

**NOTICE**  
Decision filed 11/27/17. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2017 IL App (5th) 140508-U

NO. 5-14-0508

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).

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 96-CF-8
	)	
GERRODO FOREST,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

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JUSTICE WELCH delivered the judgment of the court.  
Justices Cates and Barberis concurred in the judgment.

**ORDER**

¶ 1 *Held*: The trial court's dismissal of the defendant's petition for postconviction relief was not reversible error at the second stage because he was not provided with ineffective assistance of counsel where appellate counsel failed to raise the issue of whether the trial court's denial of special provisions denied him due process. The trial court's dismissal is hereby affirmed.

¶ 2 The defendant-appellant, Gerrodo Forest,<sup>1</sup> appeals the judgment dismissing his petition for postconviction relief. He contends that his petition made a substantial

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<sup>1</sup>The court will be using the same spelling as found in the defendant's initial postconviction appeal.

showing of a constitutional deprivation. He argues dismissal at the second stage was premature and asserts a third-stage evidentiary hearing is appropriate. He also asserts that his appellate counsel was ineffective for failing to raise on direct appeal the issue of whether the trial court's denial of special provisions denied him due process on direct appeal. For the following reasons, the judgment of the circuit court is affirmed.

¶ 3

### BACKGROUND

¶ 4 The facts of the trial and conviction were detailed by this court on direct appeal. See *People v. Forest*, No. 5-98-0044 (1999) (unpublished order under Supreme Court Rule 23). Therefore, this court will only reiterate those facts relevant to this postconviction petition. See also *People v. Forest*, 2012 IL App (5th) 100356-U.

¶ 5 The defendant was found guilty of first degree murder by a jury on November 8, 1997. On April 30, 1996, prior to trial, he filed a motion requesting a psychological evaluation by Dr. Daniel J. Cuneo to determine his psychological and mental capacity. On May 1, 1996, he filed a motion to determine his fitness to stand trial. The State filed its own motions for psychological evaluations of the defendant on September 24, 1996, and October 23, 1996. The court granted the State's motions on October 23, 1996.

¶ 6 Pursuant to the court's order, the defendant was evaluated by Dr. Cuneo. Based on his evaluation of the defendant, Dr. Cuneo wrote a letter informing the court that, consistent with his prior evaluations,<sup>2</sup> the defendant was in the mildly mentally retarded

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<sup>2</sup>Dr. Cuneo had previously evaluated the defendant to determine whether he qualified for social security insurance.

range of intelligence. Dr. Cuneo also diagnosed the defendant with antisocial personality disorder.

¶ 7 Dr. Cuneo noted that the defendant had an extremely limited vocabulary and had problems with simple math equations such as 10 minus 6. Dr. Cuneo also noted that, during the defendant's stay at St. Clair County jail, the defendant attempted suicide by trying to swallow a spoon and tried to hang himself twice. While in custody at St. Clair County jail, the defendant was outwardly aggressive toward others, attacked an officer, and had to be placed in the "Quiet Room." While he was contained in the "Quiet Room," he beat his head against the wall. Taking these facts into account, as well as his observations of the defendant and the defendant's school records, Dr. Cuneo found the defendant fit to stand trial.

¶ 8 As part of his findings, Dr. Cuneo recommended that certain special accommodations be implemented to help the defendant better understand what would be occurring in the courtroom. Dr. Cuneo suggested that sentences be kept simple and concepts broken down, so the defendant could understand what was being said. He also suggested periodically checking with the defendant to ensure he grasped the questions asked and the answers given.

¶ 9 After Dr. Cuneo submitted his report to the court, a jury trial was held to determine the defendant's fitness to stand trial. The first fitness trial, held on January 29, 1997, resulted in a hung jury, and the court declared a mistrial. The second trial was held on February 27, 1997. During the second trial, Dr. John Rabun, a forensic psychologist,

testified that he evaluated the defendant to determine his fitness to stand trial, his ability to proceed in court, and his mental state at the time of the charged offense.

¶ 10 Dr. Rabun testified that the defendant was in the mild to moderate range of mental retardation, had a history of alcohol and drug use, and heard voices. Dr. Rabun testified that he interviewed the defendant, and that, throughout the interview, the defendant often provided monosyllabic answers, had difficulty articulating certain words, and had restricted facial expressions. The defendant reported to Dr. Rabun that he had been hearing voices but that the voices had disappeared or diminished in intensity since the jail staff placed him on medication. Dr. Rabun determined that, though the defendant had a mental defect, the defect did not render him unfit to stand trial. He concluded the defendant was able to understand the nature and purpose of the proceedings against him and was able to assist his attorney in his own defense. He testified that there was no need to diagnose the defendant with a psychotic disorder because auditory hallucinations are commonly found in people with mental retardation. The jury unanimously found the defendant fit to stand trial.

