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2018 IL App (3d) 150329-U

Order filed March 21, 2018

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-15-0329 Circuit No. 09-CF-370
TYRONE T. HOPKINS,)	Honorable
Defendant-Appellant.)	David A. Brown, Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Presiding Justice Carter and Justice Schmidt concurred in the judgment.

ORDER

¶ 1 *Held:* Issues raised in postconviction petition that could have been raised on direct appeal were forfeited; therefore, defendant was not entitled to remand for additional postconviction proceedings.

¶ 2 Defendant, Tyrone T. Hopkins, appeals from the second-stage dismissal of his postconviction petition. On appeal, he argues that postconviction counsel provided an unreasonable level of assistance and the cause should be remanded for additional postconviction proceedings. We affirm.

¶ 3 Defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2008)) and unlawful possession of a weapon by a felon (720 ILCS 5/24-1.1(a) (West 2008)). At trial, Officer Robert McMillen testified that at 12:04 a.m. on March 31, 2009, he responded to a dispatch that reported two people had been shot at 2113 West Starr Street. When he arrived, he saw a large group of people standing in front of the house, some were yelling and others were crying. He found a man, later identified as Lonnie Williams, lying just inside a wire fence in the front yard. He had been shot in the head and was unresponsive. Inside the house, McMillen discovered another man, John Thomas, in the kitchen. He was bleeding but conscious.

¶ 4 Several witnesses testified that they were present at the scene when the shooting began. Robert Williams testified that he was in the front yard when defendant shot his cousin, Lonnie Williams. Robert explained that he was involved in a relationship with Lakeisha Brown. At the time, Brown was also living with defendant. On March 30, 2009, Robert and Lakeisha had an argument, and Lakeisha cut Robert's thumb with a knife. Robert was upset.

¶ 5 Later that day, defendant confronted Robert at his house. Robert heard a knock at the door and saw a large group of people standing outside. Defendant was holding a golf club or a bat. Robert told defendant to drop the object. As defendant approached the house, a gun was fired. Robert turned and ran toward the porch and heard several more shots.

¶ 6 Margaret Williams, Robert's cousin, testified that Robert was involved with Lakeisha, who was also in a relationship with a man called "Bees." She identified defendant as Bees. When the large crowd gathered in front of her house, she took lighter fluid outside and poured it on the group to make them leave. As she came back inside the fence, her brother, Lonnie, walked outside with his hands in the air, calling for peace. Margaret then saw defendant shoot Lonnie in the head. She pulled Lonnie inside the fence and ran in the house to call for help. She

did not see anyone other than defendant holding or shooting a gun. Margaret identified defendant as the shooter in a photo line-up at the police station. On cross-examination, she testified that defendant was standing “a couple of feet” away when he shot her brother.

¶ 7 Kanisha Clements testified that she and Lakeisha were friends. She had a conversation with Lakeisha before the shooting in which Lakeisha told her that “it's going to be the Browns versus the Williams and my man Bees has a gun.”

¶ 8 Debra Guyton stated that she was working at a local store on the day of the shooting when defendant came in and said that “your girls jumped my girl” and “it's not going to be over with.” Later that night, Guyton was at Margaret's house and saw defendant pull a gun and fire a shot.

¶ 9 Sherry Williams, Margaret's cousin, testified that she saw defendant fire the shots at Lonnie. On direct examination, she testified that she saw defendant firing the shots as she walked to her car to retrieve a baseball bat. On cross-examination, counsel questioned how she saw the shooting if she was walking back to her car. Sherry testified that she had already retrieved the bat and was walking back to Margaret's house when the first shot was fired.

¶ 10 The physical evidence demonstrated that all of the bullets recovered from the scene and the victims were fired from the same gun. Forensic scientist Ellen Chapman testified that defendant was tested for gunshot residue and that the test was inconclusive. Chapman explained that residue particles are small and easily removed by activities such as wiping and washing. Given that three and a half hours passed between discharge of the firearm and testing, she opined that the particles could have been removed or brushed away.

¶ 11 Defendant called police detective Katherine Burwell who testified that she interviewed Margaret on March 31, 2009. During the interview, Margaret circled the photo of defendant, but stated that there was a second person who fired shots that day.

¶ 12 Defendant's son, Tyrone, Jr., was eleven years old at the time of trial. He testified that he went with other family members to Margaret's house. He saw a man that he knew as "Sneeze" run from the side of the house next door and fire a gun. Defendant's stepson, Darrell Brown, also testified that he witnessed a man named "Sneeze" come from the side of the neighboring house with a gun.

¶ 13 Brian Cleary testified that he was the one who fought with Lonnie. When he heard the shots, he and others ran away. When defense counsel asked him if he had a conversation with Sam Trapps about a month after the shooting, the State objected, citing inadmissible hearsay, and the objection was sustained.

