

No. 1-17-2480

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 07 CR 6580
)	
JAMES MCKINNEY,)	Honorable
)	Thaddeus L. Wilson,
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Hoffman and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* Dismissal of the defendant's postconviction petition at the second stage of proceedings affirmed where claim of prosecutorial misconduct was forfeited and claim of ineffective assistance of counsel did not substantially show a constitutional violation.

¶ 2 Defendant-appellant James McKinney, convicted of first-degree murder, appeals the second stage dismissal of his postconviction petition. On appeal, the defendant argues that he made a substantial showing of prosecutorial misconduct and ineffective assistance of counsel arising out of the State's motion for an extension of the speedy trial term. For the reasons that

follow, we affirm the judgment of the circuit court of Cook County.

¶ 3

BACKGROUND

¶ 4 On September 8, 1991, the defendant and codefendant Jerome Wilkins shot and killed Willis Myers in Chicago. Mr. Wilkins was arrested shortly thereafter and pled guilty to first degree murder, but the defendant was not located until February 21, 2007, while he was serving a federal prison sentence in a Pennsylvania penitentiary for an unrelated crime. The prosecution for the instant case then actively began.

¶ 5 On May 18, 2009, the State moved to extend the speedy trial term in order to compel eyewitness Kenneth Jackson, whom the State had recently located in Racine, Wisconsin, to appear at the defendant's trial. Previously, on January 12, 2006, two Chicago police detectives had located Mr. Jackson at his residence at 1220 North Wisconsin Street in Racine, Wisconsin. At that time, he identified the defendant in a photo array as the shooter of Willis Meyers in 1991. In May 2009, in their motion to extend the speedy trial term, the State explained that it began looking for Mr. Jackson in September 2008 in Hennepin County, Minnesota. The State had information that he might be residing there instead of in Racine where the detectives had interviewed him in 2006. According to the State's motion, Hennepin County investigators made "numerous" attempts to serve Mr. Jackson at his known address in Minnesota but were unsuccessful. The Hennepin County Assistant Attorney assured the Illinois investigators that Jackson was residing in Minnesota but was avoiding investigators.

¶ 6 On May 13, 2009, a Cook County assistant State's Attorney traveled to Minnesota along with investigators from the Cook County State's Attorney's office to personally serve Mr. Jackson. While there, they learned from a "local state of Minnesota database" that Mr. Jackson no longer lived in Minnesota but had moved to Racine, Wisconsin. Less than one week later, the State,

working with the Racine County Prosecutor's Office, learned that Mr. Jackson was living at 1754 Grange Avenue in Racine. The Wisconsin authorities improperly served Mr. Jackson with an Illinois subpoena, but as of May 18, 2009, the State had procured the documents necessary to properly serve Mr. Jackson with a Wisconsin subpoena. (Mr. Jackson had spoken with an Illinois assistant State's Attorney and indicated that he would not voluntarily appear at trial.)

¶ 7 In response to the State's motion, defense counsel argued that the State was not diligent in attempting to locate Mr. Jackson given that it did not attempt to serve him until May 2009. The trial court ultimately granted the State's motion and extended the speedy trial term by 30 days.

¶ 8 A jury trial commenced in June 2009, at which Mr. Jackson testified. The defendant was found guilty of first degree murder and sentenced to 30 years imprisonment.

¶ 9 On direct appeal before this court, after his conviction, the defendant argued, *inter alia*, that the trial court abused its discretion in granting the State an extension of 30 days on the speedy trial term. *People v. McKinney*, 2011 IL App (1st) 100317, ¶ 27. Specifically, the defendant contended that the State failed to exercise diligence in locating Mr. Jackson and should have begun its search for Mr. Jackson in Wisconsin, instead of Minnesota, since he had previously been found in Wisconsin in 2006. *Id.* In that appeal this court found that the State was sufficiently diligent in its attempt to locate Mr. Jackson prior to the expiration of the speedy trial term. *Id.* ¶ 32. We further rejected the defendant's claim that the State should have begun searching for Mr. Jackson in Wisconsin rather than Minnesota on the basis that "such evidence was never presented to the trial court at the May 27, 2009 hearing." *Id.*

