2019 IL App (1st) 162527-U

No. 1-16-2527

Order filed April 9, 2019

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. 00 CR 2683
	)	
VANDAIRE KNOX,	)	Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justice Lavin concurred in the judgment.
Justice Pucinski dissented, with opinion.

ORDER

¶ 1 *Held*: The summary dismissal of defendant's *pro se* postconviction petition is affirmed over his contention that the petition presented an arguable claim of ineffective assistance of counsel.

¶ 2 Defendant Vandaire Knox appeals from the summary dismissal of his *pro se* petition for relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2016)). On appeal, Knox contends that the circuit court erred when it dismissed his petition

because it presented an arguable claim that he was denied the effective assistance of trial counsel when counsel failed to investigate and present the testimony of a witness whose statement to police would have corroborated Knox's testimony that he acted in self-defense. We disagree and affirm.

¶ 3 On May 20, 2002, Knox entered a negotiated plea of guilty to first degree murder arising out of the December 19, 1999 shooting death of Rodney Clifton. He was sentenced to 35 years in prison. Knox later moved to withdraw his plea, and the court appointed postplea counsel. Although counsel filed a supplemental petition to withdraw Knox's guilty plea, counsel did not file a certificate pursuant to Supreme Court Rule 604(d) (eff. Nov. 1, 2000). The trial court denied Knox leave to withdraw his plea. On appeal, this court remanded the cause to allow Knox to file a new motion to withdraw his guilty plea and for a hearing on that motion in compliance with the requirements of Rule 604(d). See *People v. Knox*, No. 1-03-1010, Order at 4 (2004) (unpublished order under Supreme Court Rule 23).

¶ 4 On remand, Knox withdrew his plea. The matter then proceeded to a jury trial. Before trial, Knox filed a motion *in limine* seeking to bar the State from using his previous felony convictions to impeach him. The trial court declined to rule upon Knox's motion until after Knox testified, finding that a ruling on the motion would be premature before Knox decided whether to testify. Knox testified at trial and the court permitted the State to impeach him with his prior convictions. The jury found Knox guilty of first degree murder, and he was sentenced to 45 years in prison. On appeal, this court reversed Knox's conviction and remanded the cause for a new trial because "the trial court's failure to rule on defendant's motion *in limine* until after he

testified amounted to reversible error." *People v. Knox*, No. 1-06-3278, Order at 15-16 (2009) (unpublished order under Supreme Court Rule 23).

¶ 5 On remand, the matter once again proceeded to a jury trial. We set forth only the testimony relevant for understanding the issue on appeal.

¶ 6 Shortly after midnight on December 19, 1999, Ondrell "Country" Schaffer arrived to pick up Misty Allen, who planned to go to Vanity Nightclub (Vanity), with Schaffer and her cousin. Knox was with Schaffer. Allen was sitting with Clifton, her boyfriend, in his maroon Chevy Malibu. Knox got out of Schaffer's car, walked over to Allen, pulled on the car door handle, and said: "What you doing in the car with this nig***? You supposed to be going out with us. Why you in the car with this nig***?" Clifton responded by getting out of the car and having "a little tussle" with Knox. The men returned to their respective vehicles. As the cars drove toward Vanity, Clifton and Knox continued "hollering and cussing" at each other.

¶ 7 At one point, Clifton stopped the car and got out. Knox then exited Schaffer's car and walked toward Clifton holding a "car Club." The men argued, but Allen and Schaffer broke them apart. Once Clifton and Allen were back in the car, he drove her to Vanity. Clifton stopped in front of the club, and Allen stayed in the car waiting for her cousin and Schaffer. A short time later, a grey car driven by Linnell Little arrived and Knox exited. Knox was carrying a gun. Allen "jumped out" of Clifton's car and told Knox several times "please don't do this." Knox pointed the gun at the driver's side window of Clifton's car, and began firing. Allen testified that Knox "shot about six times." Clifton did not exit the car. The car then rolled "really slow" to a bus stop. Allen "guess[ed]" that Clifton's foot came off the brake.

¶ 8 Shortly before the shooting, Melissa Stiler and her boyfriend, Little, were driving around in his grey station wagon when she saw Knox and Schaffer. Little stopped, got out of the car, and spoke to the men. Stiler heard Little decline an invitation to go to Vanity. Little got back in the car, and they drove away. As they were driving, Schaffer's vehicle drove up behind them and began honking. Little stopped, and Knox "got into the backseat" of Little's car. Knox was "very excited" and "was loud and talking fast." He asked Little to take him to Vanity, and Little complied. As soon as the car stopped, Knox exited the car, but left the door open. Stiler heard gunshots "almost instantaneously" coming from behind her but "did not see the shooting."

