2018 IL App (1st) 152647-U

No. 1-15-2647

Order filed April 24, 2018

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 04 CR 27500
	)	
EDUARDO FLORES,	)	Honorable
	)	Luciano Panici,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE MASON delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court's order granting the State's motion to dismiss defendant's second-stage *pro se* postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) is affirmed where defendant forfeited his claims of ineffective assistance of trial counsel by not raising the issue on direct appeal.

¶ 2 Defendant, Eduardo Flores, appeals from an order of the circuit court granting the State's motion to dismiss his *pro se* postconviction petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the circuit court

erred in dismissing his petition at the second stage because he made a substantial showing that his trial counsel was ineffective for coercing him into a jury trial rather than a bench trial and denying him his right to testify at trial. We affirm.

¶ 3 Following a 2007 jury trial, Flores was found guilty of first degree murder and sentenced to 50 years' imprisonment. We affirmed his conviction on direct appeal. *People v. Flores*, No. 1-07-1870 (2009) (unpublished order under Supreme Court Rule 23). Because we set forth the facts in detail in our earlier order, we recount them here only to the extent necessary to resolve the issue raised on appeal.

¶ 4 Flores was charged with two counts of first degree murder and two counts of aggravated discharge of a firearm for the 1994 shooting death of Ricky McDaniel. On August 31, 2006, trial counsel filed an answer to the State's motion for discovery and the trial court set a final status date. On at least six court dates between October 11, 2006 and April 30, 2007, while Flores was present in-court, either trial counsel or the trial court indicated that the case was to be set for a jury trial. On May 14, 2007, the trial court granted the State's motion to introduce proof of other crimes and indicated that jury selection would begin the next day. On May 15, 2007, the State nol-prossed the aggravated discharge counts, and the case proceeded to jury selection.

¶ 5 The evidence at trial established that, on April 9, 1994, a vehicle driven by Flores forced McDaniels's car off of the road before a passenger inside Flores's vehicle stuck his hand out of the window and fired a gun toward McDaniel, his fiancé, and his seven year-old daughter. Though McDaniel was shot, he attempted to drive his car in reverse in order to escape. McDaniel's fiancé testified that Flores also drove in reverse and prevented McDaniel's vehicle

from moving. Flores's vehicle then sped away from the scene, and McDaniel later died as a result of multiple gunshot wounds.

¶ 6 At the close of the State's case-in-chief, the trial court admonished Flores about whether he wished to testify. The following exchange took place:

"THE COURT: Mr. Flores, you have a right to testify and right not to testify. Do you understand that?

DEFENDANT: Yes (indicating).

THE COURT: Say yes or no. Do you understand that?

DEFENDANT: Yes.

THE COURT: Okay. When we picked the jury I asked each one of those jurors would they hold it against you if you didn't testify. And, each answered they wouldn't hold it against you. Do you understand that?

DEFENDANT: Yes.

THE COURT: And, at appropriate time [sic] jury instructions are given. They will get an instruction the fact that you didn't testify they cannot use that against you. Do you understand that will happen too?

DEFENDANT: Yes.

THE COURT: Whether you testify or not is your decision. Do you understand that it is not your attorney's decision? You discussed this with your attorneys? Have you talked [about] whether you are going to testify with your attorneys?

DEFENDANT: Yes.

THE COURT: And, after discussing with your attorneys [do] you wish to testify; or, do you decline to testify?

DEFENDANT: I will testify.

THE COURT: You will? I'm sorry, what did you say?

DEFENDANT: I would testify.

THE COURT: I thought he said he would not?

[DEFENSE COUNSEL]: He would not testify.

THE COURT: Will not?

[DEFENSE COUNSEL]: Yes.

THE COURT: Okay. I need you — I just didn't hear you loud enough. I'm asking do you wish to? Do you want to testify, yes or no?

DEFENDANT: No.

THE COURT: Now I understand. Okay. And, counsel, that's your understanding also?

[DEFENSE COUNSEL]: Yes."

¶ 7 Flores rested without presenting evidence. After argument, the jury found Flores guilty of first degree murder and the trial court later sentenced him to 50 years' imprisonment. On direct appeal, this court affirmed Flores's conviction over his contention that the State introduced prejudicial other-crimes evidence, that he was denied a fair trial when the State made improper remarks during closing argument, and that his trial counsel was ineffective for failing to object to those errors and move for a mistrial. See *People v. Flores*, No. 1-07-1870 (2009) (unpublished order under Supreme Court Rule 23).

¶ 8 On July 23, 2010, Flores filed a *pro se* postconviction petition. As relevant here, Flores claimed that: (1) trial counsel was ineffective for coercing him to be tried by a jury even though he wanted a bench trial; and (2) counsel was ineffective for using undue influence and coercion to prevent him from testifying at trial. Flores attached his own affidavits supporting his claims, averring that counsel scared him out of testifying by saying that his testimony would be bad for his case and appeal. Flores also averred that counsel told him that the case would proceed to a jury trial even after he expressed his desire for a bench trial.

¶ 9 On December 5, 2014, appointed counsel filed an amended postconvition petition, supplementing Flores's *pro se* petition with case law and argument regarding the claim of trial counsel's ineffectiveness for failing to allow Flores to waive his right to a jury. On May 13, 2015, the State filed a motion to dismiss Flores's petition, which the trial court granted. Regarding Flores's claim that counsel was ineffective for preventing him from waiving his right to a jury trial, the trial court found that Flores's silence during the jury selection process demonstrated that Flores had "no basis" for bringing the claim.

