

No. 1-15-1952

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).

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. 09 CR 20155
)	
DEMOND DAVIS,)	Honorable
)	Angela M. Petrone,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court’s dismissal of defendant’s postconviction petition is affirmed.

¶ 2 Following his armed habitual criminal conviction, defendant-appellant, Desmond Davis, now appeals the circuit court’s dismissal of his postconviction petition. For the following reasons, we affirm the judgment of the circuit court of Cook County.

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¶ 3

BACKGROUND

¶ 4 Defendant was arrested on October 23, 2009, and charged with armed habitual criminal (AHC), aggravated unlawful use of a weapon (AUUW), and unlawful use of a weapon by a felon (UUWF).

¶ 5 At defendant's bench trial, Chicago police officers Rick Cabellero and Matthew Nomellini testified that, on the night of defendant's arrest, they were driving in an unmarked car when they observed a Buick fail to stop at a stop sign. The officers began following the Buick and saw the front seat passenger throw a gun out of the passenger window. After a brief chase, the officers pulled over the Buick. Both officers approached the Buick on foot and saw defendant sitting in the front passenger seat, as well as the driver of the car and a third person sitting in the back seat behind the driver. The officers found the gun that was thrown out of the car nearby and arrested defendant. The State also offered evidence of defendant's prior felony convictions to support the AHC and UUWF charges.

¶ 6 Defendant testified that on the night of his arrest, his brother, Edjuan Collins, picked him up from a party. Defendant sat in the rear passenger-side seat, another man sat beside him in the rear driver-side seat, and a man named Joseph Moore sat in the front passenger seat. He claimed he was intoxicated and asleep in the back seat and did not see anyone throw a gun out the window.

¶ 7 The trial court credited the police officers' testimony that they saw the defendant sitting in the front passenger seat and found defendant's testimony to be incredible. The trial court found that defendant threw the gun out of the Buick. The court then, based on defendant's past convictions, found him guilty of AHC, AUUW, and UUWF. The court sentenced defendant to six years', three years', and two years' imprisonment respectively. The court verbally ordered

that the sentences “are all merged together,” but the mittimus reflected three convictions and three concurrent sentences.

¶ 8 On direct appeal, this court affirmed his conviction. *People v. Davis*, 2013 IL App (1st) 111623-U, ¶ 32 (unpublished order under Supreme Court Rule 23). However, we agreed with both parties that defendant’s mittimus did not conform to the oral pronouncements and that the three counts should be merged together. *Id.* at ¶ 31. We ordered the mittimus corrected to reflect a single conviction for the offense of AHC. *Id.*

¶ 9 While his appeal was pending, defendant filed a *pro se* postconviction petition.¹ The petition asserted an argument not previously raised on direct appeal: that his trial counsel was ineffective for failing to call his brother, Edjuan Collins, to testify at his trial, despite the fact that he was present and ready to do so. Attached to the petition were affidavits from both defendant and Collins.

¶ 10 Defendant’s affidavit attested that on the night of the incident, Collins picked him up from a party, and that there was only one other passenger in the car with them, a “Mr. Carter.” Defendant was intoxicated and asleep in the back seat when the police pulled them over. Defendant’s affidavit further stated that Collins was the owner of the gun and that Collins “admitted to authorities that he tossed the gun out the window,” but that the police officers arrested defendant after they realized he was on parole. Defendant also attested that Collins told his trial counsel that he would testify that it was his gun. Although defendant’s counsel told Collins to be in court for the trial, counsel never called him to testify.

¹ The Post-Conviction Hearing Act does not bar a postconviction case from proceeding at the same time as a direct appeal. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Harris*, 224 Ill. 2d 115, 126-27 (2007).

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¶ 11 Collins' affidavit attested that he owned the gun and that defendant was asleep in the back seat during the incident. Collins stated that he was the "guilty party." However, Collins' affidavit never explicitly stated that he threw the gun out the vehicle window. Collins also stated that, despite telling the police officers that it was his gun, the police arrested defendant because of his parole status. Collins told defendant's trial counsel that he was the "guilty person" and that he would testify. Collins went to defendant's trial and was ready to take the stand, but defendant's counsel never called him as a witness.

¶ 12 The State filed a motion to dismiss defendant's postconviction petition.

¶ 13 In its written order granting the State's motion to dismiss, the trial court found Collins' affidavit to be cumulative based on its similarity to defendant's testimony. The court explained that Collins' claim that he owned the gun did not negate the police officers' testimony regarding defendant's possession of the gun, such that there was "no reasonable probability that the proceeding would have been different even with this testimony by Collins." The court found that defendant failed to overcome the strong presumption of sound trial strategy by his trial counsel in the decision not to call Collins as a witness. Defendant then filed this appeal.

