2017 IL App (1st) 152800-U

SIXTH DIVISION
SEPTEMBER 15, 2017

No. 1-15-2800

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. 05 CR 12227
	)	
WAYNE KIRK,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

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

¶ 2 Following his conviction of aggravated battery with a firearm, defendant-appellant, Wayne Kirk, appealed the circuit court's dismissal of his postconviction petition. This court reversed and remanded, allowing defendant to amend his petition. *People v. Kirk*, 2012 IL App (1st) 101606, ¶ 26. On remand, the circuit court dismissed his amended petition, and defendant now appeals that dismissal. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On May 8, 2005, defendant shot and injured his roommate, William Herron, during an argument in the townhouse they shared with four others at 145 East 133rd Street in Chicago.

¶ 5 Defendant claimed that he shot Herron in self-defense and a *Lynch* hearing[1] was conducted prior to trial. Although the record is unclear, it appears that defendant's trial counsel sought to introduce some *Lynch* witnesses, but that the trial court limited the *Lynch* evidence to defendant's testimony alone.

¶ 6 During the bench trial, Herron testified that he entered defendant's second-story bedroom and accused him of being lazy and told him to "start being a man." A verbal argument then ensued between the two men and Herron called the police. Herron walked downstairs, but defendant followed him, taunting him with his handgun. Defendant then shot Herron.

¶ 7 Defendant testified that he shot Herron in self-defense. He claimed that Herron kicked open his bedroom door while he was playing video games, started an argument with him, and hit him several times in the face.

¶ 8 At the conclusion of trial, defendant was convicted of aggravated battery with a firearm, and sentenced to six years' imprisonment. On June 28, 2008, this court affirmed defendant's conviction and sentence on direct appeal over his claim that the State failed to disprove his use of self-defense beyond a reasonable doubt. *People v. Kirk,* No. 1–06–1969, 378 Ill. App. 3d 1122 (2008) (unpublished order under Supreme Court Rule 23) (hereinafter referred to as *Kirk I*).

¶ 9 Following this court's ruling which affirmed the trial court, defendant then filed a *pro se* petition for postconviction relief. His petition alleged that his trial counsel was ineffective for

[1] In *People v. Lynch*, 104 Ill. 2d 194, 200 (1984), our supreme court held that when self-defense is raised, the defendant may present appropriate evidence of the victim's aggressive and violent character to establish the victim as the aggressor.

failing to present several documents that would support his self-defense claim, including the 911 report from the day of the shooting incident and a police report of Herron's arrest for domestic battery four months after the shooting incident with which defendant was charged. He further alleged:

> "Although there were not any eyewitnessess [*sic*] to the actual occurrence. There are several witnessess [*sic*] that could have been called. The victim's sister Angenette Holloway [who is also] the defendant's fiancé[e] and her son Ramon Herron. They both would have testified to the victim's violent behavior as they both have witnessed his behavioral patterns in the past. ***"

The petition advanced to the second stage and postconviction counsel was appointed. Defendant's postconviction counsel filed a certificate under Rule 651(c) (Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013)), in which she noted, "I have examined [defendant's] *pro se* petition for postconviction relief and, as it adequately presents his issues, a supplemental petition will not be presented."

¶ 10 The State filed a motion to dismiss defendant's postconviction petition. During the hearing, defendant's postconviction counsel argued, for the first time, that defendant received ineffective assistance of appellate counsel for failing to challenge the trial court's *Lynch* ruling on direct appeal. Following the hearing, the trial court dismissed defendant's postconviction petition.

¶ 11 Defendant appealed to this court, arguing that his postconviction counsel rendered unreasonable assistance by failing to amend his *pro se* postconviction petition or procure supporting affidavits. We rejected defendant's argument that postconviction counsel rendered

unreasonable assistance by failing to procure supporting affidavits. *Kirk*, 2012 IL App (1st) 101606, ¶ 26 (hereinafter referred to as *Kirk II*). We stated:

> "affidavits from the proposed *Lynch* witnesses in this case would have provided no support for the defendant's claim that counsel was ineffective for failing to call such witnesses since the trial court limited the *Lynch* evidence counsel could present to the defendant's testimony alone." *Id*.

However, we agreed that defendant's postconviction counsel rendered ineffective assistance by failing to amend his petition to include the claim of ineffective assistance of appellate counsel which was raised at the hearing on the State's motion to dismiss. *Id*. at ¶ 36. We reversed and remanded, directing the trial court to conduct another second-stage hearing, after allowing defendant leave to amend his petition to add a claim of ineffective assistance of appellate counsel. *Id*.

¶ 12 On remand, defendant's new postconviction counsel filed a supplemental petition alleging ineffective assistance of both trial and appellate counsel. Unlike defendant's original petition, his amended petition attached supporting affidavits from two people: (1) Julie Mayes, Herron's fiancée, and (2) Angenette Holloway, Herron's sister and defendant's girlfriend. Both women lived with defendant and Herron in their shared townhome on the date of the shooting incident.

