2017 IL App (1st) 151897-U

No. 1-15-1897

FIFTH DIVISION
September 1, 2017

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. 11 CR 04775
	)	
JOSEPH VERRE,	)	The Honorable
	)	Thomas J. Byrne,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Hall and Gordon concurred in the judgment.

O R D E R

¶1 *HELD*: Defendant's postconviction petition was properly dismissed following first-stage review where defendant failed to sufficiently allege his trial and appellate counsels were ineffective.

¶2 Defendant, Joseph Verre, appeals the first-stage dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). Defendant contends the trial court erred in summarily dismissing his petition where it

stated the gist of constitutional claims of ineffective assistance of trial and appellate counsels. Based on the following, we affirm.

¶3 FACTS

¶4 This case appears before us for a second time. Following a bench trial, defendant was convicted of two counts of criminal sexual assault and two counts of criminal sexual abuse. He was sentenced to consecutive five-year prison terms for the criminal sexual assault counts and two one-year prison terms, to be served concurrent to each other and to the criminal sexual assault terms, for the criminal sexual abuse counts. On direct appeal, defendant argued that the evidence was insufficient to support his conviction and that his sentence was excessive. In this court's unpublished order affirming defendant's conviction and sentence, we provided the following facts:

> "At trial, [D.H.][1] testified that she grew up in Park Ridge and graduated from Maine South High School where she was in special education classes '[p]art of the time.' After graduation, she worked at supermarkets, and had been working at a Jewel in Niles for 10 years. At different times during [D.H.'s] employment, her parents, who moved to Antioch, drove her to work, and she also rode the public bus. Although [D.H.] had a check book and wrote checks, her father kept track of the balance. [D.H.] lived at Avenues to Independence in Park Ridge where she had two roommates. According to [D.H.], she cooked for her roommates, but did not shop when she cooked because it was too difficult for her. [D.H.] walked to the library where she borrowed music CDs. She sent e-mails to

[1] Use of initials for victims of sexual offenses protects the privacy of the victims. *People v. Oliver*, 50 Ill. App. 3d 665, 667 n. 2 (1977).

her friends, surfed the internet, completed word puzzles, and read the newspaper. [D.H.] also had a cell phone that she used to call family.

[D.H.] testified that on February 10, 2011, the day of the incidents in question, defendant picked up [D.H.] from work. [D.H.] knew defendant her entire life and participated in activities such as shopping and sports with him and his son, Frank, who, according to the testimony of defendant's wife, Leah Verre, was mentally disabled. Defendant told her that he needed to fix the heater at 7151 West Belmont Avenue, waved [D.H.] inside, and locked the door. Despite [D.H.'s] statements to stop, defendant took her to the furnace room, and pulled down her pants and underwear. Defendant touched her vagina with his hand, 'rubbing it up and down,' and then lifted up her shirt and bra. He fondled and licked her breasts. Defendant placed his penis in her vagina and 'was rubbing it up and down.' Defendant told her not to tell anybody, and then took [D.H.] to K–Mart to buy toys. She went into the store alone and spent $92 on toys using her own check. On February 11, 2011, [D.H.] told her mother what happened because she was 'shook up' and did not know what to do. [D.H.] went to the hospital where she was examined by a doctor and discussed the incident. She subsequently spoke to a detective about the incident, and that detective ordered someone to come to the scene to swab her breasts. [D.H.] also testified that the incident on February 10 was not the first, and that defendant similarly assaulted her 'five times or more in the furnace room and five times or more in the bathroom' of 7151 West Belmont Avenue.

Detective Ronald Schmuck testified that on February 11, 2011, he spoke to [D.H.] regarding the incident in question and became aware that there was a possibility of biological evidence. He ordered a female evidence technician to administer swabs of [D.H.'s] breast, which she completed. On February 15, 2011, Schmuck executed a search warrant at 7151 West Belmont Avenue and found a vacant unit with very little furnishings inside, a small furnace room, and a small bathroom. A stain on the bathroom floor was recovered and inventoried. Katrina Gomez, a forensic scientist, testified that both the floor sample and the breast swab testified positive for defendant's DNA.

Dr. Michael Ostrowski, who was 78 years old, testified that he was a clinical psychologist and was employed at Avenues to Independence, the purpose of which was to transition individuals from a sheltered home environment to a more independent living arrangement. Ostrowski examined [D.H.] in December of 2003, and found that her full scale IQ was 65, placing her in the lower one to two percentile, *i.e.*, mild mental retardation. [D.H.] had a mental age of about 8 years and 2 months, and a social age of about 11 years and 9 months. Ostrowski expressed doubts about [D.H.'s] ability to comprehend the newspaper, doubted that she could read anything but the most basic library books, but thought she could understand email. In Ostrowski's professional opinion, [D.H.] did not have the ability to give knowing consent to sexual contact, and was susceptible to being manipulated by adults. Ostrowski further testified that his 2003 examination remained valid on the day of trial because [D.H.'s] condition cannot change positively.