¶ 11 On October 15, 1997, the defendant filed a motion for trial with special provisions and assistance. Attached to the motion was a letter from Honey Maggio, a consultant with Special Education Support Services, stating her willingness to provide the defendant with the required assistance. Following a hearing on the motion, the court found it unnecessary to appoint someone to assist the defendant because, despite his intellectual limitations, it was not a situation where special provisions were needed to make the

defendant fit to stand trial. The court denied the motion for special provisions during trial.

¶ 12 Following a jury trial, the defendant was found guilty of first degree murder. On December 1, 1997, the defendant filed a posttrial motion, motion to reconsider the motion to dismiss, motion for judgment of acquittal notwithstanding the verdict, or, in the alternative, motion for new trial. On December 31, 1997, a hearing was held for the posttrial motion and sentencing. After hearing argument from both defense counsel and the State, the court denied the posttrial motion and proceeded to sentencing. The court sentenced the defendant to 45 years' imprisonment with no good time credit.

¶ 13 The defendant filed a direct appeal asserting three issues: (1) the evidence was insufficient to substantiate that the victim was murdered during an attempted armed robbery; (2) his trial counsel was incompetent for failing to submit an instruction to the jury about the necessity to view accomplice witness testimony with suspicion; and (3) the sentence was excessive in light of the circumstances of the offense and the defendant's rehabilitative potential. On August 25, 1999, this court affirmed the conviction and the sentence.

¶ 14 On May 3, 2004, the defendant filed a *pro se* postconviction petition alleging he was denied effective assistance of counsel in violation of his constitutional rights and that he was arrested without probable cause. On the same date, he filed a motion for appointment of counsel. Counsel was appointed, and the defendant was granted leave to amend the petition. The defendant's counsel filed an amended postconviction petition alleging due process and equal protection violations and ineffective assistance of

appellate counsel. On March 27, 2007, the State filed a motion to dismiss the amended petition on the grounds that it was untimely, the allegations were forfeited for not being raised on direct appeal, and the defendant failed to show that appellate counsel's failure to raise certain issues on direct appeal was objectively unreasonable and prejudiced the defendant.

¶ 15 On May 2, 2007, defense counsel filed a second amended petition for postconviction relief. The amended petition alleged equal protection and due process violations. Specifically, the amended postconviction petition argued the defendant was denied due process because the trial court denied the petition for special assistance during trial, denied the defendant's posttrial motion raising the issue of "denial of assistance," and the defendant was denied effective assistance of appellate counsel because appellate counsel failed to raise all issues ripe for review.

¶ 16 On June 1, 2007, the State filed a motion to dismiss the second amended postconviction petition. The State argued the petition was untimely, that any allegations were forfeited by defendant for failing to raise them on direct appeal, and that the defendant's claim of ineffective assistance of appellate counsel did not rise to the standard established in *Strickland v. Washington*, 466 U.S. 668 (1984).

¶ 17 On October 12, 2009, the trial court held a hearing on the State's motion to dismiss the second amended petition for postconviction relief. At the hearing, Dr. Cuneo testified that, as to the issue of untimeliness, based on his multiple evaluations of the defendant's mental capabilities, the defendant did not have the ability to prepare and file a legal document on his own. Dr. Cuneo felt the defendant's mental instability coupled with the

fact that he is illiterate and has the intellectual abilities of a nine-year-old would necessitate assistance in preparation of a postconviction petition.

¶ 18 On July 6, 2010, the trial court dismissed the defendant's petition for being untimely. The trial court further found the defendant's inability to file his petition in a timely manner was the result of the defendant acting out aggressively and being sent to segregation, rather than the innate mental handicap from which he suffers.

¶ 19 On May 1, 2012, this court found the defendant was not culpably negligent for failing to timely file his postconviction petition where he lacked the ability to prepare a petition without assistance and was unable to obtain assistance because his mental retardation and psychological problems resulted in his being placed in segregation. This court therefore reversed the dismissal and remanded the case to the trial court for further second-stage proceedings on the defendant's second amended postconviction petition. *Forest*, 2012 IL App (5th) 100356-U, ¶ 41.

