

2019 IL App (1st) 161831-U

No. 1-16-1831

Order filed July 23, 2019

Second Division

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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. 12 CR 13779
)	
DEON WILSON,)	Honorable
)	Thomas M. Davy,
Defendant-Appellant.)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Lavin concurred in the judgment.
Justice Mason specially concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's summary dismissal of defendant's postconviction petition is reversed, and the petition is remanded for second-stage postconviction proceedings.

¶ 2 Defendant, Deon Wilson, appeals the summary dismissal of his *pro se* petition for relief under the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that the trial court erroneously dismissed his petition where he presented an arguable

claim of ineffective assistance of trial counsel based on counsel's failure to impeach one of the State's key witnesses at trial. For the reasons that follow, we reverse and remand for second-stage proceedings under the Act.

¶ 3 Following a 2012 bench trial, defendant was convicted of being an armed habitual criminal (AHC) (720 ILCS 5/24-1.7(a) (West 2012)) and was sentenced to eight years' imprisonment. On direct appeal, this court affirmed defendant's conviction and sentence. See *People v. Wilson*, 2015 IL App (1st) 131002-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue on appeal. See *Wilson*, 2015 IL App (1st) 131002-U, ¶¶ 5-14.

¶ 4 Chicago police officer Patrick Soraghan testified at trial that on June 29, 2012, about 11:45 a.m., he and his partner, Officer Dejuan Turner, received information from another police officer about an individual with a gun. They drove their unmarked vehicle to a tire shop, located at 10952 South Michigan Avenue, in order to locate a black male, wearing a white T-shirt and blue jeans, with a light complexion and large earrings.

¶ 5 As the officers approached the tire shop, which had its garage door open, they observed defendant, who matched the offered description. Defendant, who had been sitting with three other men in the garage, stood up, and a handgun fell to the ground. Soraghan then patted defendant down, secured him, and recovered the loaded handgun. The officers also recovered suspect cannabis and ammunition from a shelf near where defendant was sitting. Soraghan testified that he did not see defendant have any contact with those items on the shelf and defendant did not make any movements toward the shelf. Defendant was taken into custody and transported to the police station.

¶ 6 Lieutenant Sean Loughran testified that he spoke with defendant at the police station. He advised defendant of his *Miranda* rights, and defendant waived those rights and agreed to speak with Loughran. Defendant informed Loughran of his history of selling cannabis, his prior convictions, and the events that led to this arrest. Defendant stated that he smoked cannabis and then went to the tire shop to sell the rest of his supply of cannabis. He told Loughran that he carried the handgun to protect himself because he had been robbed on three occasions and shot once. Defendant lifted his shirt up to show Loughran his scar from a gunshot wound. On the date in question, he was concerned with being robbed because he saw the same vehicle drive past the tire shop multiple times, so he kept his handgun readily accessible. He acknowledged that he was not permitted to own a handgun due to his criminal history. Loughran stated on cross-examination that the conversation was not memorialized or videotaped and that defendant did not sign a written *Miranda* rights waiver form. Loughran summarized the conversation in his police report.

¶ 7 The State introduced certified copies of defendant's two prior felony convictions. The State rested, and defendant moved for a directed verdict. The trial court denied the motion.

¶ 8 Defendant testified that he was a convicted felon. He stated that on the date in question he went to the tire shop due to an issue with a tire on his vehicle. He waited in the garage with other customers. He then saw police officers get out of a vehicle and approach the garage. The officers searched all four individuals. He stated that himself and the other three individuals were placed in handcuffs in the back of the officers' vehicle and the officers conducted a search of the garage. Defendant was the only one transported to the police station. Other than admitting his prior felony convictions, defendant denied being in possession of the handgun and cannabis. He

also denied that he had a conversation at the police station with Loughran, and he specifically denied ever being shot or showing Loughran scars on his back.

¶ 9 In finding defendant guilty, the court noted that it found the police officers' testimony to be more credible than defendant's. Defendant filed a motion for a new trial, which the court denied. Following a sentencing hearing, the court sentenced defendant to eight years' imprisonment.

¶ 10 On direct appeal, defendant argued that the trial court improperly shifted the burden of proof to him during the bench trial in violation of his due process rights. This court affirmed his conviction. See *Wilson*, 2015 IL App (1st) 131002-U.