¶ 9 Little was legally unavailable to testify at the time of Knox's second trial, but the court ruled that the testimony that he provided at a prior proceeding could be read to the jury. During a conversation with Schaffer and Knox, Little observed Allen walk to a car and get inside. Little then heard Knox say, "what you getting in the car with that nig*** for?" Little told Knox to "leave it alone," then got into his car and drove away. A short time later, Schaffer's vehicle pulled up behind him and blew its horn. Little stopped, and Knox got into the car and asked for a ride to Vanity. When they arrived, Knox "hopped out" of the car before it stopped. Little then heard "eight or more" gunshots.

¶ 10 Carl Brasic, a forensic investigator with the Chicago police department, was assigned to process the crime scene. When he arrived, he observed a maroon Chevy Malibu with a body in the driver's seat. He recovered six cartridge casings from the street near the car and two bullets from inside the vehicle.

¶ 11 Forensic pathologist James Filkins performed Clifton's autopsy, which revealed that Clifton had suffered eight gunshot wounds to his body as well as several skin lacerations to his

head and face. Clifton's wounds were consistent with being shot through the driver's side window of a car while seated or leaning over reaching for something.

¶ 12 After the State rested, the parties stipulated that Detective Hart would testify that when he arrived at the crime scene, he observed Clifton's body "seated in the driver's seat slumped to the right and back over [the] raised armrest" with his feet "jutting out over the driver's door."[1]

¶ 13 Knox elected to testify. According to Knox, when he saw Allen walk to a maroon vehicle, he asked about her "kids' father," but she did not answer. Knox then heard Clifton, the car's male occupant, yell out "nig***, who are you calling a n***." Knox made a comment back. At some point, Knox and Schaffer began driving to Vanity. When Schaffer stopped at a stop sign, the maroon car pulled up, and Clifton told Knox that he was "going to do something" to Knox the next time that they saw each other. At one point, the maroon car "cut [them] off," Clifton exited, and he and Knox "tussl[ed]." After the fight ended, Knox and Schaffer continued to drive. When Knox saw Little's car, he got into that car and told Little what had happened. As Little began to drive toward Vanity, he reached back and retrieved a gun. Knox "grabbed it and set it on the seat." When Little stopped the car, Knox got out. He saw Clifton standing, talking to Allen. Clifton then "got to going back in the car" and "reaching in the car," so Knox put the gun in his hand and went toward Clifton. He explained that he "was scared because [Clifton] had just got through attacking [him] and [Knox] didn't know what [Clifton] was reaching in the car to get or what he was doing." Knox then "just got to shooting" in Clifton's direction. After he fired the gun, he went back to Little's car and they drove away.

[1] Detective Hart's first name is not included in the report of proceedings.

¶ 14 The jury found Knox guilty of first degree murder. Knox then filed a *pro se* posttrial motion alleging ineffective assistance of counsel. The motion alleged, in pertinent part, that trial counsel "refused" to interview or subpoena Lester Griffin, "whose account of events of the night in question would have corroborated" Knox's version of events." The trial court permitted trial counsel to withdraw, and ultimately appointed new counsel. Posttrial counsel then filed a motion for a new trial which alleged:

> "Defense counsel erred in not procuring witness Lester Griffin to testify on defendant's behalf. Lester Griffin is listed in the police reports by name, date of birth, address, social security number, phone number, and IR number. Mr. Griffin was unrelated to either the victim or defendant and corroborated defendant's testimony that the victim was outside his vehicle when the shooting occurred because Mr. Griffin saw four (4) people outside at the time of the shooting."

¶ 15 At a later court date, the trial court noted that posttrial counsel had filed a motion for a new trial, and that Knox's *pro se* motion alleging ineffective assistance of counsel was withdrawn. The court then heard argument on the motion for a new trial. Posttrial counsel argued specifically that "there were a number of witnesses that Knox asked [counsel] to call in his behalf one of which is a Lester Griffin." The State responded that "Lester Griffin at no time identifie[d] Rodney Clifton as being out of the car so not calling him" to testify at trial was not error. The trial court denied the motion for a new trial and sentenced Knox to 45 years in prison.

¶ 16 On appeal, Knox contended that the trial court erred in permitting the State to impeach him with his prior felony convictions, and that his 45-year sentence was excessive. This court affirmed Knox's conviction and sentence. See *People v. Knox*, 2014 IL App (1st) 120349.