> On cross-examination, Dr. Ostrowski testified that he read an interview of [D.H.] conducted by Dr. Black in 2008. Black characterized [D.H.] as 'borderline intellectual functioning,' which, according to Ostrowski, is a category 'almost interchangeable' with the term 'mild mental retardation.' Ostrowski also testified that 'technically' borderline intellectual functioning is a category which shows a higher ability than mild mental retardation. Ostrowski further noted that the scores generated by Black in evaluating [D.H.] agreed with his own evaluation of her in 2003." *People v. Verre*, 2014 IL App (1st) 123252-U, ¶¶ 4-8.

In affirming defendant's conviction and sentence, this court found the evidence proved D.H. was unable to comprehend the nature of the sexual acts that were performed on her and defendant was aware of D.H.'s inability to understand those acts. *Id.* ¶¶ 15-18.

¶5 Defendant subsequently filed a *pro se* postconviction petition claiming: (1) his trial counsel was ineffective for failing to cross-examine D.H. and introduce evidence regarding her use of birth control, which would have demonstrated she understood the nature of the sexual acts at issue; (2) his appellate counsel was ineffective for failing to raise the issue of a discovery violation on direct appeal where the State failed to adequately tender all the information that Dr. Ostrowski testified to at trial; and (3) his trial counsel was ineffective for failing to properly investigate and challenge Dr. Ostrowski's testimony. To his petition, defendant attached, *inter alia*, records from Avenues of Independence showing D.H. was on birth control in 2008.

¶6 In summarily dismissing plaintiff's *pro se* postconviction petition, the trial court found defendant forfeited review of his claims against trial counsel. The trial court further

considered defendant's claims, despite waiver, and found defendant failed to establish the requisite standard for his all of his ineffective assistance claims. This appeal followed.

¶7 ANALYSIS

¶8 Defendant contends the trial court erred in summarily dismissing his *pro se* postconviction petition. Defendant maintains that his petition presented the gist of constitutional claims for ineffective assistance of trial and appellate counsels.

¶9 The Act provides a statutory method by which a defendant may challenge his conviction or sentence for substantial violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Edwards*, 2012 IL 111711, ¶ 21. The Act is a collateral attack on a final judgment. *Id.* Accordingly, where a petitioner previously has raised an appeal from a judgment of conviction, the reviewing court's judgment will bar postconviction review of all issues actually decided pursuant to the doctrine of *res judicata* and will forfeit any other claims that could have been presented. 725 ILCS 5/122-3 (West 2010); *Edwards*, 2012 IL 111711, ¶ 21. The doctrines of *res judicata* and forfeiture, however, are relaxed where fundamental fairness so requires, *i.e.*, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original appellate record. *People v. English*, 2013 IL 112890, ¶ 22.

¶10 The Act provides three potential stages of postconviction review. *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 27. Section 122-2 of the Act requires a postconviction petitioner to "clearly set forth the respects in which petitioner's constitutional rights were violated." 725 ILCS 5/122-2 (West 2010). In the first stage of review, the defendant need only present a limited amount of detail in the petition. *People*

v. Hodges, 234 Ill. 2d 1, 9 (2009). That said, section 122-2 also provides that "[t]he petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). At the first stage, the trial court, taking the allegations as true, reviews the petition to ascertain whether it is frivolous or patently without merit, *i.e.*, whether it presented "the gist of a constitutional claim." *Lofton*, 2011 IL App (1st) 100118, ¶ 27. A petition is frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact. A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation. An example of an indisputably meritless legal theory is one which is completely contradicted by the record. [Citation.] Fanciful factual allegations include those which are fantastic or delusional." *Hodges*, 234 Ill. 2d at 15. If the petition is frivolous or patently without merit, it must be dismissed by the trial court. *Lofton*, 2011 IL App (1st) 100118, ¶ 27. We review the dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶11 To determine whether defendant's postconviction petition was frivolous or patently without merit, we must address his ineffective assistance of counsel claims. Under the rules established by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must demonstrate that his counsel's performance was deficient and that he was prejudiced as a result. *Id.* at 687. To show deficient representation, a defendant must establish his counsel's performance fell below an objective standard of reasonableness. *Id*. at 688. Judicial scrutiny of a counsel's performance is highly deferential, such that a court must indulge in a strong presumption that the counsel's conduct fell within the wide range of professional assistance. *Id*. at 689.

To demonstrate prejudice, the defendant must show there is a reasonable probability that, but for counsel's deficient representation, the result of the proceeding would have been different. *Id*. at 694. The Supreme Court advised that "[a] reasonable probability is a probability sufficient to undermine the confidence in the outcome" of the proceeding. *Id*. Moreover, because the defendant must satisfy both parts of the *Strickland* test, if an ineffective assistance claim can be disposed of on the ground of lack of sufficient prejudice, a court need not consider the quality of the attorney's performance. *Id*. at 697.