¶ 11 On March 18, 2016, defendant filed a challenge to his conviction, which the trial court deemed a *pro se* postconviction petition under the Act. The petition contained numerous claims. In an affidavit included with his petition, defendant added a claim that his trial counsel was ineffective for failing to "investigate and present exculpatory evidence" that would have demonstrated that defendant had never been shot in the back.

¶ 12 The trial court dismissed defendant's petition, finding it frivolous or patently without merit due to *res judicata* and forfeiture. In a written order, entered on May 27, 2016, the trial court enumerated the sixteen claims contained in defendant's petition but did not address the particular claim at issue here. *People v. Maclin*, 2014 IL App (1st) 110342, ¶ 27 ("[T]he court is not required to provide a written response to each and every specific claim that is presented within a postconviction petition.").

¶ 13 Defendant now appeals the trial court's summary dismissal of his petition. In this court, defendant solely argues that the trial court erred in summarily dismissing his petition because he

presented an arguable claim that counsel was ineffective for failing to impeach Loughran with evidence that he had not been shot.

¶ 14 The State responds that defendant's claim is procedurally barred by forfeiture where he could have raised the issue on direct appeal. See *People v. English*, 2013 IL 112890, ¶ 22 ("Issues that could have been raised on direct appeal, but were not, are forfeited."). For the reasons that follow, we find that defendant's claim has not been forfeited and his petition should proceed to second-stage proceedings.

¶ 15 The Act provides a method for defendants to assert that their convictions were the result of a substantial denial of their rights under the federal or state constitution or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is not a direct appeal from a conviction but is a collateral attack on the judgment. *People v. Tate*, 2012 IL 112214, ¶ 8.

¶ 16 At the first stage of proceedings under the Act, a defendant need only present a limited amount of detail in the petition. *People v. Delton*, 227 Ill. 2d 247, 254 (2008). The threshold for survival of claims in the first stage is low because most petitions are drafted by defendants with little legal knowledge or training. *People v. Tate*, 2012 IL 112214, ¶ 9. The trial court must initially determine if the petition "alleges sufficient facts to state the gist of a constitutional claim." *People v. Allen*, 2015 IL 113135, ¶ 24. The trial court may summarily dismiss a postconviction petition within 90 days of filing if it "determines the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2016). If the petition is not dismissed as frivolous or patently without merit, then the petition advances to the second stage, where counsel may be appointed to an indigent defendant (725 ILCS 5/122-4 (West 2012)) and where the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5

(West 2012)). We review *de novo* the summary dismissal of a postconviction petition. *Allen*, 2015 IL 113135, ¶ 19.

¶ 17 “The purpose of a postconviction proceeding is to permit inquiry into constitutional issues involved in the original conviction and sentence that were not, and could not have been, adjudicated previously on direct appeal.” *English*, 2013 IL 112890, ¶ 22. Thus, issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *Id.* There are three instances where *res judicata* and forfeiture do not apply or are relaxed : (1) where fundamental fairness requires; (2) where the alleged forfeiture stems from the incompetence of appellate counsel; or (3) where facts relating to the claim do not appear on the face of the original appellate record. *Id.*; *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005). Here, defendant does not argue that either of the first two exceptions applies. Instead, he exclusively argues that his claim is not forfeited because facts relating to his claim cannot be found on the face of the record. We, however, find that fundamental fairness requires us to relax the rules of forfeiture in this case.

¶ 18 In his petition, defendant alleges that his trial counsel was ineffective for failing to impeach Loughran by presenting evidence that defendant had not been shot in the back. According to defendant, that would have called into question Loughran’s credibility as to what occurred on the date in question and what defendant said to Loughran after being arrested. Defendant maintains that, if Loughran’s credibility had been undermined, the outcome at trial may have been different.

¶ 19 The record shows that Loughran testified that defendant showed him a scar on his back from a gunshot wound and, conversely, defendant testified that he has never been shot and did

not show Loughran his back. Loughran's testimony supported the narrative that defendant sells cannabis and carries a weapon because he has been robbed multiple times and was even shot on one occasion. In finding defendant guilty, the trial court stated that it found the police officers' testimony to be more credible but also specifically noted that neither the State nor the defense offered defendant's back as evidence. The court specifically identified counsel's failure in issuing its ruling. Thus, the argument that trial counsel was ineffective for failing to impeach Loughran with evidence that defendant had not been shot was apparent on the face of the record and could have been made in defendant's direct appeal.