¶ 10 On August 15, 2013, the defendant filed the postconviction petition at issue here, in the circuit court of Cook County. His *pro se* petition alleged, in relevant part, that (1) trial counsel was ineffective for failing to present evidence in response to the State's motion to extend the

speedy trial term, that the State knew all along that Mr. Jackson was in Wisconsin; (2) the State committed prosecutorial misconduct when it falsely stated that it initially believed Mr. Jackson was in Minnesota; and (3) appellate counsel was ineffective for failing to raise issues (1) and (2) on direct appeal.

¶ 11 Attached to the petition was a December 18, 2008, internal memorandum from defense counsel's law firm regarding the defendant's case. Among other things, the memo identified Mr. Jackson as a witness and listed his address as follows: "Current address (as of 1-12-06): 1220 N. Wisconsin, #3, Racine, WI." The memo further indicated that Mr. Jackson was located in Wisconsin on January 12, 2006, where he had identified the defendant in a photo array.

¶ 12 The trial court advanced the petition to second-stage proceedings and appointed counsel for the defendant. Appointed counsel did not amend the *pro se* petition, and the State filed a motion to dismiss. On September 19, 2017, after hearing argument, the trial court dismissed the petition in a written order. The defendant appealed.

¶ 13 ANALYSIS

¶ 14 We note that we have jurisdiction to review this matter, as the defendant timely appealed. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. July 1, 2017).

¶ 15 The Post-Conviction Hearing Act (Act) allows a defendant who is imprisoned in a penitentiary to challenge his conviction or sentence for violations of his federal or state constitutional rights. 725 ILCS 5/122-1 (West 2016); see also *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). The Act establishes a three-stage process for adjudicating a postconviction petition. 725 ILCS 5/122-1. During the first stage, the trial court must independently review the petition, taking the allegations as true, in order to determine whether the petition is frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9; 725 ILCS 5/122-2.1(a)(2) (West 2016)). If

the petition survives dismissal at this stage, it advances to the second stage, where counsel may be appointed, and the State may move to dismiss the petition. *People v. Harris*, 224 Ill. 2d 115, 126 (2007). At the second stage, the defendant must make a substantial showing of a constitutional violation in order to proceed to the third and final stage of the postconviction process and obtain an evidentiary hearing. *Id.* (citing 725 ILCS 5/122-6 (West 2016)).

¶ 16 Here, only the second stage is at issue. Although the defendant raised numerous claims in his postconviction petition, on appeal, he argues only the following three: (1) the State's efforts to locate Mr. Jackson were not reasonable and prudent; (2) the State misled the trial court about Mr. Jackson's location and the reasonableness of its efforts; and (3) defense counsel was ineffective for failing to inform the trial court that the State knew Mr. Jackson was in Wisconsin when it searched for him in Minnesota. We review *de novo* the trial court's dismissal of a petition at the second stage. *People v. Sanders*, 2016 IL 118123, ¶ 31.

¶ 17 Initially, the State argues that the defendant's claims on appeal are barred by *res judicata* or forfeiture.¹ A postconviction petition is meant to raise constitutional claims that were not, and could not have been, adjudicated on direct appeal. *People v. English*, 2013 IL 112890, ¶ 22. "Issues that were raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited." *Id.* There are limited exceptions to the doctrines of *res judicata* and forfeiture, including where "the facts relating to the issue do not appear on the face of the original appellate record." *Id.*

¹ The State erroneously argues that the defendant's claims were barred by waiver, not forfeiture, but it is forfeiture that is applicable here. See *People v. Sophanavong*, 2020 IL 124337, ¶ 20 (forfeiture is the failure to make the timely assertion of a right, while waiver is intentional relinquishment of a known right).

