2018 IL App (2d) 151244-U
No. 2-15-1244
Order filed April 24, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DAVID A. KLEIN, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Ogle County. No. 03-CF-109 Honorable Stephen C. Pemberton and Robert T. Hanson, Judges, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition, which alleged that trial counsel coerced defendant to waive his right to testify: defendant's claim was refuted by the record, in that he assured the court that his waiver was his own decision, and in any event counsel's alleged coercion consisted merely of his expression of his honest assessment that defendant's testimony would damage his case.

¶ 2 Defendant, David A. Klein, and a codefendant were going to sell marijuana to Joseph Mirro. After the codefendant became convinced that Mirro was a police officer, the codefendant killed Mirro with defendant's assistance. At trial, defendant told the court that he was not going

to testify. A jury found defendant guilty of first-degree murder (720 ILCS 5/5-1, 9-1(a)(1) (West 2002)), and defendant was sentenced to 30 years' imprisonment. He appealed, and this court affirmed his conviction and sentence. *People v. Klein*, No. 2-04-0533 (2007) (unpublished order under Illinois Supreme Court Rule 23). Defendant subsequently petitioned for postconviction relief, arguing, among other things, that his trial attorney was ineffective when he used undue influence and coerced defendant not to testify. Defendant's petition advanced to the second stage of postconviction proceedings, counsel was appointed to represent defendant, amendments to defendant's petition were made, and the State moved to dismiss the petition. Following a hearing, the trial court granted the State's motion to dismiss, noting that the record rebutted defendant's claim that his attorney coerced him not to testify. Defendant moved the court to reconsider, the court denied that motion, and this timely appeal followed. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The following exchange was had at trial concerning whether defendant would testify:

"THE COURT: Mr. Morelli [defense counsel]?

MR. MORELLI: Judge, [defendant] is not going to testify.

THE COURT: All right.

MR. MORELLI: And we would ask that you admonish him at this time.

THE COURT: [Defendant], there are certain decisions that are made in a case that you have to make. Such as whether you waive a jury trial. And one of those decisions that I have to ask you about specifically is a decision not to testify. It's a decision you have to make in consultation with your Counsels. But for purposes of the record, I need

you to state affirmatively that you have consulted with your attorneys and it is your decision not to testify. Is that correct?

THE DEFENDANT: Yes, it is, Your Honor.

THE COURT: And you have had a chance to talk to your attorneys this morning and on prior days about that, is that correct?

THE DEFENDANT: Yes, I have, Your Honor.

THE COURT: You've decided not to testify?

THE DEFENDANT: That is correct, Your Honor."

¶ 5 In his petition for postconviction relief, defendant claimed that his trial counsel used undue influence and coercion to prevent defendant from testifying at trial. Defendant alleged that counsel told him that his testimony would hurt his case and that his appeal would suffer. Defendant thus contended that, although he wanted to testify, he was "afraid" to do so. The State moved to dismiss the petition, and the court granted that motion. In doing so, the court noted, among other things, that the record rebutted defendant's claim that his attorney coerced him into not testifying at trial.

¶ 6 Defendant filed a notice of appeal, and shortly thereafter he moved the trial court to reconsider the order granting the State's motion to dismiss. In that motion, defendant claimed that he was denied the reasonable assistance of counsel in proceeding with his petition. This court dismissed the appeal for lack of jurisdiction, the trial court appointed new counsel to represent defendant, and an amended motion to reconsider was filed. Attached to this motion was a report prepared by a psychologist who concluded that, when Mirro was killed, defendant was "unable to resist the pressures of coercion placed on him by another individual." The psychologist theorized that, due to defendant's "personality structure," "he was involved in the

acts without the ability to remove himself from the situation." Also attached to the motion was defendant's supplemental affidavit. Defendant attested in this affidavit that he was unable to resist the "pressure of the coercion" by his attorney. More specifically, defendant asserted that his attorney "coerced [him] in to not testifying by telling [him that his] testimony would hurt [his] case and [his] appeal would suffer if [he] testified."

¶ 7 The trial court denied the motion to reconsider, noting that the record rebutted defendant's claim that his attorney coerced him not to testify. This timely appeal followed.

¶ 8 II. ANALYSIS

¶ 9 As an initial matter, we note that the State mentions in its brief that it filed a motion with its brief to strike defendant's citation to *People v. Pennington*, 2015 IL App (1st) 132354-U, which defendant cites without acknowledging that it is not precedential. The State claims that this court should not consider any citation to or argument predicated on this case, as *Pennington* is an Illinois Supreme Court Rule 23 (eff. July 1, 2011) order and not precedential. This court has already granted that motion. That said, we caution the parties to ensure when writing their briefs that they cite only precedential cases.

¶ 10 Turning to the merits, at issue in this appeal is whether the trial court should have granted the State's motion to dismiss defendant's postconviction petition. More specifically, we are asked to consider whether defendant made a substantial showing that trial counsel used undue influence to coerce defendant not to testify.

¶ 11 Proceedings under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) are divided into three distinct stages. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). This appeal concerns the dismissal of a petition at the second stage. We review such dismissals *de novo*. *People v. Whitfield*, 217 Ill. 2d 177, 182 (2005).

