2012 IL App (1st) 103355-U

SECOND DIVISION
September 11, 2012

No. 1-10-3355

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. 03 CR 11681
WILLIE GODARD,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	Evelyn B. Clay
	)	Judge Presiding.
	)	

JUSTICE MURPHY delivered the judgment of the court.
Steele and Neville, JJ., concurred in the judgment.

O R D E R

¶ 1 *HELD*: The circuit court erred by dismissing defendant's *pro se* postconviction petition at the first stage of proceedings on the basis of waiver and *res judicata* where defendant's claims are based on facts that were not part of the record on direct appeal. Defendant's entire petition must advance to the second stage of postconviction proceedings because his claim of ineffective assistance for failing to file a motion to suppress his videotaped confession is not frivolous or patently without merit where it has an arguable basis in law and fact.

¶ 2 Defendant Willie Godard appeals the first-stage dismissal of his petition for relief under

the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)). On appeal, he contends that the circuit court erred in dismissing his petition on grounds of *res judicata* and waiver. For the reasons that follow, we reverse and remand.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with two counts of first degree murder and one count of concealment of a homicidal death for his actions on May 6, 2003, in connection with the death of Vernice Carpenter. At trial, the State primarily relied on a videotaped confession by defendant and the testimony of the patrolman of his apartment complex to prove him guilty of the charged crimes beyond a reasonable doubt. The jury found defendant guilty, and he was sentenced to two concurrent terms of 50 years' imprisonment for first degree murder and a consecutive term of 2 years' imprisonment for concealment of a homicidal death. On appeal, this court vacated one of defendant's convictions for first degree murder pursuant to the one-act, one-crime doctrine and affirmed in all other respects.

¶ 5 On August 23, 2010, defendant filed a *pro se* postconviction petition alleging that he was denied his constitutional right to the effective assistance of trial counsel. Defendant attached a signed affidavit to his petition in which he states that he was taking the drugs Trazadone and Prozac for depression and Vicodin for a slipped disc in his back at the time of his arrest, that the police did not provide him with those medications prior to or during his interrogation despite his requests for them, and that his lack of medication affected his ability to understand his *Miranda* rights and mentally and physically withstand four days of interrogation. Defendant also states in his affidavit that he was handcuffed, hit in the back with a rod, and slapped in the face every time

he began to fall asleep during interrogation; that he was directed by police as to what to do and say during his videotaped confession; and that he agreed to follow those directions because he was in physical pain, mentally depressed, and starving. In addition, defendant states that the man who conducted his medical intake did not conduct a medical evaluation of him and that he would have told the man of the pain in his back, the scars on his back, and his medication had he done so. Defendant further states in his affidavit that he provided defense counsel with all this information prior to trial.

¶ 6 Additionally, defendant asserted in his petition that counsel had received during discovery photographs of a suicide note he had allegedly written and attached photographs of a suicide note on the coffee table of his apartment to his petition. Defendant also attached a signed affidavit from his appellate counsel to his petition in which she avers that she was provided with trial counsel's case file and that the file contained photographs of a suicide note that appeared to have been written by defendant.

¶ 7 Defendant alleged in his petition that he had been denied effective assistance of counsel because counsel did not use the information he had provided counsel to move to suppress his videotaped confession as being involuntarily given or to challenge his fitness to stand trial and his ability to waive is *Miranda* rights on the basis of his mental deficiencies. The circuit court then entered a written order dismissing defendant's petition and finding that his claims of ineffective assistance of counsel were waived because they could have been raised on direct appeal and that his involuntary confession claim was barred by the doctrine of *res judicata* because he had unsuccessfully raised that claim on direct appeal.

¶ 8 ANALYSIS

¶ 9 The Act provides a remedy for a defendant whose federal or state constitutional rights were substantially violated in the defendant's original trial or sentencing hearing. *People v. Williams*, 209 Ill. 2d 227, 232 (2004). Postconviction relief is warranted where a defendant demonstrates a substantial deprivation of constitutional rights in the proceedings that produced the conviction. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Postconviction proceedings may consist of as many as three stages. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, dismissal is appropriate if the circuit court determines the petition is either frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Summary dismissal of a postconviction petition is reviewed *de novo*. *People v. Coleman*, 233 Ill. 2d 366, 388-89 (1998).