¶12 Our supreme court has further advised that the right to effective assistance of counsel refers to competent, not perfect, representation. *People v. Sharp*, 2015 IL App (1st) 130438,¶ 101. In other words, *Strickland* only requires a fair trial for the defendant; one that is free from errors so egregious that they, in all probability, caused the conviction. *Id*.

¶13 Defendant first contends the trial court erred in summarily dismissing his postconviction petition where he sufficiently alleged his trial counsel was ineffective for failing to introduce evidence negating the State's position that D.H. could not understand the nature of sexual acts. Defendant's postconviction petition alleged his trial counsel compounded the error by failing to establish that D.H. was taking birth control pills at the time of the incident, which defendant argued was directly relevant to the issue of D.H.'s understanding of the sexual nature of the alleged acts.

¶14 We find defendant has forfeited review of his contention. Both parties acknowledge the information providing that D.H. was taking birth control pills in 2008 was included in the discoverable trial documents. The record, however, revealed defense counsel's cross-examination of D.H. and the lack of questioning regarding her birth

control prescription. Moreover, the record contained defense counsel's closing statement establishing the consent theory of defense. As a result, the facts in support of defendant's claim that trial counsel was ineffective for failing to raise D.H.'s birth control prescription and to cross-examine her regarding her knowledge of the sexual acts at issue appeared within the record and the claim could have been raised on direct appeal. Therefore, the issue is forfeited.

¶15 Despite forfeiture, we also find defendant cannot sufficiently establish prejudice resulting from his trial counsel's decision to present a consent theory of defense. See *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 33 (forfeiture is an admonition on the parties and, in the interest of developing a sound body of law, a court may review a forfeited issue so long as the record contains sufficient facts for its resolution). In other words, defendant could not establish an ineffective assistance claim based on trial counsel's failure to introduce evidence demonstrating D.H. was taking birth control pills and to cross-examine D.H. regarding her understanding of sexual acts. Put simply, the sheer introduction of evidence that D.H. took birth control pills could not establish that she understood the sexual acts in question. Women use birth control pills for a multitude of reasons and defendant presented no demonstrable evidence that all of those women have a certain level of sexual knowledge, or any at all.

¶16 Moreover, defendant failed to support his argument that cross-examining D.H. regarding her use of birth control would have established she understood the sexual acts that occurred. There was no affidavit, testimony, or other document indicating D.H., in fact, understood the nature of sexual acts. Rather, defense counsel explicitly cross-examined Dr. Ostrowski regarding D.H.'s level of understanding of the nature of the

sexual acts that took place. Despite the expert's opinion that D.H. could not understand the sexual acts, defense counsel attempted to discredit Dr. Ostrowski's opinion by questioning his expertise in light of the length of time since the doctor had examined her. Additionally, even if defense counsel was able to establish that D.H. understood the physical nature of the sexual acts, doing so " 'is not sufficient to establish that the victim comprehended the social and personal costs involved.' " *People v. Vaughn*, 2011 IL App (1st) 092834 ¶ 38, (quoting *People v. Blake*, 287 Ill. App. 3d 487, 493 (1997)).

¶17 In sum, defendant could not establish that, but for his counsel's failure to introduce evidence regarding D.H.'s use of birth control pills and to cross-examine her as to whether she understood the nature of the sexual acts at issue, there is a reasonable probability the outcome of trial would have been different. We, therefore, conclude the trial court did not err in finding defendant's ineffective assistance of counsel claim was frivolous and patently without merit.

¶18 Defendant next contends the trial court erred in summarily dismissing his postconviction petition where he sufficiently alleged his appellate counsel was ineffective for failing to raise the argument that he was denied a fair trial due to the State's undisclosed expert opinion testimony at trial. More specifically, defendant alleged that Dr. Ostrowski's opinion testimony provided on direct was not sufficiently disclosed by the doctor's submitted 2-page report, and the State's failure to fully disclose that expert opinion testimony caused unfair surprise and undue prejudice. Defendant alleged that, because appellate counsel failed to argue on appeal that the State violated a discovery rule, appellate counsel's performance was deficient and prejudicial.

¶19 In order to establish that appellate counsel was ineffective, we again must apply the familiar standard set forth in *Strickland*. In other words, a defendant must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability the appeal would have been successful. *English*, 2013 IL 112890, ¶ 33. "Appellate counsel is not obligated to raise 'every conceivable issue on appeal,' but rather is expected to 'exercise professional judgment to select from the many potential claims of error that might be asserted on appeal.' " *Id*. (quoting *People v. Williams*, 209 Ill. 2d 227, 243 (2004)).