¶ 18 Turning first to the claims of prosecutorial misconduct, we agree with the State that they are barred. On direct appeal, the defendant argued that the trial court abused its discretion in allowing the State's motion to extend the speedy trial term when the trial court found that the State had made diligent attempts to locate the witness, Mr. Jackson. Now, in his postconviction petition, the defendant repackages this claim as a constitutional violation, arguing that the State was not diligent in attempting to find Mr. Jackson and that the State misled the trial court as to Mr. Jackson's location, thereby committing prosecutorial misconduct. To the extent that this is a different claim from that raised on direct appeal, it *could* have been made on direct appeal, and, as such, it is forfeited.

¶ 19 The defendant's argument to the contrary rests on defense counsel's internal memorandum of December 18, 2008 that the defendant attached to his postconviction petition. In that memorandum, Mr. Jackson's "[c]urrent address (as of 1-12-06)" is listed as 1220 N. Wisconsin, #3, Racine, WI. But the memorandum does not indicate what Mr. Jackson's address was in 2008 or 2009, the time period during which the State was searching for him. Therefore, it does not shed light on the issue of whether the State misled the trial court when the State informed the court that it believed Mr. Jackson was in Minnesota in 2008. Thus, the memorandum does not save this otherwise forfeited claim.

¶ 20 Turning to the defendant's claim of ineffective assistance of counsel based on counsel's failure to inform the trial court that the State knew Mr. Jackson was previously in Wisconsin, the State contends that this, too, is barred by the doctrine of forfeiture. This claim rested on defense counsel's knowledge that Mr. Jackson was in Wisconsin in 2006. Such evidence was not part of the record on direct appeal. It is, however, part of the postconviction record in the form of the December 2008 memorandum. Accordingly, we consider the merits of this claim.

¶ 21 At the second stage of postconviction proceedings, we do not engage in fact-finding or credibility determinations, but take all well-pleaded facts not positively rebutted by the record as true. *People v. Smith*, 2015 IL App (1st) 140494, ¶ 17. In order to establish that he suffered ineffective assistance of counsel, a defendant must show that (1) his counsel's representation fell below an objective standard of reasonableness; and (2) he suffered prejudice in that there is a reasonable probability that but for counsel's errors the outcome of the proceeding would have been different. *People v. Rouse*, 2020 IL App (1st) 170491, ¶ 46 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)).

¶ 22 Here, we need not evaluate counsel's performance, because the defendant has not made a substantial showing of prejudice. See *People v. Campos*, 2019 IL App (1st) 152613, ¶ 46. According to the defendant, if counsel had informed the court that the State had previously located Mr. Jackson in Wisconsin in 2006, the court would not have found that the State acted diligently in beginning its search for Mr. Jackson in Minnesota in 2008. We disagree. Significantly, although both addresses were in Racine, the address where the State had located Mr. Jackson in 2006—1220 North Wisconsin Street—was different from the address where the State learned Mr. Jackson was living in 2009—1754 Grange Avenue. Defense counsel's memorandum only lists Mr. Jackson's 2006 address and does not preclude the possibility that Mr. Jackson left Racine at some point between January 2006 and September 2008 to move to Minnesota, and then returned once again to Racine in 2008 or 2009.

¶ 23 While the defendant alleged in his postconviction petition that Mr. Jackson continued to live at 1220 North Wisconsin Street during the time the State was searching for him in 2008 and 2009, this is positively rebutted by the record. The record reflects that officials in Hennepin County, Minnesota repeatedly assured the State that Mr. Jackson resided at a specific address in

that county in 2008, but that he was avoiding service by Minnesota authorities. Moreover, the State eventually located Mr. Jackson at a different address in Racine than his 2006 address. Under these circumstances, we cannot say defense counsel's failure to inform the court that Mr. Jackson previously resided in Wisconsin in 2006 was reasonably likely to change the trial court's decision to extend the speedy trial term. Therefore, we agree with the trial court that the defendant failed to make a substantial showing that he received ineffective assistance of counsel sufficient to overcome the State's motion to dismiss.

¶ 24

CONCLUSION

¶ 25 For the reasons stated, we affirm the circuit court of Cook County's dismissal of the defendant's postconviction petition.

¶ 26 Affirmed.