

NOTICE
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2016 IL App (5th) 140101-U

NO. 5-14-0101

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Effingham County.
)	
v.)	No. 10-CF-162
)	
RANDAL E. DYE,)	Honorable
)	Kimberly G. Koester,
Defendant-Appellant.)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

ORDER

¶ 1 *Held:* The defendant's postconviction petition was frivolous and patently without merit because it attempted to raise issues that were previously waived.

¶ 2 The defendant, Randal E. Dye, appeals the first-stage dismissal of his postconviction petition. The Office of the State Appellate Defender (OSAD) was appointed to represent the defendant. OSAD filed a motion to withdraw as counsel, alleging that there is no merit to the appeal. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. McKenney*, 255 Ill. App. 3d 644 (1994). The defendant was given proper notice and granted an extension of time to file briefs, objections, or any other document supporting his appeal. The defendant filed a response. We considered

OSAD's motion to withdraw as counsel on appeal and the defendant's response. We examined the entire record on appeal and found no error or potential grounds for appeal. For the following reasons, we grant OSAD's motion to withdraw as counsel on appeal and affirm the judgment of the circuit court of Effingham County.

¶ 3

BACKGROUND

¶ 4 The State charged the defendant with aggravated battery and reckless driving. The incidents occurred at the Blue Mound Tavern. The defendant struck Angel Waller multiple times. The defendant then left the tavern and began driving in a reckless manner. The case proceeded to a jury trial at which the defendant argued self-defense. The jury found the defendant guilty of both offenses. The following evidence was presented at trial.

¶ 5 Amber Booher, a bartender at the tavern, saw the defendant hit Waller in the face two or three times. The blows knocked Waller to the ground. At that time, a number of bystanders detained the defendant and Waller left. Outside the tavern, Booher saw the defendant trying to hit people in the parking lot with his vehicle as well as using his truck to throw rocks at people in the parking lot.

¶ 6 Dickie Evans testified that as Waller was walking towards the defendant, the defendant jumped up and began to hit Waller. Evans saw the defendant hit Waller three or four times. Evans did not see Waller hit the defendant. After the defendant left the tavern, Evans saw the defendant attempt to hit people with his truck.

¶ 7 William Evans, Jr., testified that he saw a man hit a woman in the back of the head three or four times at the tavern that night. Outside the tavern, he observed the defendant try to hit people with his truck. He was unable to identify the defendant in court.

¶ 8 Hollie Hendricks observed an altercation at the tavern. She witnessed a man strike a woman in the face.

¶ 9 Kristy Hallmark testified that she saw the defendant hit Waller three times. The blows knocked Waller to the ground. In the parking lot, she observed the defendant attempt to run over people with his truck.

¶ 10 Truman Rhodes saw Waller approach the defendant. He saw Waller reach up like she was going to strike the defendant. He then saw the defendant strike Waller multiple times, knocking her to the ground. Outside the tavern, Rhodes saw the defendant attempt to run over people in the parking lot with his truck.

¶ 11 Waller testified that she struck the defendant in the mouth as hard as she could. She then hit him a second time. Subsequently, the defendant hit her at least once, maybe more. Waller testified that she was the aggressor and was ready to hit the defendant again. The State impeached her with prior statements indicating that the defendant hit her at least three times, at least one of which was while she was on the ground.

¶ 12 Deputy Jeremy Richardson testified that he saw Waller a few days after the incident at the tavern. She had a large bruise on her eye and right cheek.

¶ 13 Julie Warner testified that she observed Waller a few days after the incident at the bar and saw a bruise on her face.

¶ 14 Ultimately, the jury found the defendant guilty of aggravated battery and reckless driving. Prior to the scheduled sentencing, the defendant filed a *pro se* motion alleging that he received ineffective assistance of counsel during his trial. The court appointed counsel to represent the defendant on the ineffective-assistance-of-counsel claim.