¶ 12 In determining whether the dismissal of defendant's petition at the second stage was proper, we note that a postconviction action is a collateral attack on a prior conviction and sentence and "is not a substitute for, or an addendum to, direct appeal." *People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994). Issues that could have been raised, but were not, are considered forfeited. *People v. Blair*, 215 Ill. 2d 427, 443-44 (2005); *People v. Towns*, 182 Ill. 2d 491, 502-03 (1998). Nevertheless, forfeiture will be relaxed in three circumstances: (1) where fundamental fairness so requires, (2) where the forfeiture stems from the ineffective assistance of appellate counsel, or (3) where the facts relating to the claim do not appear on the face of the original appellate record. *People v. Whitehead*, 169 Ill. 2d 355, 371-72 (1996), *overruled on other grounds, People v. Coleman*, 183 Ill. 2d 366 (1998).

¶ 13 Here, the State claims that defendant forfeited review of the issue he raises on appeal, because he (1) failed to raise the issue in his motion for a new trial and (2) did not allege in his petition that his appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness. Defendant avers that, because the facts related to his claim, *i.e.*, his conversations with his attorney off the record about whether defendant should testify, do not appear on the face of the original appellate record, the issue he raises on appeal now should not be considered forfeited. We agree with defendant. *People v. Barkes*, 399 Ill. App. 3d 980, 985-86 (2010). Accordingly, we consider the merits of defendant's appeal.

¶ 14 At the second stage, the petition may be dismissed "when the allegations in the petition, liberally construed in light of the trial record, fail to make a substantial showing of a constitutional violation." *People v. Hall*, 217 Ill. 2d 324, 334 (2005). In determining whether a defendant has made a substantial showing of a constitutional violation, "all well-pleaded facts in the petition and in any accompanying affidavits are taken as true." *Towns*, 182 Ill. 2d at 503.

That said, when the record rebuts a defendant's postconviction claims, the petition must be dismissed. *Coleman*, 183 Ill. 2d at 382 ("[T]his court has consistently upheld the dismissal of a post-conviction petition when the allegations are contradicted by the record from the original trial proceedings.").

¶ 15 Here, we conclude that defendant's petition was properly dismissed, as the record rebuts defendant's claim that his attorney coerced him not to testify at trial. Specifically, although the court advised defendant that his decision whether to testify should be made in consultation with his attorney, which was entirely correct (see *People v. Brown*, 54 Ill. 2d 21, 24 (1973)), the court stressed that the ultimate decision was defendant's. The court noted that, "for purposes of the record," defendant needed to "state affirmatively" that he "[had] consulted with [his] attorneys and it [was *defendant's*] *decision not to testify*." (Emphasis added.) The court asked, "Is that correct?" In reply, defendant said, "*Yes, it is*, Your Honor." (Emphasis added.) Moments later, the court inquired yet again, "*You've decided not to testify*?" (Emphasis added.) Defendant responded, "*That is correct*, Your Honor." (Emphasis added.) Given this exchange, we simply find unfounded any claim that defendant's decision not to testify was not solely his own.

¶ 16 For this reason, defendant's reliance on *People v. Lester*, 261 Ill. App. 3d 1075, 1076 (1994), is misplaced. Although the defendant there, like defendant here, claimed that his counsel was ineffective for usurping his decision whether to testify by telling him that his testimony would hurt his appeal, nothing in *Lester* indicated that the defendant there advised the court that he had decided not to testify. Here, defendant did so twice. Moreover, given this court's decision in *People v. Buchanan*, 403 Ill. App. 3d 600, 606-08 (2010), the continued validity of *Lester* is questionable. In *Buchanan*, we explained that "[a]n attorney's honest assessment of a case, when made based on his or her professional experience, cannot be considered misleading."

Buchanan, 403 Ill. App. 3d at 607. Moreover, we criticized *Lester* for that decision's "complete failure to address the prejudice prong of the ineffective-assistance-of-counsel test." *Id.* at 608.

¶ 17 The psychologist's report adds nothing to defendant's argument. Although the psychologist did conclude that defendant was "unable to resist the pressures of coercion placed on him by another individual" and that defendant's "personality structure" made him unable to "remove himself from the situation," the psychologist's report was prepared solely "to determine [defendant's] mental condition at the time of the alleged offense of First Degree Murder." Thus, the psychologist's conclusion is simply not relevant here. Added to that is the fact that defendant never indicated that he was easily influenced by others. In fact, in the presentence report defendant stated that, other than "experience[ing] difficulty controlling his anger," he was "in good mental health."

¶ 18 Finally, defendant proposes that, in order to validate his waiver of his right to testify, the court should have inquired whether defendant had been threatened or coerced to waive his right to testify and should have specifically asked defendant whether he understood that the decision to testify was his and his alone, regardless of counsel's advise. We disagree. Nothing requires a court to take an on-the-record waiver of a defendant's right to testify. *People v. Medina*, 221 Ill. 2d 394, 407 (2006). If it were so required, the court could improperly influence a defendant's decision, as a defendant could quite possibly believe that the court's extended inquiry into the defendant's decision not to testify amounts to the court's second-guessing counsel's opinion on that matter. See *People v. Smith*, 176 Ill. 2d 217, 235 (1997). This would intrude upon the attorney-client relationship and interfere with the defense's strategy. *Id.* at 235-36.

¶ 19 In any event, we note that, even if the record did not refute defendant's claim, the claim would fail. Defendant alleged that counsel "coerced" him simply by expressing his opinion that

defendant's testimony would damage his case. This was merely counsel's honest assessment, which cannot have rendered defendant's decision involuntary. See *People v. Wilson*, 295 Ill. App. 3d 228, 237 (1998).

¶ 20 III. CONCLUSION

¶ 21 For the reasons stated, we affirm the judgment of the circuit court of Ogle County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 22 Affirmed.