¶ 20 Prior to our supreme court's recent decision in *People v. Veach*, 2017 IL 120649, this court often declined to consider ineffective assistance of trial counsel claims and dispatched defendants to raise them in postconviction petitions instead. In *Veach*, our supreme court specifically noted this court's practice of refusing to consider ineffective assistance of counsel claims on direct review. *Id.* ¶ 39. The supreme court then rejected that practice and directed reviewing courts to "carefully consider each ineffective assistance of counsel claim on a case-by-case basis." *Id.* ¶ 48. The supreme court further explained: "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." *Id.* at 6. As such, the backdrop for defendants and counsel from this court, prior to *Veach*, was that matters of ineffective assistance of trial counsel should be brought on postconviction petitions.

¶ 21 In this case, defendant's direct appeal was brought prior to the issuance of *Veach*, and defendant could not have known then that this claim was required to be included in his direct appeal, rather than in a postconviction petition. It was not until after *Veach* that defendants

became definitively aware of when to raise the issue on direct appeal or when to raise it in a postconviction petition. Defendant should not be barred from judicial review where he could not foresee the supreme court's clarified approach to ineffective assistance of counsel claims.

¶ 22 To conclude that defendant forfeited his claim would be incompatible with fundamental fairness. See *People v. Davis*, 156 Ill. 2d 149, 158 (1993) (“Where fundamental fairness so requires, *** strict adherence to the rule of waiver may be avoided.”). Accordingly, in the interest of fundamental fairness, we do not find that defendant's claim has been forfeited. We now address whether defendant has made an arguable claim of ineffective assistance of counsel. *Hodges*, 234 Ill. 2d at 17 (“The question before us is whether defendant's petition had no arguable basis either in law or in fact[.]”).

¶ 23 A constitutional claim of ineffective assistance of counsel is subject to a two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Albanese*, 104 Ill. 2d 504, 526 (1984). Under this test, a defendant must show both that counsel's performance was objectively unreasonable and that he was prejudiced as a result of counsel's deficient performance. *People v. Bew*, 228 Ill. 2d 122, 127. In a first-stage postconviction proceeding, a petition claiming ineffective assistance of counsel may not be summarily dismissed “if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced.” *Hodges*, 234 Ill. 2d at 17. We emphasize that fact finding and credibility determinations are not permitted at the first stage of proceedings under the Act. *People v. Scott*, 2011 IL App (1st) 100122, ¶ 23. Additionally, we must take all well pleaded facts as true unless rebutted by the record. *Id.*

¶ 24 With respect to the first prong of *Strickland*, counsel's performance was arguably deficient. The trial court noted the parties' failure to introduce evidence either supporting or contradicting Loughran's testimony regarding defendant's scars, and there does not appear to be any strategic reason for failing to impeach Loughran.

¶ 25 As to the second prong of *Strickland*, we find that it is arguable that defendant was prejudiced. Assuming the facts in the petition as true, as we must at this stage, Loughran's testimony could have been impeached by evidence that defendant did not have gunshot wound scars on his back. This certainly would have undermined Loughran's credibility, and it is arguable that the outcome of trial could have been altered due to this credibility dispute.

¶ 26 We, therefore, conclude that defendant's claim of ineffective assistance of trial counsel is not frivolous or patently without merit and has an arguable basis under the *Strickland* test. See *Hodges*, 234 Ill. 2d at 11, 22. Defendant should be given the opportunity to receive appointed postconviction counsel and proceed to second-stage proceedings under the Act. We reverse the trial court's summary dismissal of defendant's postconviction petition and remand the matter to the trial court for second-stage proceedings. Finally, we note that we take no position on the merits of defendant's claim or his ability to prove that he was denied effective assistance of counsel. See *Tate*, 2012 IL 112214, ¶ 26.

¶ 27 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand for second-stage proceedings.

¶ 28 Reversed and remanded.

¶ 29 JUSTICE MASON, specially concurring:

¶ 30 I concur in the result only. For the reasons stated in *People v. Knox*, 2019 IL App (1st) 162527-U, ¶¶ 24-26, I specifically do not concur in the majority's reasoning regarding a defendant's responsibility to raise ineffective assistance claims on direct appeal in cases pre-dating our supreme court's decision in *People v. Veach*, 2017 IL 120649.