¶ 15 The defendant's original trial counsel filed a motion for a new trial. Subsequently, newly appointed counsel filed an amended motion for a new trial. Relevant to this appeal, the motion alleged that the defendant received ineffective assistance of trial counsel. The defendant's allegations of ineffective assistance of counsel were that trial counsel failed to interview or call eyewitnesses to the incident, at least two of whom were present on the day of trial. The defendant attached affidavits from some of the alleged witnesses.

¶ 16 Shannon Medrano's affidavit stated that she attempted to contact trial counsel on multiple occasions. On one occasion trial counsel took her call, informed her that he was fed up with people calling him about the case and that the defendant did not know what he was talking about. Further, Medrano's affidavit states that on the night of the incident she observed Waller, and Waller had no visible injuries.

¶ 17 Oscar Rodriguez's affidavit stated that he attempted to contact trial counsel on two separate occasions and never received a call back from trial counsel. He further stated that he was present at the time of the altercation. He witnessed Waller swing at the defendant and knock off his glasses.

¶ 18 The court held a hearing on the posttrial motion. At the hearing Medrano testified in conformance with her affidavit. Rodriguez, however, testified that although he

attempted to contact the defendant's trial counsel, he was unable to and never left a message. On the day of trial, Rodriguez was present until lunch, but he never introduced himself to the defendant's trial counsel. Rodriguez also testified that prior to the defendant's trial, he had been convicted of felony domestic battery.

¶ 19 The defendant testified at the hearing. He testified that his trial attorney failed to work with him to prepare a witness list. He said that he had given trial counsel the names of Rodriguez and Medrano and provided contact information for them. He also asked trial counsel to call Kyle Kelly, someone the defendant was talking to at the bar. Notably, the defendant admitted that Kelly prepared a written statement indicating that the defendant attempted to hit people with his truck. The defendant also claimed that trial counsel would not talk to him about the case more than a couple of times.

¶ 20 The defendant's trial counsel testified at the hearing. He explained that he did talk to Medrano about what she observed. Trial counsel decided that she offered nothing to the defendant's case because his defense was self-defense. Since the defendant admitted to striking Waller, Medrano's testimony was immaterial to the defendant's case. Trial counsel testified that he did not call Rodriguez because he had two felony convictions and that he would reflect poorly on the defendant. Trial counsel did not recall having any discussions with the defendant about Kyle Kelly. Upon consideration, he indicated he did not think he would have helped the defendant's case. Trial counsel also identified a note that the defendant gave him at trial. The note thanked trial counsel for all he had done and for doing a good job. The note was admitted into evidence.

¶ 21 At the conclusion of the hearing, the trial court found that trial counsel's representation was not objectively unreasonable and that even if the representation was unreasonable, it did not affect the outcome of the trial. Subsequently, the court sentenced the defendant to 10 years' incarceration with one year of mandatory supervised release.

¶ 22 On direct appeal, the defendant argued that he was not proved guilty beyond a reasonable doubt because the State failed to refute his claim of self-defense and that the State presented prejudicial and irrelevant evidence. This court affirmed his conviction. *People v. Dye*, 2013 IL App (5th) 110364-U.

¶ 23 On January 8, 2014, the defendant filed a *pro se* postconviction petition. He alleged ineffective assistance of counsel for the same reasons he alleged ineffective assistance of counsel in his posttrial motion: trial counsel failed to contact or call certain witnesses. The circuit court found the defendant's petition to be frivolous and patently without merit and dismissed it.

¶ 24 The defendant then filed this appeal. After reviewing the case, OSAD filed a *Finley* motion seeking leave to withdraw from the appeal. The defendant filed a response to OSAD's motion. The defendant's response included information not before the trial court: records of trial counsel's visits with the defendant in jail and trial counsel's billing submitted to the circuit court in a request for attorney fees. The defendant alleges that this information shows that trial counsel did not talk to the defendant on certain instances in which trial counsel indicated he had spoken with the defendant. The defendant alleges trial counsel defrauded the court. He also alleges that trial counsel was disbarred for a number of years for actions in other cases for similar fraudulent claims.

