant's parents, the Reeds were not present during counsel's conversation with defendant, and that the affidavits were hearsay. The State further argued that defendant made no earlier claim that his jury waiver was not knowingly or intelligently made, pointing out that when defendant was questioned by the judge at the time of his jury waiver, defendant did not assert then that he had been coerced into signing the waiver.

¶ 17 As to the merits of defendant's petition, the State argued that defendant did not suffer prejudice by being tried by a judge and not a jury because defense counsel argued a theory of involuntary manslaughter to the trial judge, and the judge rejected that theory and convicted him

[2] The State also asserted in its motion to dismiss that defendant's petition was untimely; however, the State withdrew that contention when arguing the motion before the circuit court.

of first-degree murder. The State addressed defendant's additional claims of his trial counsel's ineffectiveness and asserted that defendant did not show any of those alleged deficiencies in his defense would have changed the outcome of his case.

¶ 18 After hearing arguments, the circuit court granted the State's motion to dismiss. Defendant now appeals that ruling.

¶ 19 The Act provides a criminal defendant the means to redress substantial violations of his constitutional rights in his original trial or sentencing, and the Act sets out three stages for post-conviction relief. *People v. Allen*, 2015 IL 113135, ¶¶ 20-21. Where, as here, a petition is not dismissed within 90 days of its filing, the petition advances to the second stage, where it is docketed for further consideration. 725 ILCS 5/122-2.1(b) (West 2010). At the second stage, counsel may be appointed to represent defendant, and the State must move to dismiss the petition or file an answer to the petition. 725 ILCS 5/122-5 (West 2010). At the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *Allen*, 2015 IL 113135, ¶ 21. If that burden is met, the circuit court advances the petition to the third stage and the court conducts an evidentiary hearing on the defendant's claims and may receive proof by affidavits, depositions, oral testimony or other evidence. 725 ILCS 5/122-6 (West 2010). The trial court’s dismissal of a post-conviction petition at the second stage, *i.e.*, without an evidentiary hearing, is reviewed *de novo*. *People v. Cotto*, 2016 IL 119006, ¶ 24.

¶ 20 The State has raised several procedural bars to defendant's petition. However, we fail to find that any of the State’s contentions preclude our consideration of whether defendant's petition makes a substantial showing of a constitutional violation based on his claims of the ineffectiveness of his trial counsel.

¶ 21 The State first contends defendant waived his present claim of his trial counsel's ineffectiveness by failing to raise it in his direct appeal. As a general rule, issues that could have been presented on direct appeal, but were not, are forfeited. *People v. Rogers*, 197 Ill. 2d 216, 221 (2001). However, that rule has been relaxed and there is no forfeiture "where the facts relating to the issue of [counsel's] incompetency do not appear on the face of the record." *People v. Johnson*, 2011 IL App (1st) 092817, ¶ 70, quoting *People v. Eddmonds*, 143 Ill. 2d 501, 528 (1991). Here, defendant's claim involves a conversation he had with his trial counsel, which would not be present in the record. See *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010). Moreover, at the second stage of post-conviction review, defendant's averments as to that conversation must be taken as true. *People v. Sanders*, 2016 IL 118123, ¶ 42.

¶ 22 The State next argues that the record rebuts defendant's claim that his jury waiver was involuntary. The State asserts defendant was "silent" when the trial court questioned him and that he did not "raise his concern about proceeding with a bench trial." It is true that if a defendant is present when a jury waiver is discussed and the defendant does not object to the waiver, the defendant "is deemed to have acquiesced in the waiver." *People v. Sailor*, 43 Ill. 2d 256, 260 (1969); *People v. Smith*, 326 Ill. App. 3d 831, 848 (2001). However, even where a jury waiver has been entered on the record, this court can review the waiver to see if the record shows that waiver was made expressly and understandingly. *Id.*

¶ 23 While the trial court admonitions on the record are to be considered, such admonitions "are not sufficient in every circumstance to negate the effect of erroneous advice from defense counsel." *People v. Hall*, 217 Ill. 2d 324, 337 (2005). We find the facts of *Smith* to be illustrative on this point. There, the defendant alleged in his post-conviction petition that his attorney told

him he should take a bench trial because the judge owed him a favor and would have access to information that was not available to the jury. *Smith*, 326 Ill. App. 3d at 838. The *Smith* court held that the defendant's signed jury waiver and the trial court's admonitions when securing the defendant's oral jury waiver did not rebut the defendant's claim that his counsel pressured him to waive his right to a jury trial, and this court held that the defendant's petition should advance to the second-stage of post-conviction review. *Id*. at 847-49. Specifically, the *Smith* court noted that when the trial judge admonished the defendant regarding his desire to waive the right to a jury trial, "[a]t no time [during those admonitions] did the trial judge ask the defendant whether he had been promised anything in exchange for giving up his right to a jury trial." *Id*. at 848-49. The *Smith* court found that the record failed to rebut the defendant's contentions that he was coerced into choosing a bench trial. *Id*. at 849.