¶ 17 On April 26, 2016, Knox filed the instant *pro se* petition for postconviction relief alleging that he was denied the effective assistance of counsel when trial counsel stipulated to certain testimony and failed to present the testimony of witnesses Griffin and Schaffer. The petition also alleged, *inter alia*, that the trial court erred when it found Little legally unavailable and permitted his testimony to be read into the record, and that Knox was denied his right to due process when Allen testified falsely at trial. With respect to Griffin, the petition alleged that Griffin was an "unrelated" witness who could corroborate Knox's testimony that the victim was outside the vehicle when the shooting took place as he saw four people "outside" at the time of the shooting. The petition finally alleged that appellate counsel failed to raise "viable constitutional claims preserved for appellate review."

¶ 18 Attached to the petition in support were an "Investigative Report" and a Chicago Police Department "Case Supplementary Report." The Investigative Report detailed investigator Chris Lappe's unsuccessful attempt to serve a subpoena upon Little. The Case Supplementary Report indicated that Griffin stated, in pertinent part, that he was walking when he heard "loud voices" and observed "[a]pproximately four people in front of Vanity's." Knox's notarized "Verification of Certification" was attached to the petition; however, no other affidavits were included.

¶ 19 On June 17, 2016, the circuit court summarily dismissed the petition as frivolous and patently without merit in a written order. The court noted, in pertinent part, that Knox had not attached an affidavit from Griffin. On October 13, 2016, this court granted Knox's motion for leave to file a late notice of appeal.

¶ 20 On appeal, Knox contends that the circuit court erred in summarily dismissing his *pro se* postconviction petition when it raised an arguable claim of ineffective assistance of trial counsel

based upon counsel's failure to investigate and present Griffin's testimony. Knox argues that Griffin's statement to police that four people were standing near a car corroborates his testimony that Clifton was standing outside the car at the time of the shooting and therefore "substantiated" his "theory of self-defense."

¶ 21 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 *et seq*. (West 2016). A proceeding initiated under the Act is "not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *People v. Davis*, 2014 IL 115595, ¶ 13. The Act allows inquiry into constitutional issues arising in the original proceeding that were not raised and could not have been adjudicated on direct appeal. *Id.* Issues 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*.

¶ 22 At the first stage of proceedings under the Act, defendant files a petition, which the circuit court independently reviews and, taking the allegations as true, determines whether "the petition is frivolous or is patently without merit." (Internal quotation marks omitted.) *People v. Tate*, 2012 IL 112214, ¶ 9 (quoting *People v. Hodges*, 234 Ill. 2d 1, 10 (2009), quoting 725 ICLS 5/122-2.1(a)(2) (West 2006)). A petition should be summarily dismissed as frivolous or patently without merit only when it "has no arguable basis in either fact or law." *Hodges*, 234 Ill. 2d at 11-12. A petition lacks an arguable basis in fact or law when it "is based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* at 16. Fanciful factual allegations are those which are "fantastic or delusional," and an indisputably meritless legal theory is one that is

"completely contradicted by the record." *Id*. at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Id.* at 9.

¶ 23 Knox argues on appeal that trial counsel was ineffective based upon the failure to investigate and present Griffin as a witness at trial. To state a claim for ineffective assistance of counsel, a defendant must show both that counsel's performance was objectively unreasonable and that he was prejudiced as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). 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.

¶ 24 Here, Knox's claim of ineffective assistance is forfeited because this argument could have been raised on direct appeal. The record reveals that Knox's motion for a new trial alleged that he was denied the effective assistance of trial counsel when counsel failed to present Griffin as a witness at trial and that Griffin would have corroborated Knox's testimony that Clifton was outside the vehicle. The trial court denied Knox's motion for a new trial, and Knox did not raise this claim on direct appeal. Because counsel's alleged ineffectiveness for failing to investigate and present Griffin as a witness was raised before the trial court in the motion for a new trial, this issue could have been raised and determined on direct appeal. The issue is, therefore, forfeited in this postconviction proceeding. See *Davis*, 2014 IL 115595, ¶ 13 (the Act allows inquiry into constitutional issues arising from the original conviction that had not been raised and could not have been adjudicated on direct appeal; issues that could have been raised, but were not, are forfeited).

¶ 25 We note that generally a defendant is required to raise a claim of ineffective assistance of counsel on direct appeal or risk forfeiting that claim. *People v. Veach*, 2017 IL 120649, ¶ 47. In other words, "defendants are required to raise ineffective assistance of counsel claims on direct appeal if apparent on the record." *Id*. ¶ 46. However, in those cases where the record on direct appeal is incomplete or inadequate such that a reviewing court cannot resolve a defendant's ineffective assistance of counsel claim, such a claim may be better suited to a collateral proceeding. *Id.* ¶ 46. In cases where an ineffective assistance of counsel claim depends on facts that are not found in the record, procedural default will not prevent a defendant from raising that claim on collateral review. *Id.* ¶ 47.