¶ 13 Mayes' affidavit attested to past incidents in which Herron had been violent with her. Mayes' also attested that she was in the townhome during the shooting incident, and that Herron was on "some kind of drugs" that morning. Herron began hitting and choking her, but defendant came into the bedroom and told Herron to stop when he heard Mayes' screams. Mayes then saw

Herron go to defendant's bedroom and punch him two to three times. She heard defendant shoot Herron while she was still upstairs, but did not see the shooting incident downstairs. Mayes stated that defendant's trial counsel never contacted her.

¶ 14 Holloway's affidavit described past incidents in which Herron acted violently with several different people. Holloway further attested that she was not at the townhome when the shooting incident occurred, but that she saw Herron that morning and believed he had been drinking or using drugs. Holloway stated that defendant's trial counsel contacted her one time, but did not ask her about Herron's violent tendencies.

¶ 15 Neither Holloway nor Mayes attested that defendant was aware of Herron's past violent acts. And while both stated they never received a subpoena to testify in defendant's trial, neither stated that she would have been available or willing to testify at defendant's trial.

¶ 16 The State filed a motion to dismiss defendant's amended postconviction petition and the trial court conducted a second-stage proceeding. Although defendant's amended petition alleged ineffective assistance of both trial and appellate counsel, the trial court, citing to our directions in *Kirk II*, only evaluated whether defendant had received ineffective assistance of appellate counsel. Specifically, the trial court discussed whether defendant received ineffective assistance when appellate counsel: (1) failed to raise on direct appeal that defendant's trial counsel was ineffective for failing to call *Lynch* witnesses, and (2) failed to challenge on direct appeal the trial court's *Lynch* ruling.

¶ 17 In its written order, the trial court held that appellate counsel was not ineffective for failing to raise trial counsel's ineffectiveness on direct appeal because defendant did not suffer any prejudice from trial counsel's failure to call *Lynch* witnesses. The trial court relied on this court's statements in *Kirk II*, specifically: "nothing in the record establishes or suggests that

counsel did not make an effort to obtain affidavits in support of the defendant's claims." 2012 IL App (1st) 101606, at ¶ 25. The trial court also noted its trial ruling which limited any *Lynch* witnesses to defendant's testimony alone. The trial court concluded that because it was meritless to argue that defendant's trial counsel was ineffective for failing to call *Lynch* witnesses, defendant suffered no prejudice from appellate counsel's failure to raise that argument on direct appeal.

¶ 18 The trial court also held that defendant suffered no prejudice when appellate counsel failed to challenge the trial court's *Lynch* ruling. The trial court noted that it was unclear whether any of the potential *Lynch* witnesses were available at the time of trial, and that neither Mayes nor Holloway attested that defendant was aware of Herron's past violent behaviors, as would be required to make such evidence admissible under *Lynch*. See *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008). The trial court further stated:

> "Although the trial court ruled not to include the affiants' proffered evidence of Herron's past violent acts, the exclusion of additional evidence was not prejudicial to [defendant] because [defendant] was able to present the same or substantially the same evidence during the trial in an attempt to show that Herron had always been violent and aggressive as well as to show [defendant's] state of mind and belief that Herron was more likely to be aggressive towards him."

The trial court concluded that because defendant was not prejudiced by the trial court's *Lynch* ruling, appellate counsel was not ineffective for failing to challenge that ruling on direct appeal.

¶ 19 After the trial court granted the State's motion to dismiss defendant's amended petition, defendant filed this appeal.

¶ 20 ANALYSIS

¶ 21 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.[2] Ill. S. Ct. R. 603 (eff. Feb. 6, 2013); Ill. S. Ct. R. 606 (eff. Dec. 11, 2014).

¶ 22 As a preliminary matter, we note that the trial court's dismissal order addressed two issues related to appellate counsel's ineffectiveness, but that defendant only challenges one issue on appeal. Defendant does not address the trial court's holding that his appellate counsel was not ineffective for failing to challenge the trial court's *Lynch* ruling. Therefore, defendant has forfeited this argument. See Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016); *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 208 (2007) (arguments not raised in an appellant's brief are forfeited).

¶ 23 The sole issue before us is whether the trial court erred in dismissing defendant's amended postconviction petition to the extent it was premised on appellate counsel's failure to argue trial counsel's ineffectiveness for failing to call *Lynch* witnesses.[3]

¶ 24 To evaluate appellate counsel's ineffectiveness, we must first determine whether defendant received ineffective assistance of trial counsel. If trial counsel was not ineffective, defendant will not be prejudiced by appellate counsel's failure to argue trial counsel's ineffectiveness. See *People v. Jones*, 362 Ill. App. 3d 31, 35 (2005) (noting that in order to

[2] After the initial notice of appeal, this court granted defendant's motion to amend his notice of appeal.