¶ 20 On March 10, 2014, Dr. Cuneo submitted an opinion letter to the trial court stating that the trial judge had failed to follow his suggestions regarding special accommodations for the defendant. Dr. Cuneo stated that he had advised the trial court that vocabulary be kept simple and that the court administer periodic checks with the defendant to ensure that he understood the proceedings in the courtroom. Dr. Cuneo concluded that the provisions provided to the defendant at his 1997 trial were insufficient for him to understand what was happening during his court proceedings.

¶ 21 On August 4, 2014, the State once again filed a motion to dismiss the second amended petition for postconviction relief. The State argued that any issues raised by the

defendant were forfeited for not being raised on direct appeal and that the defendant's allegations were without merit and not supported by the record.

¶ 22 On September 12, 2014, the trial court issued an order granting the State's motion to dismiss. The court made specific findings on two issues. First, as to the allegations of violations of the defendant's right to a speedy trial, the court found that the allegations were not supported by the record. As to the special assistance issue, the court noted that a jury found the defendant fit to stand trial and that nothing in the record supported the defendant's claim that a third-stage hearing was necessary. The court found that the defendant forfeited the issue of special provisions during trial for failing to raise them on direct appeal. The court incorrectly stated that the issue of special assistance was not raised at trial or in a postconviction motion. In fact, trial counsel raised the issue in a pretrial motion *in limine* and in a posttrial motion to reconsider, and appellate counsel raised the issue in the second amended petition for postconviction relief. The court correctly noted, however, that the defendant failed to raise the issue on direct appeal. The defendant filed a timely notice of appeal.

¶ 23 ARGUMENT

¶ 24 On appeal, the defendant argues that the trial court erred in dismissing his postconviction petition at the second stage. The question of whether a petition is sufficient to warrant relief under the Post-Conviction Hearing Act (Act) is a legal one. Therefore, this court reviews the issue *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-389 (1998).



¶ 25 This court must determine whether the defendant's second amended petition made a substantial showing of a deprivation of a constitutional right. The defendant argues he was denied due process when the trial court denied his request for special assistance and that he was denied effective assistance of appellate counsel because appellate counsel failed to raise all issues ripe for review.

¶ 26 The Act provides a means for defendants to challenge a conviction or sentence by asserting that either one or both resulted from a substantial denial of rights of either the state or federal constitution. 725 ILCS 5/122-1 *et seq.* (West 2010). A postconviction proceeding is a collateral attack on the trial proceedings. *People v. Petrenko*, 237 Ill. 2d 490, 499 (2010).

¶ 27 The Act provides a three-stage process for postconviction proceedings. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the circuit court independently determines whether, taking the allegations as true, the *pro se* petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Edwards*, 197 Ill. 2d at 244. If the circuit court determines the petition asserts the gist of a constitutional claim, then the petition survives to the second stage where counsel may be appointed for indigent defendants, and the State is given the opportunity to either file an answer to the petition, or move that it be dismissed for failing to make a substantial showing of a constitutional deprivation. 725 ILCS 5/122-4, 122-5 (West 2010).

¶ 28 The purpose of a postconviction proceeding is to allow examination into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated in the direct appeal. *People v. English*, 2013 IL 112890,

¶ 22 (citing *People v. Harris*, 206 Ill. 2d 1, 12 (2002)). Any issue raised by the defendant on direct appeal is barred from being raised in a postconviction proceeding under *res judicata*. *English*, 2013 IL 112890, ¶ 22 (citing *People v. Ligon*, 239 Ill. 2d 94, 103 (2010)). Similarly, any issue that could have been raised on direct appeal, but was not, is forfeited in a postconviction proceeding. *English*, 2013 IL 112890, ¶ 22 (citing *Ligon*, 239 Ill. 2d at 103). For the purpose of postconviction relief, however, the rules are relaxed where the forfeiture is the result of ineffective assistance of appellate counsel, or where the relative facts do not appear on the face of the original appellate record. *English*, 2013 IL 112890, ¶ 22 (citing *People v. Williams*, 209 Ill. 2d 227, 233 (2004)).

¶ 29 The defendant argues that he was denied due process when the trial court denied his motions for special assistance both before and after the trial. In response, the State argues that the issue of whether the defendant was denied due process when the trial court denied his motions for special assistance is forfeited because it was not raised on direct appeal. We agree with the State.

¶ 30 The claims raised in the defendant's postconviction petition are based entirely on matters contained within the trial record and could have been raised on direct appeal but were not. The defendant's trial counsel raised the issue of special provisions both before the trial in a motion *in limine* and posttrial in a motion to reconsider. The postconviction petition does not present any new legal or factual basis under which the defendant should have been provided special assistance which did not exist at the time of the direct appeal. The issue is therefore forfeited for not being raised on direct appeal.