¶ 26 The record in this case was such that this court could have resolved Knox's ineffective assistance of counsel claim on direct appeal. Knox's argument is based upon the Chicago Police Department "Case Supplementary Report," which was contained in the common law record. Moreover, this same issue, *i.e.*, that Knox was denied the effective assistance of trial counsel when counsel failed to present Griffin as a witness at trial and that Griffin would have corroborated Knox's testimony that Clifton was outside the vehicle, was raised in Knox's posttrial motion and argued before the trial court. Thus, as Knox's claim of ineffective assistance of counsel depends upon facts that were contained in the record on direct appeal, this issue could have been raised and resolved on direct appeal. *Id.* ¶ 46. Accordingly, the claim is forfeited in this postconviction proceeding. *Id.* ¶ 47 ("[i]t is not the function of collateral review to consider claims that could have been presented on direct review").

¶ 27 But even if we were to overlook the fact that this claim is forfeited, Knox's petition was still properly dismissed as it failed to establish that he was arguably prejudiced by counsel's

failure to investigate and present Griffin's testimony at trial. While the Case Supplementary Report indicated that Griffin stated that he was walking when he heard "loud voices" and observed "[a]pproximately four people in front of Vanity's," there is no indication that Griffin observed the shooting, and he did not identify either Knox or Clifton. In other words, even if Griffin testified that he saw four people outside Vanity, there is no indication that his potential testimony touched upon whether Clifton was outside the car at the time of the shooting. Moreover, the record reveals that Allen testified that Clifton was sitting in the car when Knox shot him, forensic investigator Brasic testified that he observed a maroon Chevy Malibu with a body in the driver's seat, forensic pathologist Filkins testified that Clifton's wounds were consistent with being shot at through the driver's side window of a car, and the parties stipulated that Detective Hart would testify that Clifton's body was "in the driver's seat slumped to the right." Accordingly, Knox cannot establish that he was arguably prejudiced by counsel's failure to present Griffin at trial, and his claim of ineffective assistance of counsel fails. See *Hodges*, 234 Ill. 2d at 17. The circuit court therefore properly summarily dismissed Knox's petition as frivolous and patently without merit. *Tate*, 2012 IL 112214, ¶ 9.

¶ 28 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 29 Affirmed.

¶ 30 JUSTICE PUCINSKI dissenting:

¶ 31 With respect, I dissent. My colleagues hold that "defendant's claim of ineffective assistance of counsel is forfeited because this argument could have been raised on direct appeal."

¶ 32 However, in 2017 the basic analysis of when to bring an ineffective assistance of counsel claim – that is, on direct appeal or at the postconviction petition stage –was clarified in *People v. Veach*, 2017 IL 120649.

¶ 33 Pre-*Veach* there was some ambivalence as to the propriety of defendants raising claims of ineffective assistance of trial counsel on direct appeal. Knox is being held to a standard that did not apply when he filed his direct appeal. See, e.g., *People v. Weeks*, 393 Ill. App. 3d, 1004, 1011 (2009) ("Claims of ineffective assistance of counsel are usually reserved for postconviction proceedings where a trial court can conduct an evidentiary hearing, hear defense counsel's reasons for any allegations of inadequate representation, and develop a complete record regarding the claim and where attorney-client privilege no longer applies."); *People v. Phillips*, 383 Ill. App. 3d 521, 544 (2008) ("As a general rule, where a defendant's ineffective assistance of counsel claim requires consideration of matters not included in the record on appeal, a postconviction relief proceeding is better suited to resolve that claim and the appellate court may properly decline to adjudicate the defendant's claim on direct appeal.").

¶ 34 More recently, the supreme court has clarified that when the record is sufficiently complete to allow a claim of ineffective assistance to be presented and disposed on direct appeal it is preferable for a defendant to raise it at that juncture. However, in this case, the trial court did not fully develop the record on this issue.

¶ 35 In *People v. Knox*, 1-03-1010 (2004) (unpublished order under Illinois Supreme Court Rule 23), this court remanded the case to allow Knox to file a new motion to withdraw his plea after his postplea counsel failed to file a 604(d) certificate.

¶ 36 On remand, Knox withdrew his plea and the case went to a jury trial during which the trial court did not rule on Knox's *motion in limine* until after Knox testified. He was found guilty and sentenced to 45 years in prison.

¶ 37 That case was appealed, *People v. Knox*, 1-06-3278 (2009) (unpublished order under Illinois Supreme Court Rule 23), and this court remanded again for a new trial finding that the trial judge's decision to wait until after Knox testified to decide his *motion in limine* was reversible error.