¶ 26 The Post-Conviction Hearing Act (Act) allows persons convicted of a crime to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution." *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). Evidence of the claim must be attached to the petition in the form of "affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The Act provides a three-stage process for dealing with postconviction petitions. *People v. Tate*, 2012 IL 112214, ¶ 9. At the first stage, the court determines whether the petition is frivolous or patently without merit. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). If the court determines the petition fails to state the gist of a constitutional violation, it dismisses the petition *sua sponte*. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). *Res judicata* and waiver apply to claims in a postconviction petition, and they are a valid basis for a trial court to dismiss a claim in a postconviction petition *sua sponte*. *People v. Blair*, 215 Ill. 2d 427, 442 (2005). Issues which are waived (or forfeited) are "issues that could have been raised, but were not, and are therefore barred." *Id.* at 444 (citing *People v. Rogers*, 197 Ill. 2d 216, 221 (2001)). "An ineffective-assistance claim based on what the record on direct appeal discloses counsel did, in fact, do is, of course, subject to the usual procedural default rule. [Citation.]" *People v. Erickson*, 161 Ill. 2d 82, 88 (1994).

¶ 27 An allegation of a violation of the constitutional right to effective assistance of counsel is evaluated under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted in Illinois in *People v.*

Albanese, 104 Ill. 2d 504, 526-27 (1984). The standard has two prongs, both of which must be satisfied for a defendant to prevail on an ineffective-assistance-of-counsel claim. First, a defendant must show that his "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to deprive the defendant of a fair trial." (Internal quotation marks omitted.) *Albanese*, 104 Ill. 2d at 525. Second, a 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." (Internal quotation marks omitted.) *Id.* In *People v. Tate*, 2012 IL 112214, the Illinois Supreme Court stated that at the second stage of postconviction proceedings the petitioner must "'demonstrate' or 'prove' ineffective assistance by 'showing' that counsel's performance was deficient and that it prejudiced the defense." *Id.* ¶ 19. The reviewing court can address these requirements in either order. *Albanese*, 104 Ill. 2d at 527. A failure to satisfy either prong of the *Strickland* standard causes the allegation of ineffective assistance of counsel to fail; the court need not address both prongs. See *Strickland*, 466 U.S. at 670.

¶ 28 The postconviction petition filed by the defendant raises the exact issues he raised in his posttrial motion; it relies on facts included in the record on direct appeal. Therefore, the issues are forfeited, and the circuit court's dismissal of the postconviction petition was proper.

¶ 29 In his response to OSAD's motion, the defendant argues that he has new evidence that was not available at trial or part of the record on direct appeal. He includes records purporting to show that trial counsel misrepresented the time he spent representing the

defendant at trial to the circuit court when he requested reimbursement for his time. Additionally, the defendant alleges that his trial counsel was disbarred by the Illinois Attorney Registration & Disciplinary Commission. This was not alleged in the defendant's postconviction petition. The defendant made no effort to explain why this evidence was not attached to his postconviction petition. It is evidence outside the record on appeal. As such, it cannot be considered in this appeal. *People v. Stewart*, 179 Ill. 2d 556, 567 (1997).

¶ 30 Even if we were to consider the evidence the defendant provided, it would not alter our decision in this case. Assuming trial counsel misrepresented his time to the circuit court and was disbarred in proceedings resulting from his actions in separate cases, it had no impact on the outcome of the defendant's trial. It does not allege representation of the defendant that was objectively unreasonable in the defendant's case. Nor does it make any showing that but for these actions, the outcome of the defendant's trial would have been different. Therefore, it cannot meet the *Strickland* requirements to establish a violation of the right to effective assistance of counsel.

¶ 31 CONCLUSION

¶ 32 The circuit court properly dismissed the defendant's postconviction petition as frivolous or patently without merit. OSAD's motion for leave to withdraw is granted, and the circuit court of Effingham County's order is affirmed.

¶ 33 Motion granted; affirmed.