¶ 10 Flores appeals, contending that the trial court erred in granting the State's motion to dismiss his postconviction petition because his petition set forth two meritorious claims of ineffective assistance of trial counsel. Specifically, Flores argues that he made a substantial showing that trial counsel was ineffective for: usurping his right to choose between a bench and jury trial and using undue influence and coercion to prevent him from testifying.

¶ 11 The Act provides a method by which a defendant can assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Applewhite*, 2016 IL App (1st) 142330, ¶ 9. The Act " 'provides for postconviction proceedings that may consist of as many as

three stages.' " *People v. Gonzales*, 2016 IL App (1st) 141660, ¶ 23 (quoting *People v. Pendleton*, 233 Ill. 2d 458, 471 (2006)). At the first stage, the trial court reviews the petition and may dismiss it only if it is " 'frivolous or is patently without merit.' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). If a petition is not summarily dismissed, it proceeds to the second-stage, where counsel is appointed and the petitioner bears the burden of making a substantial showing of a constitutional violation. *Id.* At the second stage, the State must either answer or move to dismiss the petition. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). All well-pleaded facts not positively rebutted by the trial record are taken as true. *Cotto*, 2016 IL 119006, ¶ 26. We review *de novo* a trial court's second stage dismissal of a postconviction petition. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 12 "Proceedings on a postconviction petition are collateral to proceedings in a direct appeal and focus on constitutional claims that have not and could not have been previously adjudicated." *People v. Holman*, 2017 IL 120655, ¶ 25. "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are forfeited." *People v. Holman*, 2017 IL 120655, ¶ 25. "Thus, in Illinois, a defendant must generally raise a constitutional claim alleging ineffective assistance of counsel on direct review or risk forfeiting the claim." *People v. Veach*, 2017 IL 120649, ¶ 47. However, our supreme court has noted that the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, 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 record. *People v. English*, 2013 IL 112890, ¶ 22.

¶ 13 The State argues that Flores has forfeited his claim that trial counsel was ineffective by failing to raise the issue on direct appeal. See *People v. Johnson*, 352 Ill. App. 442, 447 (2004) ("issues that could have been presented on direct appeal, but were not, are considered waived").

¶ 14 In his reply brief, Flores does not argue that fundamental fairness requires that this court review the issue or that the forfeiture stems from the ineffective assistance of appellate counsel. Rather, he argues, citing *People v. Tate*, 2012 IL 112214, ¶14, that forfeiture does not apply because the facts relating to the issue do not appear on the face of the original record where counsel's deficient performance caused the basis for the claim to be omitted from the record. Flores essentially maintains that his ineffective assistance of counsel claim is better suited to a collateral proceeding than a direct appeal. See *Veach*, 2017 IL 120649, ¶ 46 ("ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim").

¶ 15 Here, we find Flores's claims that trial counsel was ineffective for usurping his right to choose between a bench and jury trial, and for preventing him from testifying to be procedurally barred because these issues could have been raised, and disposed of, on direct appeal. We initially note that, given the nature of Flores's ineffectiveness claim, it is clear that he was aware of counsel's alleged ineffectiveness prior to filing his direct appeal and thus could have raised the issue on appeal. Moreover, this court could have disposed of the issue on direct appeal where the trial record belies both claims of ineffectiveness. The record shows that at no point during pretrial proceedings did Flores make his desire for a bench trial known to the trial court. See *People v. Powell*, 281 Ill. App. 3d 68, 75 (1996) ("[W]e have no sympathy for this defendant or any other who sits through that entire process and-while supposedly wishing for a bench trial-

says nothing to the trial court even though, as defendant claims here, his trial counsel has failed to request a bench trial in accordance with defendant's wishes"). Further, the record shows that Flores, after being admonished by the court that the decision to testify was his and his alone, informed the court that he did not wish to testify. See *People v. Frieberg*, 305 Ill. App. 3d 840, 852 (1999) (Noting that admonishments about the right to testify and "that whatever trial counsel's advice on this point may be, counsel cannot force the defendant to testify, nor can counsel prevent the defendant from testifying" would make the success of similar claims of ineffective assistance "virtually impossible."). Accordingly, we find that these claims of ineffective assistance of counsel are forfeited because they could have been raised, and disposed of, on direct appeal.

¶ 16 In reaching this conclusion, we are not persuaded by Flores's reliance on *Tate*. The defendant in *Tate* alleged that trial counsel failed to call four witnesses, who would have testified that defendant was not at the scene of the shooting for which he was convicted. *Tate*, 2012 IL 112214, ¶ 5. Our supreme court found that the defendant had not forfeited these claims, stating that it had "repeatedly noted that a default may not preclude an ineffective-assistance claim for what trial counsel allegedly ought to have done in presenting a defense" *Id.* at ¶¶ 13-15. Here, unlike *Tate*, Flores's claims are not based on what trial counsel ought to have done in presenting a defense. Rather, they allege that trial counsel told him that the case was going to proceed to a bench trial and that his testimony would hurt his case advice which, under any circumstances, could not be deemed coercive. Further, unlike *Tate*, the success of Flores's claims would not have depended on the veracity or authenticity of counsel's alleged statements, where, as mentioned, Flores's claims that he was prejudiced by counsel's actions are belied by the record.

¶ 17 For the reasons stated, we affirm the second-stage dismissal of Flores's postconviction petition.

¶ 18 Affirmed.