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SIXTH DIVISION
APRIL 29, 2011

IN
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County
v.)	
)	No. 87 CR 5385
PATRICK PALAGGI,)	
)	Honorable
Defendant-Appellant.)	Luciano Panici,
)	Judge Presiding.

JUSTICE ROBERT E. GORDON delivered the judgment of the court.
Justices Cahill and McBride concurred in the judgment.

ORDER

Held: Defendant received effective assistance of counsel and the trial court properly dismissed his motion to reconsider when defendant failed to show that his depression effected his voluntary confession and failed to show how a judge's corruption conviction affected his trial.

Following a bench trial in the circuit court of Cook County on March 23, 1989, defendant Patrick Palaggi, age 24, was convicted of two counts of first degree murder (720 ILCS 5/9-1), two counts of concealment of a homicidal death (720 ILCS 5/9-3.1(a)), based on the killing of

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two people, and one count of theft (720 ILCS 5/16-1), possession of a stolen motor vehicle (635 ILCS 5/4-103), and residential burglary (720 ILCS 5/19-3(a)). After hearing aggravation and mitigation, the trial court sentenced defendant to natural life in the Illinois Department of Corrections for murder. The trial court also sentenced defendant to five years for concealment of a homicidal death, two years for theft, and seven years for possession of a stolen motor vehicle to be served concurrently.

Defendant appealed arguing that 1) the trial court erred in denying his motion to suppress his confession in violation of his Miranda rights, 2) he received ineffective assistance of counsel, and 3) the State did not prove him guilty beyond a reasonable doubt. We affirmed defendant's convictions and sentences. People v. Palaggi, No. 1-89-1080 (February 18, 1992) (unpublished order under Supreme Court Rule 23). Defendant then filed a petition for writ of habeas corpus on January 25, 1995, which the trial court considered as a post conviction petition and summarily dismissed. Defendant did not appeal that decision. Instead, defendant filed a petition for a federal writ of habeas corpus in the Northern District of Illinois and was appointed counsel. On August 25, 1999, the Federal District Court denied his petition. Palaggi v. Page, 1999 U.S. Dist. 13930 (N.D. Ill. 1999). The Seventh Circuit affirmed the district court's ruling. Palaggi v. Chrans, 2000 U.S. App. LEXIS 18217 at *6 (7th Cir. 2000).

On July 3, 2001, defendant filed a second post conviction petition, which the trial court dismissed. Defendant first appealed the dismissal and then withdrew the appeal and filed a *pro se* motion before the trial court to reconsider the dismissal claiming 1) his confession was not voluntary because he was depressed and that his lawyer was ineffective because he failed to

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suppress the confession and failed to investigate the judge's corruption in the handling of the case, and 2) that he was denied the opportunity to proceed *pro se* on his successive post conviction petition. The trial court dismissed defendant's motion to reconsider for lack of jurisdiction on January 23, 2007. Defendant then appealed the dismissal of the motion to reconsider. On September 8, 2008, we reversed and remanded the trial court's dismissal of the motion to reconsider with instructions that the trial court determine whether defendant desired to proceed *pro se* before ruling on his motion. People v. Palaggi, No. 1-07-0502 (September 8, 2008) (unpublished order under Supreme Court Rule 23). Defendant's appointed attorney from the Public Defender's Office was reassigned and on January 29, 2010, the trial court denied defendant's motion to reconsider. Defendant now appeals claiming that 1) the denial of defendant's motion to reconsider the dismissal of his post conviction petition was in error because a new judge admitted to having no understanding of the motion, 2) the trial court should have granted defendant an evidentiary hearing, and 3) defendant received ineffective assistance of counsel.