¶ 31 Alternatively, the defendant claims he was deprived of effective assistance of appellate counsel where counsel failed to argue on direct appeal that he was deprived of due process in denying his motions, both pre- and posttrial, for special provisions. The State argues that appellate counsel was not ineffective in deciding not to raise the issue on direct appeal because the decision not to do so was a strategic one. We agree with the State.

¶ 32 To show ineffective assistance of counsel, a defendant must establish both that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that there is a reasonable probability that but for the deficiency in counsel's performance, the result of the proceedings would have been different. *Strickland*, 466 U.S. at 687, 694. A defendant must satisfy both prongs of the *Strickland* test in order to prevail on an ineffective assistance of counsel claim.

¶ 33 In the case at hand, the defendant fails on both prongs. First, appellate counsel is not required to raise all issues ripe for appeal. In assessing claims for ineffective assistance, courts presume that defense counsel's actions were driven by sound trial strategy. *People v. Eddmonds*, 143 Ill. 2d 501, 529 (1991). The burden lies with the defendant to prove that counsel's performance was deficient. Counsel is not required to raise every conceivable issue on direct appeal. *English*, 2013 IL 112890, ¶ 33. The defendant's appellate counsel made a strategic decision not to raise the issue of denial of special provisions, and chose instead to raise the three issues of insufficient evidence, incompetent trial counsel, and excessive sentence. Based on the record, it was reasonable

for appellate counsel to believe the issue of denial of special assistance lacked merit. At the time of the direct appeal, the defendant had been found fit by both a jury and a forensic psychologist. Counsel's decision not to raise the issue on direct appeal appears to be based on strategy rather than deficiency and therefore does not rise to ineffective assistance of counsel.

¶ 34 Even assuming deficient representation by appellate counsel, the defendant cannot establish a reasonable probability that but for the deficiency, the outcome of the appeal would have been different. To satisfy the prejudice prong of the *Strickland* test, the defendant must show a reasonable probability that absent the error—failing to raise the issue of denial of due process for denying the motion for special provisions during trial—a court would have reached the conclusion that due process was in fact denied and therefore would have remanded the case for a new trial. *Strickland*, 466 U.S. at 695.

¶ 35 Had the issue been raised on direct appeal, this court would not have overturned the trial court's ruling on the motion for special assistance unless it was against the manifest weight of the evidence. *People v. Burton*, 184 Ill. 2d 1, 13 (1998). The defendant claims he was denied due process because he could not understand the nature of the proceedings against him. A defendant is presumed fit to stand trial. 725 ILCS 5/104-10 (West 2016); *People v. Easley*, 192 Ill. 2d 307, 318 (2000). "A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2016). In this case, there is substantial support in the record for the trial court's decision.

¶ 36 This defendant was evaluated by two different doctors prior to trial, both of whom found the defendant fit. The defense relies too heavily on Dr. Cuneo's recommendation that the defendant be provided special provisions to help him understand trial proceedings. Dr. Rabun, a forensic psychiatrist, relying on both his findings and the findings of Dr. Cuneo, found the defendant fit without the need for special provisions. Additionally, a jury determined that the defendant was fit. The jury's verdict was not conditional on the defendant's receiving special provisions. Though Dr. Rabun was the only witness called at the fitness hearing, Dr. Rabun was subject to cross-examination, and the defendant was given the opportunity to rebut the witness through questions referencing Dr. Cuneo's report. The jury's verdict cannot be ignored solely because there was a single witness called.

¶ 37 After the fitness trial was held, defense counsel moved that the defendant be provided special provisions during trial. Most notably, counsel requested Maggio be appointed as a special consultant. The trial judge, relying on his observations of the interactions between the defendant and his lawyer, the finding by the jury, and the recommendation of Dr. Rabun, denied the defendant's motion for special provisions. There is nothing in the record to support the defendant's claim that he did not understand the proceedings. He answered questions appropriately when addressed by the court and conferred with his attorney regarding trial strategy. Once, when he notified the court that he did not understand what was occurring, the court took a recess to allow counsel to explain the proceeding to the defendant, after which, the defendant said on the record that he now understood. There is no reasonable probability that this court would have granted

a new trial based on this record. The trial court's decision to not implement all of Dr. Cuneo's suggestions was based on the court's observations that the defendant understood who his lawyer was, understood the role of the judge and the prosecutor, and was confident in defense counsel's ability to communicate with the defendant and explain the proceedings in a way the defendant could understand.

¶ 38 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 39 Affirmed.