¶ 14 Defendant testified that he heard the first shots as he was leaning over to help Cleary. When he turned around, he saw Samuel Trapps, otherwise known as "Sneeze," shooting the gun. He did not tell investigators that Trapps was the shooter because shortly after the shooting Trapps told everyone not to mention his name.

¶ 15 Defendant was convicted of first degree murder and unlawful possession of a weapon by a felon and sentenced to concurrent terms of 65 years and 10 years in prison. On direct appeal, defendant argued that (1) the State failed to prove him guilty beyond a reasonable doubt, and (2) the trial court erred in barring hearsay testimony that Sam Trapps admitted to shooting the victims. We affirmed his convictions and sentence on May 22, 2012. *People v. Hopkins*, 2012 IL App (3d) 100658-U.

¶ 16 On June 26, 2013, private counsel filed a postconviction petition on defendant's behalf. In the petition, defendant claimed that his trial attorney provided ineffective assistance of counsel (1) for failing to call Sam Trapps as a defense witness or ask for a continuance to secure his presence, and (2) for failing to "secure an expert witness who could testify regarding the trajectory of the bullets and the improbability of [defendant] being the shooter." The petition also alleged that defendant was actually innocent and requested a new trial to allow Sam Trapps to testify and, if necessary, present rebuttal witnesses who could impeach him. The trial court docketed defendant's petition and set it for a second-stage status hearing.

¶ 17 On May 23, 2014, prior to the second-stage hearing, private counsel filed an affidavit signed by Marsha Harris and dated March 7, 2014. The affidavit stated that Harris saw Sam Trapps enter the courtroom on one of the days she attended defendant's trial. Postconviction counsel also filed a memorandum of law claiming that trial counsel was ineffective for failing to call Sam Trapps as a witness or, in the alternative, seek a continuance of the trial. Counsel claimed that without Trapps' material testimony, several witnesses who were available to impeach his testimony were unable to testify.

¶ 18 The State filed a motion to dismiss defendant's petition, arguing that defendant failed to satisfy his burden of providing factual allegations in support of his constitutional claims. The State maintained that defendant had done nothing more than generically conclude both deficient performance and prejudice as a result of trial counsel's performance. As to the second claim, the State noted that defendant failed to provide documentation or affidavits to show what the expert testimony would have established.

¶ 19 In response, postconviction counsel filed a motion seeking to strike the State’s motion to dismiss. Counsel also filed a certificate of compliance in accordance with Illinois Supreme Court Rule 651(c) (eff. Feb. 6, 2013).

¶ 20 At the hearing on the motion to dismiss, the State emphasized that the claims in the petition were not factually supported, leaving the court with nothing upon which it could decide what the evidence would have been or how its absence resulted in prejudice. The State also maintained that the claims could have been raised on direct appeal and were therefore forfeited. Postconviction counsel responded by arguing that the appellate court could not have addressed any of these claims on direct appeal because the claims relied on new facts that came to light after trial. Counsel maintained that the proper forum for resolving an ineffective assistance of counsel claim that depends on new evidence is an evidentiary hearing in a postconviction proceeding.

¶ 21 The trial court granted the State’s motion and dismissed defendant’s postconviction petition.

¶ 22 ANALYSIS

¶ 23 Defendant argues that postconviction counsel provided unreasonable assistance by failing to properly develop and support his claims of ineffective assistance of trial counsel at the second stage of the postconviction proceedings.

¶ 24 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a three-stage process for defendants who allege that they have suffered a substantial deprivation of their constitutional rights. *People v. Cotto*, 2016 IL 119006, ¶ 26. At the first stage of the Act, the circuit court must determine whether the petition's claims are frivolous or patently without merit. 725 ILCS 5/122-2.1 (a)(2)(West 2012); *Cotto*, 2016 IL 119006, ¶ 26. If the court

does not dismiss the petition at the first stage, it advances the petition to the second stage. *Cotto*, 2016 IL 119006, ¶ 26. Regardless of whether counsel is appointed or retained at the second stage, a defendant is entitled to a “reasonable” level of assistance during postconviction proceedings, which is less than the level of assistance that the constitution guarantees to defendants at trial. *People v. Groszek*, 2016 IL App (3d) 140455, ¶¶ 11-12; *People v. Owens*, 139 Ill. 2d 351, 364-65 (1990).

¶ 25 To ensure defendants receive reasonable assistance, Illinois Supreme Court Rule 651(c) imposes three specific duties on postconviction counsel: (1) to consult with the defendant to ascertain his allegations of how he was deprived of his constitutional rights, (2) to examine the record of the trial court proceedings, and (3) to make “any amendments to the petitions filed *pro se* that are necessary for an adequate presentation of [the defendant's] contentions.” Ill. S. Ct. R. 651(c) (eff. Feb. 6, 2013). When counsel files a Rule 651(c) certificate asserting his or her compliance, a presumption exists that counsel provided reasonable assistance and defendant must overcome that presumption. *People v. Profit*, 2012 IL App (1st) 101307, ¶ 19.