BACKGROUND

In March, 1987, Henrietta and Donald Russell were beaten and strangled to death in their home in Country Club Hills, Illinois. Their bodies were found stuffed into a closet. Defendant and his nephew were later arrested in Florida in possession of Russels' automobile. On March 25, 1987, Officers Jagman, Comanda and Anglin of the Country Club Hills Police Department questioned defendant and his nephew in Florida in their investigation of the double homicide. When they arrived in Florida, Officer Comanda testified the he read defendant his *Miranda*

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rights and asked him if he would speak to them. Defendant initially said: "I would like to talk to you, or I will talk to you, but tomorrow, after I have been able to at least speak with an attorney." Defendant testified that he said "no, . . . I would like to speak to an attorney."

The next day, Officers Comanda again read defendant his *Miranda* rights and told him that "we were back in reference to his statement that he wanted to talk to us the following day and asked if he was interested in talking to us at that point." Defendant said that he was feeling ill and that he would talk to the officers back in Illinois. Officer Comanda told defendant that the officers felt they had enough evidence to charge him in this death penalty case and would not approach him again. If defendant wished to speak to the officers in the future he would have to approach them. Defendant did not say anything about a lawyer during that conversation.

Subsequently, the officers returned to Illinois with defendant, who was taken to the Country Club Hills Police Department. On March 28, 1987, Officer Comanda went to the lock-up to check on defendant who asked if he could speak to Officer Jagman.

Officer Jagman testified that defendant said he wanted to talk about the crime, and Officer Jagman told him he would have to waive his *Miranda* rights to do so. Officer Jagman then read the *Miranda* rights from a preprinted card, stopping after each sentence to ask defendant if he understood. Officer Jagman testified that defendant confirmed his understanding of his *Miranda* rights. Defendant then confessed to the murders of both Donald and Henrietta Russell as well as to the theft in their home. Thereafter, an Assistant State's Attorney prepared a written statement after talking with defendant in Officer Jagman's presence, and defendant made

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some changes that were initialed by all parties. Defendant then signed the corrected confession witnessed by the both ASA and Officer Jagman.

Defendant testified that he gave the confession only because Officer Comanda threatened him. Defendant testified that Officer Comanda told him that he was, “glad that [defendant] [didn’t] want to talk because [Officer Comanda] [was] going to make sure that [defendant] get[s] the death penalty.” Defendant testified that he told Officer Jagman, “listen, you know, whatever you want me to sign or say, I don’t care, I will do it” because he was afraid of Officer Comanda.

Before his trial, defendant moved to suppress the confession on the grounds that his *Miranda* right to counsel had been violated. At the conclusion of the suppression hearing, the trial court found: (1) "the testimony of the police officers . . . to be clear, convincing, and concise" and the testimony of defendant "to be somewhat evasive and selective" (2) that "there's no definitive statement . . . that defendant clearly exercised and demanded the right to counsel or the right to remain silent in Florida," and (3) "the statement given by defendant to Officer Jagman was a knowing, intelligent waiver of both his right to remain silent and his right to counsel." Defendant never claims that he had been depressed or that depression rendered his confession involuntary.

Post Conviction Petition

Defendant filed a second post conviction petition. In this petition, defendant alleges that 1) his natural life sentence violated Apprendi v. New Jersey, 530 U.S. 466 (2000), and 2) his trial judge was corrupt. Judge Paul Foxgrover was the trial judge and was later convicted of taking bribes. Defendant contends that because he refused to pay Judge Foxgrover, his motion to

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suppress his confession was denied. The Public Defender's Office was appointed to represent defendant and subpoenaed his medical records from Cermak Health Services that revealed defendant was fit and sane to stand trial but indicated he suffered from depression. The assistant public defender assigned to the case refused to use the depression to claim the confession was involuntary and instructed defendant to sign an affidavit as to his depression to present *pro se*.

On October 6, 2006, the trial court dismissed defendant's post conviction petition without making any findings. At that hearing, defendant's counsel told the court that she could not find any nexus between defendant's trial and the trial judge's illegal activities, and after reviewing defendant's medical records, she could not find evidence that he was "mentally unfit" at the time of his confession

As noted, defendant filed a notice of appeal, which he withdrew and then a *pro se* motion to reconsider. On January 23, 2007, the trial court dismissed the motion to reconsider for lack of jurisdiction.