¶ 24 Here, as in *Smith*, the record of defendant's oral waiver of his right to a jury trial does not contain the specific admonition in which the court asks if any threats were made against the defendant or promises were made to the defendant before he gave up his right to a jury trial. Accordingly, the record does not rebut defendant's claim that his jury waiver was involuntary. Furthermore, the State's contention that defendant knowingly and understandingly waived his right to a jury trial is a challenge to the facts raised in defendant's petition, and as stated previously, all facts are taken as true during a second-stage review of a post-conviction petition. Indeed, by moving to dismiss the defendant's petition, the State has in fact "assumed the truth of defendant's factual allegations." *Hall*, 217 Ill. 2d at 336; see also *People v. Clark*, 2011 IL App (2d) 100188, ¶ 30.

¶ 25 The State's remaining procedural arguments relate to the materials attached to defendant's petition in support. Defendant stated in his petition that his trial counsel "at the eleventh [] hour before trial coerced [him] to waive his right to a jury trial under the threat of abandonment if [he] refused." The State contends on appeal that defendant failed to specify counsel's exact remarks or indicate when this conversation occurred and who was present, and the State asserts that such a "generalized conclusion" is insufficient to make a substantial showing of a constitutional violation.

¶ 26 The State cannot prevail on this argument because neither an affidavit from defendant nor an affidavit from counsel is required to support defendant's claim at this point in post-conviction proceedings. The requirement of section 122-2 of the Act that a defendant attach affidavits to a petition to support the claims stated therein does not apply beyond the first stage of post-conviction review. *Hall*, 217 Ill. 2d at 332-33; *People v. Collins*, 202 Ill. 2d 59, 66-67 (2002); *Clark*, 2011 IL App (2d) 100188, ¶ 33. Moreover, the Act does not require a defendant alleging a claim of ineffective assistance of counsel to attach his own affidavit to a post-conviction petition attesting to a private conversation with counsel, nor is the defendant required to explain the absence of such an affidavit. *People v. Teran*, 376 Ill. App. 3d 1, 3-4 (2007). It can be inferred from defendant's petition that the only support that he could offer for his claim would be from trial counsel, and defendant is excused from obtaining such an affidavit. *Hall*, 217 Ill. 2d at 333-34, citing *People v. Williams*, 47 Ill. 2d 1, 4 (1970) (noting that the "difficulty or impossibility of obtaining such an affidavit is self-apparent").

¶ 27 The State further argues that the affidavits of defendant's parents contain hearsay. Hearsay affidavits are generally inadmissible. *People v. Morales*, 339 Ill. App. 3d 554, 565

(2003). Still, we do not find defendant's attachment of those affidavits to his petition precludes a review of his claims because, as stated above, a defendant is not required to attach any affidavits to a petition to support his post-conviction claims beyond the first stage of proceedings. See *Hall*, 217 Ill. 2d at 332-33. Having disposed of those threshold issues raised by the State, we consider whether defendant's petition makes a substantial showing of a constitutional violation so as to warrant an evidentiary hearing.

¶ 28 At this second stage of post-conviction review, a defendant is entitled to an evidentiary hearing on the claims in his petition if he makes a substantial showing of a violation of his constitutional rights. *Allen*, 2015 IL 113135, ¶ 21. "The second stage of post-conviction review tests the legal sufficiency of the petition." *People v. Domagala*, 2013 IL 113688, ¶ 35. At this juncture, credibility is not an issue because all well-pleaded facts that are not positively rebutted by the trial record are taken as true. *Sanders*, 2016 IL 118123, ¶ 42; *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006).

¶ 29 When considering a defendant's claim of ineffective assistance of counsel regarding his right to waive a jury trial, the first consideration is whether counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The second consideration is whether a reasonable likelihood exists that the defendant would not have waived his right to a jury trial in the absence of the alleged error. *Barkes*, 399 Ill. App. 3d 980, 988 (2010); see also *People v. Maxwell*, 148 Ill. 2d 116, 142 (1992) (adapting *Strickland* test to claimed ineffective assistance involving jury waiver in capital sentencing hearing).

¶ 30 A defendant's right to a trial by jury and to have his guilt determined by a jury, and not a judge, is a fundamental constitutional right. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art.

I, § 8; *Sullivan v. Louisiana*, 508 U.S. 275, 277 (1993). Accordingly, whether to have a bench trial or a jury trial is one of a select group of decisions that belongs to the defendant, not to counsel. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (pleading guilty and testifying on one's own behalf are other decisions that can be made only by a defendant).

¶ 31 This court has recognized that defense counsel can offer advice to a defendant on whether to select a jury or bench trial and that such guidance is deemed to be "the type of trial strategy and tactics that cannot support a claim of ineffectiveness." *People v. Elliott*, 299 Ill. App. 3d 766, 774 (1998). See, *e.g.*, *People v. Simon*, 2014 IL App (1st) 130567, ¶ 74 (counsel provided reasonable representation in advising defendant that he should choose a bench trial because the judge would be required to follow the law); *People v. Hobson*, 386 Ill. App. 3d 221, 243 (2008) (finding reasonable defense counsel's strategic decision to advise defendant to opt for bench trial with judge known to counsel was based on "counsel's evaluation of the mitigating circumstances of the case" and his knowledge of the trial judge); *People v. Powell*, 281 Ill. App. 3d 68, 73-74 (1996) (counsel's explanation, in hearing on defendant's post-trial motion, that he advised to elect a jury trial as opposed to a bench trial because "then all 12 of them have to find you guilty and not just one person" reflected reasonable trial strategy).