¶ 14 ANALYSIS

¶ 15 We note that we have jurisdiction to review the trial court's order dismissing defendant's postconviction petition, as defendant filed a timely notice of appeal. Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); Ill. S. Ct. R. 606 (eff. Dec. 11, 2014).

¶ 16 The sole issue before us is whether the trial court erred in dismissing defendant's postconviction petition to the extent it was premised on trial counsel's ineffectiveness for failing to call Collins as a witness.

¶ 17 Defendant argues that his trial counsel was ineffective because Collins would have testified that he was the person who threw the gun from the vehicle, which creates a reasonable probability that the outcome of the trial would have been different. Defendant emphasizes that Collins was in the courtroom ready to take the stand.

¶ 18 The Post-Conviction Hearing Act provides a procedural mechanism through which a criminal defendant can assert that his federal or state constitutional rights were substantially violated in his original trial or sentencing hearing. *People v. Davis*, 2014 IL 115595, ¶ 13 (citing 725 ILCS 5/122-1 *et seq.* (West 2012)). “The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal.” *People v. English*, 2013 IL 112890, ¶ 22. The State may file a motion to dismiss defendant’s postconviction petition. *People v. Simpson*, 204 Ill. 2d 536, 546 (2001); 725 ILCS 5/122–5 (West 2012). To survive a motion to dismiss, the defendant must make a substantial showing that his constitutional rights have been violated, supported by the trial record or accompanying affidavits where appropriate. *Simpson*, 204 Ill. 2d at 546-47. Postconviction petition issues that could have been raised on direct appeal, but were not, are forfeited. *English*, 2013 IL 112890, ¶ 22. We review the dismissal of a petition for postconviction relief *de novo*. *People v. Fields*, 331 Ill. App. 3d 323, 327 (2002).

¶ 19 Claims of ineffective assistance of counsel are reviewed through a two-part test that was announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), and was adopted by our supreme court. *People v. Burrows*, 148 Ill. 2d 196, 232 (1992). To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) counsel’s representation fell below an objective standard of reasonableness, and (2) counsel’s substandard representation so prejudiced the defense as to deny the defendant a fair trial. *Id.* The

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failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel. *People v. Albanese*, 104 Ill. 2d 504, 527 (1984) (quoting *Strickland* 466 U.S. at 697).

¶ 20 We first address the State's claim that defendant has forfeited this ineffectiveness claim by failing to raise it for the first time on direct appeal. In response, defendant argues that he could not have raised this issue on his direct appeal because the nature of Collins' testimony was outside of the appellate record during his appeal. We are not persuaded by this argument.

¶ 21 Ordinarily, the failure to raise a claim of ineffectiveness of trial counsel in the direct appeal renders the issue waived in postconviction proceedings. *People v. Daniels*, 301 Ill. App. 3d 87, 97 (1998). There are exceptions to the doctrine of forfeiture: where fundamental fairness so requires, where the alleged forfeiture stems from the incompetence of appellate counsel, or where facts relating to the claim do not appear on the face of the original appellate record. *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 37.

¶ 22 Here, defendant relies on the third exception by claiming that Collins' testimony was not available in the original record. However, "[t]he forfeiture exception based on facts outside of the original appellate record, is not an invitation for defendants to present incomplete claims at trial, sit back, and if they are unsuccessful, raise the 'new' fact in a postconviction petition." *Id.* at ¶ 40. Collins' testimony and the decision not to call him was not a new fact. Defendant presumably knew at the time of his direct appeal that Collins was willing to testify and that his trial counsel did not call him. He even filed his postconviction petition with this issue while his direct appeal was pending, establishing his possession of these facts at the time of his direct appeal. See *People v. Gale*, 376 Ill. App. 3d 344, 349 (2007) (issues known to defendants at the time of direct appeal but not raised on direct appeal are forfeited).

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¶ 23 Defendant could have easily raised the issue on direct appeal, but failed to do so. Thus, defendant has forfeited this argument.

¶ 24 Regardless of forfeiture, we agree with the trial court that the ineffective assistance of counsel claim would fail because there is not a reasonable probability that Collins' testimony would have changed the outcome of defendant's trial so as to meet the prejudice prong of *Strickland*. Collins' affidavit never explicitly states that he threw the gun himself, he only claims that he owned the gun and was the "guilty party." And the fact that Collins owned the gun does not negate the police officers' testimony, which was credited by the trial court, that they saw defendant in possession of the gun when he threw it. Accordingly, defendant is unable to show that the absence of Collins' testimony at trial prejudiced him.

¶ 25 CONCLUSION

¶ 26 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County dismissing defendant's postconviction petition.

¶ 27 Affirmed.