Defendant then appealed that decision. On January 4, 2008 we reversed and remanded the dismissal of defendant's motion to reconsider with instructions to the trial court to determine whether defendant desired to proceed *pro se* before ruling on his motion to reconsider.

On January 29, 2010 the trial court dismissed defendant's motion to reconsider when defendant was represented by the Public Defender's Office. In denying the motion a new judge on the case stated:

"This is like totally non sequiter [*sic*]. I don't know what the hell he's saying. I don't understand what he's saying. It's not cognizant [*sic*] of the law. Having read the entire petition for reconsideration of ineffective assistance of counsel, it would seem to me if anything it was strategy by the counsel at the time.

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Therefore, the motion to reconsider is denied.”

Defendant now appeals the trial court’s dismissal.

ANALYSIS

On appeal, defendant claims that 1) the denial of defendant’s motion to reconsider was in error because the trial court admitted to having no understanding of defendant’s motion, 2) the trial court should have granted defendant an evidentiary hearing and 3) defendant received ineffective assistance of counsel.

“The Post Conviction Hearing Act (“Act”) provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both.” People v. Hodges, 234 Ill. 2d 1, 9 (2009); See 725 ILCS 5/122-1 *et seq.* A post conviction proceeding not involving the death penalty contains three distinct stages. Hodges, 234 Ill. 2d at 10.

At the first stage, the trial court must, within 90 days of the petition's filing, independently review the petition and determine whether "the petition is frivolous or is patently without merit." Hodges, 234 Ill. 2d at 10. If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a written order. Hodges, 234 Ill. 2d at 10; See 725 ILCS 5/122-2.1(a)(2) (West 2006). If the court does not dismiss the petition 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

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(West 2006)), and the State is allowed to file a motion to dismiss or an answer to the petition (725 ILCS 5/122-5 (West 2006)). Hodges, 234 Ill. 2d at 10-11.

At the second stage, the trial court must determine whether the petition and any accompanying documentation make a substantial showing of a constitutional violation. People v. Pendleton, 223 Ill. 2d 458, 472 (2006). If no such showing is made, the petition is dismissed. People v. Edwards, 197 Ill. 2d 239, 246 (2001). If, however, a substantial showing of a constitutional violation is set forth, the petition is advanced to the third stage, where the trial court conducts an evidentiary hearing. Edwards, 197 Ill. 2d at 246; Pendleton, 223 Ill. 2d at 471; See 725 ILCS 5/122-6 (West 2006).

To proceed, pursuant to the Act, defendant files a petition in the trial court in which the original proceeding took place. Hodges, 234 Ill. 2d at 9. In the first stage, Section 122-2 of the Act requires that a post conviction petition must, among other things, "clearly set forth the respects in which petitioner's constitutional rights were violated." Hodges, 234 Ill. 2d at 9; See 725 ILCS 5/122-2 (West 2006). Defendant, at the first stage, need only present a limited amount of detail in the petition. Hodges, 234 Ill. 2d at 9. Since most petitions are drafted at this stage by defendants *pro se*, this court views the threshold for survival as low. Hodges, 234 Ill. 2d at 9. We only require that a *pro se* defendant allege enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. Hodges, 234 Ill. 2d at 9; See People v. Porter, 122 Ill. 2d 64, 74, 521 N.E.2d 1158, 118 Ill. Dec. 465 (1988) (stating that only a "gist" of a constitutional claim is needed at this stage).

Throughout the second and third stages of a post conviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation. Pendleton, 223 Ill. 2d at 473 (2007). At the second stage proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the trial court dismisses the petition at that stage, we review the circuit court's decision under a *de novo* standard of review. Pendleton, 223 Ill. 2d at 473.

Defendant first claims that his motion to reconsider was improperly denied because the trial court had not familiarized itself with defendant's case. The judge that dismissed defendant's post conviction petition was not the judge that presided at his trial. According to defendant, the trial court improperly dismissed his petition because the court had "no idea what defendant was saying."