¶ 38 On the second remand, the case again went to a jury trial. Knox was found guilty of first degree murder.

¶ 39 Knox filed his *pro se* posttrial motion alleging ineffective assistance of counsel, claiming that his attorney refused to interview or subpoena Lester Griffin, a witness who could verify Knox's version of events. The court appointed new posttrial counsel who filed a motion for a new trial alleging ineffective assistance of counsel. The trial court did not hold a hearing to determine the factual basis for defendant's claim of ineffective assistance of counsel and denied the motion for a new trial and sentenced Knox to 45 years in prison.

¶ 40 Defendant, through appointed counsel, filed his brief on direct appeal on March 22, 2013. On direct appeal, defendant did not allege that trial counsel was ineffective for failing to present the testimony of Griffin. Posttrial counsel did raise the issue in the trial court, but defendant raises it on appeal for the first time here.

¶ 41 This is no surprise because until the supreme court clarified the process for ineffective assistance of counsel claims at the appellate level in *Veach*, this court routinely declined to

consider ineffective assistance claims brought on direct appeal deciding instead that those claims must be brought under the process of a postconviction petition.

¶ 42 This court affirmed his conviction and sentence in *People v. Knox*, 2014 IL App (1st) 120349.

¶ 43 On April 26, 2016, Knox filed the instant *pro se* petition for postconviction relief alleging ineffective assistance of counsel again based on counsel's failure to call Griffin as a witness.

¶ 44 The landscape changed with *Veach*, but that was well after Knox brought his direct appeal so he could not have known then that it should have been included in his direct appeal. It was not until after *Veach* that defendants could know when to raise the issue on direct appeal or when to raise it in a postconviction petition.

¶ 45 *Veach* 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. The reason is that in Illinois, defendants are required to raise ineffective assistance of counsel claims on direct review if apparent on the record." *Veach*, 2017 IL 120649, ¶ 46.

¶ 46 The backdrop for defendants and counsel from this court until *Veach* was that matters of ineffective assistance of counsel should be brought on postconviction petitions.

¶ 47 In *People v. Durgan*, 346 Ill. App. 3d 1121, 1142 (2004), this court, quoting the United States Supreme Court's decision in *Massaro v. United States*, 538 U.S. 500, 504-05 (2003), explained why it is preferable that an ineffective-assistance-of-counsel claim be brought on collateral review instead of on direct appeal, as follows:

> "When an ineffective-assistance claim is brought on direct appeal, appellate counsel and the court must proceed on a trial record not developed precisely for the object of litigating or preserving the claim and thus often incomplete or inadequate for this purpose. Under [*Strickland*], a defendant claiming ineffective counsel must show that counsel's actions were not supported by a reasonable strategy and that the error was prejudicial. The evidence introduced at trial, however, will be devoted to issues of guilt or innocence, and the resulting record in many cases will not disclose the facts necessary to decide either prong of the *Strickland* analysis. If the alleged error is one of commission, the record may reflect the action taken by counsel but not the reasons for it. The appellate court may have no way of knowing whether a seemingly unusual or misguided action by counsel had a sound strategic motive or was taken because the counsel's alternatives were even worse. See [*Guinan v. United States*, 6 F.3d 468, 473 (7th Cir.1993)] (Easterbrook, J., concurring) ('No matter how odd or deficient trial counsel's performance may seem, that lawyer may have had a reason for acting as he did *** Or it may turn out that counsel's overall performance was sufficient despite a glaring omission ***')." (Internal quotations omitted.)."

¶ 48 Because there was a timely claim of ineffective assistance in the trial court, and because the trial court did not hold the necessary hearing to determine any factual basis for that claim, this court does not have an adequate record on the matter and should remand to the trial court for a proper hearing. I express no opinion about the strength of defendant's claim or likelihood of success.

¶ 49 To hold that defendant forfeited his opportunity to raise his claim now, on collateral appeal, 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.")

¶ 50 Under the circumstances of this case, I cannot say that the defendant was afforded an opportunity on direct appeal to raise his claim of ineffective assistance of trial counsel. This court has consistently held that ineffective assistance claims should be made in postconviction petitions.

¶ 51 To hold now, after the game changing *Veach* decision, that Knox should have known at the time he filed his direct appeal that it had to include his ineffective assistance of counsel claim even though the court declined to fully develop the factual basis is fundamentally unfair.

¶ 52 Knox should be appointed postconviction counsel and be allowed to proceed to the second stage of the Act.

¶ 53 I would reverse the decision of the circuit court and remand for second stage proceedings.