¶20 Defendant argues that the disclosure of Dr. Ostrowski's two-page report was insufficient to satisfy the discovery rules. Instead, defendant insists appellate counsel should have argued that the State also was required to disclose all of the specific opinions it intended to elicit from Dr. Ostrowski at trial.

¶21 Illinois Supreme Court Rule 412 governs disclosure requirements in criminal cases. Rule 412 provides, in relevant part, that the State shall disclose to defense counsel certain material in its possession or control, including "any reports or statements of experts, made in connection with the particular case, including the results of physical and mental examinations and of scientific tests, experiments, or comparisons, and a statement of qualifications of the expert." Ill. S. Ct. R. 412(a)(iv) (eff. Mar. 1, 2001). "Discovery rules are intended to protect the accused against surprise, unfairness, and inadequate preparation." *People v. Lovejoy*, 235 Ill. 2d 97, 118 (2009). More specifically, the committee comments to the rule state:

> "without the opportunity to examine such evidence prior to trial defense counsel has the very difficult task of rebutting evidence of which he is unaware.

> In the interest of fairness paragraph (a), subparagraph (iv), requires the disclosure of all such results and reports, whether the result or report is 'positive' or 'negative,' and whether or not the State intends to use the report at trial. If the State has the opportunity to view the results of any such examination, the same opportunity should enure to defense counsel. No relevancy limitation is included: the only requirement is that the examination, etc., have been made 'in connection with' the case." Ill. S. Ct. R. 412, Committee Comments.

In interpreting the rule, our court has advised, "the State need not disclose the fact that the expert has an opinion, only the expert's reports and statements. No authority exists to support [the] assertion that the mere existence of an opinion, which is not embodied in a report or statement, must be disclosed." *People v. Glenn*, 233 Ill. App. 3d 666, 687 (1992).

¶22 We conclude defendant failed to establish ineffective assistance of appellate counsel based on the alleged discovery violation where his claim lacks merit. See *People v. Easley*, 192 Ill. 2d 307, 329 (2000). It is undisputed that Dr. Ostrowski was disclosed as a potential witness prior to trial and that his 2-page report summarizing his examination of D.H. in 2003 was disclosed as well. In stark contrast to *Lovejoy*, a case cited by defendant for support, Dr. Ostrowski's testimony was consistent with his report. In fact, defendant concedes as much in arguing that the basis of defense counsel's unfair surprise was that Dr. Ostrowski remained steadfast in his opinion that D.H. could not comprehend the sexual nature of the acts that took place in 2008 based on his evaluation of her mental capabilities in 2003. Accordingly, *Lovejoy* is inapposite to this case where the expert there testified to a conclusion in direct contradiction of the expert's opinion in

his own report. 235 Ill. 2d at 119. We, therefore, conclude the trial court did not err in finding defendant's ineffective assistance of appellate counsel claim was frivolous and patently without merit.

¶23 Defendant finally contends, in the alternative, that his postconviction petition sufficiently established his trial counsel was ineffective for failing to properly investigate Dr. Ostrowski's opinions prior to trial. Defendant's postconviction petition alleged that his trial counsel was ineffective for failing to consult his own expert, for failing to adequately prepare to cross-examine Dr. Ostrowksi, and for failing to move to bar Dr. Ostrowski's opinions as being unreliable. On appeal, however, defendant only argues that his trial counsel was ineffective for failing to introduce contrary expert testimony.

¶24 We conclude that defendant has forfeited review of his contention by failing to raise the claim on direct appeal. Dr. Ostrowski's testimony was part of the trial record, as was defense counsel's cross-examination of him and defense counsel's remaining defense. Therefore, the facts to support defendant's claim alleging trial counsel was ineffective for failing to effectively challenge Dr. Ostrowski's expert testimony by presenting a contrasting defense expert appeared within the record and the claim could have been raised on direct appeal. As such, the issue is forfeited.

¶25 Despite forfeiture, defendant cannot establish an ineffective assistance claim for failing to introduce contrary expert testimony where the allegation was unsupported by an affidavit from a proposed witness. See *People v. Harmon*, 2013 IL App (2d) 120439, ¶ 30, citing *People v. Enis*, 194 Ill.2d 361, 380 (2000). In *Enis*, the supreme court explained that, if such an affidavit is not provided, then "a reviewing court cannot determine whether the proposed witness could have provided testimony or information

favorable to the defendant, and further review of the claim is unnecessary." 194 Ill. 2d at 380. Where no such affidavit appeared in defendant's postconviction petition, the claim was properly dismissed as frivolous and patently without merit.

¶26 In sum, we conclude the trial court did not err in summarily dismissing defendant's postconviction petition.

¶27 CONCLUSION

¶28 We affirm the first-stage dismissal of defendant's postconviction petition.

¶29 Affirmed.