Defendant further claims that the judge should have granted defendant an evidentiary hearing because the allegations in both the motion to reconsider and the original post conviction petition sufficiently alleged constitutional infirmities which, when taken as true, would have necessitated relief. Defendant maintains that he was deprived a fair trial because of the corruption of his trial judge. Although the post conviction petition does not elaborate on these corruption claims, defendant argues that if his appointed counsel had not "refused" to amend defendant's petition with an account of the illegal activity of the judge, he would have been granted an evidentiary hearing.

The original post conviction petition also failed to allege that defendant's confession to the police was made involuntarily because of his severe depression. Defendant claims that he

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repeatedly asked his attorney to amend his petition to include the allegation that his depression led to an involuntary confession. According to defendant, his attorney refused to supplement defendant's petition with the information contained in his medical records. Defendant requests that we grant him an evidentiary hearing so that he can present evidence to prove both of these claims. However, defendant does not support his medical claim with a physician's affidavit or medical records that show the effects of his claimed depression. The trial court record indicates that his assistant public defender reviewed his medical records and concluded that defendant's claim of giving an involuntary confession was without merit.

The State claims that the trial court did not have subject matter jurisdiction to rule on the motion to reconsider. The State also claims that defendant is barred from raising those claims that were not mentioned in the original post conviction petition. Specifically, defendant never alleged in his post conviction petition that his depressed mental state somehow prevented him from freely confessing. The State further claims that the judicial corruption claim should not be considered on appeal because it was not raised in defendant's motion to reconsider, although it was known to him at that point in time.

Once a notice of appeal is filed, the trial court loses jurisdiction, and we are vested with jurisdiction, *instantly*. People v. Bounds, 182 Ill. 2d 1, 3 (1989); People v. Vasquez, 339 Ill. App. 3d 546, 550 (2003); c.f. People v. Clark, 314 Ill. App. 3d 181 (2000) (the Second District found that trial court maintained jurisdiction to determine a motion to reconsider even though a notice of appeal had been filed). In this case, however, we permitted defendant to withdraw his first post conviction appeal and remanded the case to the trial court to rule on the motion to

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reconsider. Therefore, we find that the trial court had jurisdiction to rule on the motion and thus address defendant's claims.

First, in considering whether the petition alleges facts sufficient to state the gist of a constitutional claim, "the court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding and any transcripts of such proceeding." People v. Brown, 236 Ill. 2d 175, 202-03; quoting 725 ILCS 5/122-2.1(c). The allegations made in the post conviction petition must also be considered in light of the facts known to the trial court at the time. Brown, 236 Ill. 2d at 203 (2010). See People v. Moore, 189 Ill. 2d 521 (2000).

In this case, the judge read the entire petition for reconsideration, determined that defendant had received effective assistance of counsel, and denied the motion. The trial court was also presented a transcript of the arguments on the State's motion to dismiss the original post conviction petition. The trial court therefore had proper knowledge and adequate information in which to make its ruling.

Defendant claims that judicial corruption lead to the denial of his motion to suppress his confession. Defendant further claims in his motion to reconsider that his confession was involuntarily given because he was suffering from severe depression. An action seeking post conviction relief is a collateral proceeding, not an appeal from the underlying judgment, therefore, the Act contemplates the filing of only one post conviction petition. People v. Anderon, 375 Ill. App. 3d 121, 132 (2007). Consequently, all issues actually decided on direct appeal or in the original post conviction petition can be barred by the doctrine of *res judicata*,

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and all issues that could have been raised in the original proceeding, or original post conviction petition, but were not, are forfeited. Id.; People v. Blair, 215 Ill. 2d 427, 443 (2005). Where *res judicata* and forfeiture preclude defendant from obtaining relief, such a claim will necessarily be frivolous and patently without merit. Id.