¶ 32 The facts here are not comparable to the above-described cases involving counsel's sound advice to a defendant as to whether that defendant should waive his right to a jury trial. Here, defendant claims that his counsel threatened to withdraw from his case unless defendant waived his right to a jury trial.

¶ 33 When considering a claim of ineffectiveness, counsel's performance is measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Threats or coercive tactics by

defense counsel have been found to constitute deficient representation under the first prong of *Strickland*. In one such case, the defendant claimed in a post-conviction petition that he wanted a bench trial but counsel told the defendant that he "was running the show" and that the defendant "was getting a jury trial." *Barkes*, 399 Ill. App. 3d at 982. Taking those allegations as true, the *Barkes* court reversed the second-stage dismissal of that claim, finding that the defendant should receive an evidentiary hearing on his claim of ineffectiveness of counsel for refusing to allow him to waive a jury trial. *Id*. at 988. The *Barkes* court further held that prejudice under the second prong of *Strickland* was presumed if there was a reasonable probability that the defendant would have waived a jury trial absent the alleged error. *Id*.

¶ 34 We find the claim of coercion in this case to be even more serious than that in *Barkes*. In *Barkes*, the defendant claimed that he was directed by counsel to *select* a jury trial, whereas here, defendant has alleged that he was forced to *give up* his fundamental right to have a jury decide his case.

¶ 35 We also find *People v. Algee*, 228 Ill. App. 3d 401 (1992), illustrative. In that case, the defendant's counsel stopped accepting the defendant's phone calls and told his client on the morning of trial that the judge would impose a maximum sentence if he did not plead guilty. *Id*. at 404-05. In finding the defendant received ineffective assistance of counsel that rendered his guilty plea involuntary, this court stated that counsel's reference to a higher sentence, coupled with his additional remarks and lack of cooperation, placed the defendant in a "no-win situation." *Id*. at 404. Here, defendant claims that he was placed in a similar circumstance. By threatening to withdraw from representing defendant immediately prior to the start of trial, as is alleged in

defendant's petition, defendant was put in the position of proceeding to trial with no counsel. It is possible that defendant was not told that he had the right to other appointed counsel.

¶ 36 We further find that defendant has made a substantial showing as to the prejudice prong. This prong differs from the standard test for ineffective assistance of counsel, which requires a defendant to show that counsel's unreasonable performance affected the result of his trial. See *People v. McCarter*, 385 Ill. App. 3d 919, 943 (2008) (where defendant contended in a post-trial motion that his trial counsel coerced him into having a jury trial instead of a bench trial, both the trial court and the State on appeal were incorrect in asserting that the key inquiry was whether the trial court would have found defendant guilty had a bench trial been held instead). Here, the defendant must show that a reasonable likelihood exists that the defendant would not have waived his right to a jury trial in the absence of the alleged error. *Barkes*, 399 Ill. App. 3d 980, 988 (2010). Thus, in contending on appeal that defendant would have been convicted either by the trial court or by a jury, given the evidence here, the State invokes the incorrect test as to the prejudice prong.

¶ 37 The State also is incorrect in asserting that defendant did not aver in his petition that he would not have waived his right to a jury trial but for his counsel's representations. Defendant alleged in his petition that: (1) his counsel threatened to abandon his representation if he did not waive his right to a jury trial; (2) he did not know that Dr. Teas would offer testimony in support of his defense; and (3) had he know such testimony would be offered, he would not have waived his right to a jury trial.

¶ 38 The "substantial showing" that must be made at the second stage "is a measure of the legal sufficiency of the petition's well-pled allegations of a constitutional violation, *which if*

proven at an evidentiary hearing, would entitle petitioner to relief." (Emphasis in original.) *Domagala*, 2013 IL 113688, ¶ 35. See also *People v. Guerrero*, 2011 IL App (2d) 090972, ¶ 72 (discussing *Barkes* and noting that in a second-stage post-conviction proceeding, the defendant "should have the opportunity to show prejudice"). Taking the claims in defendant's petition as true, as is required at this stage, (*Sanders*, 2016 IL 118123, ¶ 42), defendant has made a substantial showing that his trial counsel's performance fell below an objective standard of reasonableness and that there was a reasonable probability that the defendant would not have waived a jury trial without his counsel's deficient performance. Defendant has set out specific claims that his trial counsel told him that he would withdraw from the case if defendant did not waive his right to a jury trial and that he would not have waived his right absent his counsel's threat. Thus, defendant should receive an evidentiary hearing at which he can present facts to support his claims of ineffectiveness of his trial counsel.

¶ 39 Accordingly, for all of the reasons stated herein, we reverse the circuit court's dismissal of defendant's post-conviction petition at the second stage and remand for a third stage evidentiary hearing.

¶ 40 Reversed and remanded.