[3] Although defendant has completed his prison sentence, and its accompanying term of mandatory supervised release, he is still entitled to seek postconviction relief because he initiated the postconviction proceedings while still serving his sentence. See *People v. Correa*, 108 Ill. 2d 541, 546-47 (1985).

establish that appellate counsel was deficient, defendant must demonstrate that his allegation of ineffective trial counsel was meritorious and that this court would have found such had appellate counsel raised the issue on direct appeal).

¶ 25 Defendant argues that his trial counsel was ineffective for failing to investigate and present the testimony of Mayes and Holloway. Defendant highlights Mayes' testimony in her affidavit stating that his trial counsel never contacted her, as well as Holloway's testimony in her affidavit that his trial counsel only contacted her once and did not ask her about Herron's violent tendencies. Defendant claims that both affiants offered testimony that would have likely changed the result of this trial, either as *Lynch* evidence or as independent evidence of the circumstances of the shooting.

¶ 26 "The Postconviction 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 to (725 ILCS 5/122-1 *et seq.* (West 2008)). At the second stage of a postconviction proceeding, 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 2008). 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. We review the dismissal of a petition for postconviction relief *de novo*. *People v. Fields*, 331 Ill. App. 3d 323, 327 (2002).

¶ 27 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*. When a reviewing court addresses an ineffective assistance of counsel claim, it need not apply the two-part test in numerical order. *Id*. Because the failure to satisfy either prong of the *Strickland* test precludes a finding of ineffective assistance of counsel, " 'a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.' " *People v. Albanese*, 104 Ill. 2d 504, 527 (1984) (quoting *Strickland* 466 U.S. at 697). To show prejudice, a defendant must establish a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *People v. Smith*, 2012 IL App (1st) 102354, ¶ 168. A probability rises to the level of a "reasonable probability" when it is sufficient to undermine confidence in the outcome or the proceeding. *Id*. Accordingly, to decide whether trial counsel's failure to present the affiants' testimony resulted in prejudice, we consider whether admission of the affiants' testimony would create a reasonable probability of a different result in defendant's trial – that is, an acquittal.

¶ 28 In this case, whether offered as *Lynch* evidence or as eyewitness testimony, we do not find that the affiants' testimony would have caused a different outcome in defendant's trial. First, we find that they would have made little difference as *Lynch* evidence. Neither affidavit indicates that defendant had prior knowledge of Herron's past violent acts, as required by *Lynch*. And the record reflects that the trial court allowed defendant to testify to Herron's violent behavior in substantially the same manner as he argues Mayes and Holloway would have done. We cannot

say that two witnesses further testifying to Herron's violent behavior would have changed the trial court's view of Herron, and ultimately, the outcome of the trial.

¶ 29 Second, considering the two affidavits as eyewitness evidence, we agree with the State that nothing in Mayes' or Holloway's affidavits would have established that defendant *reasonably believed* it was necessary to shoot Herron. This is true even if the trial court had believed that Herron was on drugs on the day of the shooting incident. As we stated in *Kirk I*: "[e]ven if we assume that Herron was the initial aggressor when he struck defendant in the face, the circumstances did not reasonably require defendant to retrieve a gun, follow Herron downstairs while taunting him and shoot him after he knew that the police were en route to his location." *Kirk*, 378 Ill. App. 3d 1122. Nothing in Mayes' or Holloway's testimony would have changed that conclusion.

¶ 30 While Mayes' affidavit does corroborate defendant's claim that Herron attacked him first, it also directly contradicts defendant's own trial testimony. Defendant testified that he was playing video games when Herron kicked in his bedroom door and started arguing with and punching him. But Mayes stated in her affidavit that the incident started when defendant told Herron to stop hitting and punching her, and that Herron then followed defendant into his bedroom and began punching him. Given the direct contradictions to defendant's testimony, it seems unlikely that the trial court would have found Mayes' testimony to be credible. Accordingly, defendant is unable to show that the absence of Mayes' testimony at trial prejudiced him. See *People v. Bew*, 228 Ill. 2d 122, 135 (2008) (concluding that defendant must show actual prejudice, not mere speculation as to prejudice).

¶ 31 We cannot find a reasonable probability that admission of Mayes' and Holloway's testimony would have caused a different outcome to defendant's trial. Thus, defendant fails to

prove that he suffered any prejudice due to his trial counsel's alleged ineffectiveness, and as he fails to meet the prejudice prong of *Strickland,* there is no need for us to determine whether counsel's representation was unreasonable. See *Albanese*, 104 Ill. 2d at 527.

¶ 32 Because defendant cannot establish ineffective assistance of trial counsel, it necessarily follows that defendant cannot show ineffective assistance of appellate counsel for failing to argue that his trial counsel was ineffective. See *People v. Williams,* 2016 IL App (1st) 133459, ¶ 33 (noting that when the underlying issue has no merit, a defendant cannot show how he was prejudiced by appellate counsel's failure to raise that issue on appeal). Accordingly, the trial court did not err in dismissing defendant's amended postconviction petition.

¶ 33 CONCLUSION

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

¶ 35 Affirmed.