Here, four courts, including this court on direct appeal, have already found that the confession was voluntarily given. The judicial corruption claim is not supported by the record and also barred because of the numerous opportunities defendant had to raise this claim during direct appeal, during his petitions for habeas corpus, and in his motion to reconsider. The claim that defendant was severely depressed, likewise, is raised for the first time in defendant's motion to reconsider and barred because it was not raised in defendant original post conviction petition. We therefore find that defendant's judicial corruption and involuntary confession claims are barred by the doctrine of *res judicata*.

Next, defendant claims that had he received adequate legal representation, his allegations of judicial corruption and an involuntary confession would have been sufficiently alleged in the post conviction petition. Defendant claims that his appointed counsel refused to supplement his post conviction petition with available facts and arguments concerning both the claims of judicial corruption and defendant's severe depression. Further, defendant claims that his newly appointed counsel for the rehearing of the motion to reconsider was ineffective because counsel neither attempted to explain defendant's claims to the trial court nor advocated defendant's position.

Defendant's right to assistance of counsel in post conviction proceedings is statutory, not constitutional. People v. Suarez, 224 Ill. 2d 37, 42 (2007). According to the Post Conviction Hearing Act, defendant is to be provided a reasonable level of assistance during post conviction proceedings. 725 ILCS 5/122-1 *et seq.* "Ineffective assistance of counsel claims are governed by the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984) and adopted by this court in People v. Albanese, 104 Ill. 2d 504 (1984)." People v. Petrenko, 237 Ill. 2d 490, 496 (2010). To prevail on a claim of ineffective assistance of counsel, defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. Strickland, 466 U.S. at 687; Albanese, 104 Ill. 2d at 525. Defendant must demonstrate that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694; Albanese, 104 Ill. 2d at 525.

At the second stage of post conviction proceedings, appointed counsel serves to ensure that the claims of defendant are adequately presented. Suarez, 224 Ill. 2d at 46. To do so, appointed counsel must consult with defendant either by mail or in person, ascertain his alleged grievances, examine the record of proceedings at the trial, and amend the post conviction petition, if necessary. Suarez, 224 Ill. 2d at 46. "The statute cannot perform its function unless the attorney appointed to represent an indigent petitioner ascertains the basis of his complaints, shapes those complaints into appropriate legal form and presents them to the court." Suarez, 224

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Ill. 2d at 46; quoting People v. Slaughter, 39 Ill. 2d 278, 285 (1968). Remand is warranted where post conviction appointed counsel fails to perform these duties. Suarez, 224 Ill. 2d at 47.

Defendant fails to show how both assistant public defenders performed deficiently or how defendant was prejudiced. In this case, defendant's post conviction appointed counsel provided reasonable assistance. She consulted with defendant and helped to shape his claim into an "appropriate" legal form. She investigated defendant's severe depression claim and urged defendant to provide more than speculative evidence to support the judicial corruption charges. After having obtained all the evidence, defendant's appointed counsel advised defendant that she did not have a reasonable basis to support his claims before the trial court and subsequently withdrew after helping defendant to take steps to make *pro se* amendments to his post conviction petition. Likewise, the assistant public defender for the motion to reconsider presented the judge with the motion and explained to the judge what he had to do to comply with our remand.

Defendant provided no evidence to show that the depression he was suffering from contributed to his confession being involuntary. In fact, the medical records indicate that he was sane and fit to stand trial. Defendant's appointed counsel explained the reasons why she could not claim the confession to be involuntary and had the defendant do it *pro se*. The corruption of the trial judge in taking bribes had no relationship to defendant's case because he did not bribe or attempt to bribe the judge. There was no evidence that the trial court's corruption extended to this case. Defendant's assertion that the judge who heard his motion to reconsider was unfamiliar with the case is also not supported by the record. Defendant has failed to show that he did not receive effective assistance of counsel.

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CONCLUSION

For the reasons set forth above, we affirm the trial court's dismissal of defendant's motion to reconsider the dismissal of his post conviction petition.

Affirmed.