¶ 26 A petition filed under the Post-Conviction Hearing Act is not a direct appeal but rather a collateral proceeding that only permits inquiry into the constitutional issues that defendant did not raise and could not have raised on direct appeal. The issues defendant raised on direct appeal are barred from postconviction consideration by the doctrine of *res judicata*, and those issues that could have been raised, but were not, are forfeited. *People v. Williams*, 209 Ill. 2d 227, 233 (2004). A defendant cannot avoid the bar of *res judicata* by simply rephrasing issues previously addressed on direct appeal. *People v. Simms*, 192 Ill. 2d 348, 360 (2000).

¶ 27 Here, defendant argued that his trial attorney provided ineffective assistance when he failed to call Sam Trapps as a defense witness or ask for a continuance to secure his presence.

He also argued that trial counsel inexplicably failed to call an expert witness who could testify regarding the trajectory of the bullets and the improbability of defendant being the shooter. Both of these allegations of ineffective assistance of trial counsel involve matters apparent in the trial record and could have been raised on direct appeal. First, the failure to secure Trapps as a witness is revealed in the trial transcripts. Trapps did not testify at trial. The record demonstrates that the State obtained an arrest warrant for Trapps but investigators were unable to obtain him. Yet, during the trial proceedings, the State indicated that it had been informed that Trapps appeared in the courtroom on the first day of the bench trial. Still, defense counsel did not seek a continuance in an effort to delay the trial to secure Trapps as a witness. These issues relating to the absence of Trapps and defense counsel's decision not to subpoena him or seek a continuance to find him were fully apparent on the record. However, defendant did not raise them on direct appeal. Thus, the issue is forfeited for postconviction purposes.

¶ 28 The issue of trial counsel's failure to secure an expert witness on bullet trajectory has also been forfeited. With the aid of photographic evidence admitted at trial, defense counsel argued the specific discrepancy apparent between the testimonial evidence and the forensic evidence in closing argument, asserting that a reasonable doubt existed as to defendant's guilt. The lack of an expert witness who could testify regarding the bullet trajectory is clear from the record. Accordingly, it could have been raised. Defendant did not raise it on direct appeal and, as a result, the issue is forfeited. See *Williams*, 209 Ill. 2d at 233.

¶ 29 In *People v. Parker*, 344 Ill. App. 3d 728 (2002), the appellate court held that a claim of ineffective assistance of trial counsel was raised prematurely and should have been brought in a collateral proceeding because the claim "require[s] consideration of matters beyond the record on direct appeal." *Parker*, 344 Ill. App. 3d at 737. Defendant cites to *Parker* in an attempt to

overcome forfeiture. However, defendant fails to provide any examples of matters beyond the trial record that effectively prevented him from raising the issues of ineffective assistance of trial counsel on direct appeal.

¶ 30 Under Illinois jurisprudence, forfeiture principles are relaxed where fundamental fairness so requires, where forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the claim do not appear on the face of the original appellate record. *People v. English*, 2013 IL 112890, ¶ 22. Defendant has not made a case for application of any of these exceptions to forfeiture of the two issues he raised in his postconviction petition. Notably, he has not alleged that forfeiture should be excused based on ineffective assistance of appellate counsel, and he has failed to demonstrate that the facts relating to the claims do not appear on the face of the original record. Defendant merely argues that postconviction counsel was unreasonable for failing to obtain an affidavit from an expert regarding bullet trajectory. We find that even if postconviction counsel had obtained the affidavits that defendant argues she should have, the result would have been the same. See *Williams*, 209 Ill. 2d at 233; see also *People v. Whitehead*, 169 Ill. 2d 355, 375-76 (1996) (defendant’s claims of ineffectiveness based on failure to include affidavits did not survive forfeiture where ineffective assistance of counsel claims did not “depend[] upon” facts found in the affidavits.)¹

¶ 31 Here, none of the situations for relaxing *res judicata* and forfeiture principles apply. The issues defendant raised in his postconviction petition have been forfeited, and he cannot succeed in arguing that postconviction counsel was unreasonable in failing to pursue them in a collateral proceeding. See *English*, 2013 IL 112890, ¶¶ 36-38 (limited scope of postconviction review

¹ *Whitehead* was overruled on other grounds by *People v. Coleman*, 183 Ill. 2d 366, 382 (1998).

compels application of forfeiture doctrine where defendant failed to raise claims on direct appeal when he had the opportunity).

¶ 32

CONCLUSION

¶ 33

The judgment of the circuit court of Peoria County is affirmed.

¶ 34

Affirmed.