¶ 10 I. *Res Judicata* and Waiver

¶ 11 Defendant first contends that the circuit court erred in finding that his petition was barred by the doctrines of *res judicata* and waiver. Waiver and *res juidcata* "deal with the substance of postconviction claims and may serve as the basis for summary dismissal." *People v. Chatman*, 357 Ill. App. 3d 695, 701 (2005). A reviewing court's determination of issues on direct appeal is *res judicata*, "and issues that could have been presented on direct appeal, but were not, are deemed waived." *People v. Whitehead*, 169 Ill. 2d 355, 371 (1996), *overruled in part on other grounds*, *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). However, an exception to this rule exists where "facts relating to the claim do not appear on the face of the original appellate record" because although some claims may potentially be presented on appeal, the reviewing court may

be incapable of considering those claims under the rules governing appellate review. *Id.* at 372. Thus, where a claim's evidentiary basis is *de hors* the record, waiver and *res judicata* do not apply, irrespective of whether the claims could have been raised by a party on direct appeal and regardless of "whether their supporting facts are available as a practical matter at the time of the direct appeal." *Id.*

¶ 12 Here, defendant attached three exhibits to his petition. First, he attached his own signed affidavit, in which he avers that he informed counsel before trial that: (1) he was on Trazadone, Prozac, and Vicodin at the time of his interrogation; (2) he was not provided with his medication despite informing the police that he needed it; (3) he was handcuffed and beaten during his interrogation; (4) the man who conducted his medical intake did not complete an evaluation; and (5) the police told him what to say and do during his confession. Defendant also attached photographs of his suicide note and a signed affidavit from his appellate counsel in which she avers that the photographs were part of trial counsel's case file. In addition, the record on direct appeal did not contain evidence regarding whether defense counsel had knowledge of the information set forth in defendant's affidavit and did not contain the photographs of defendant's suicide note or appellate counsel's affidavit regarding that note.

¶ 13 Thus, although defendant raised the issue of ineffective assistance of counsel for failing to file a pretrial motion to suppress his confession on direct appeal and the facts supporting his postconviction claims were available as a practical matter at the time of his appeal, his petition is not barred by waiver or *res judicata* because the facts upon which his claims rely were not part of the record on appeal. As such, we conclude that the circuit court erred by dismissing defendant's

petition on those grounds.

¶ 14 II. Ineffective Assistance of Counsel

¶ 15 The State asserts that even if defendant's petition is not barred by the doctrines of waiver or *res judicata*, dismissal of his petition was proper because his ineffective assistance claims are frivolous and patently without merit. At the first stage of postconviction proceedings, summary dismissal is appropriate if the petition is frivolous or patently without merit, *i.e.*, if it "has no arguable basis either in law or in fact," which is the case where it is "based on an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Thus, a petition must only set forth allegations which, when taken as true and liberally construed in favor of the petitioner, present the "gist" of a constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). To set forth the "gist" of a constitutional claim, a petitioner need only present a limited amount of detail and is not required to include legal arguments, cite to legal authority, or state the claim in its entirety. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Where a defendant is acting *pro se*, a court should review his petition with a lenient eye, allowing a borderline case to proceed. *Hodges*, 234 Ill. 2d at 21.

¶ 16 A criminal defendant has a constitutional guarantee to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. In *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the United States Supreme Court established a two-prong test for claims of ineffective assistance of counsel, which requires reversal of a conviction only if the defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. A failure to make the requisite showing of either deficient performance or sufficient

prejudice defeats a claim of ineffective assistance. *People v. Palmer*, 162 Ill. 2d 465, 475 (1994). To establish deficient performance, the defendant must overcome the strong presumption that the challenged action might have been the product of sound trial strategy (*People v. Simms*, 192 Ill. 2d 349, 361 (2000)) and show that counsel's performance fell below an objective standard of reasonableness (*People v. Manning*, 241 Ill. 2d 319, 326 (2011)). To establish prejudice, the defendant must prove there is a reasonable probability that the result of the trial would have been different but for counsel's deficient performance. *Simms*, 192 Ill. 2d at 362. Thus, at the first stage of proceedings, "a petition alleging ineffective assistance 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.

¶ 17 Defendant contends that his postconviction claim that trial counsel was ineffective for failing to investigate and bring a motion to suppress his confession as involuntarily given has at least an arguable basis in fact and law. The State responds that counsel's decision not to bring a motion to suppress the confession is a virtually unchallengeable tactical decision.

¶ 18 Although "there is a strong presumption that trial counsel's action or inaction resulted from sound trial strategy" (*People v. Mabry*, 398 Ill. App. 3d 745, 751 (2010)) and the question of whether to file a motion to suppress is normally a matter of trial strategy left to trial counsel's discretion (*People v. Morris*, 229 Ill. App. 3d 144, 157 (1992)), counsel's failure to file a motion to suppress may constitute ineffective assistance where such a motion is the defendant's strongest or only viable defense (*People v. Spann*, 332 Ill. App. 3d 425, 436-37 (2002); *People v. Stewart*, 217 Ill. App. 3d 373, 376 (1991)). In addition, the evidence of defendant's guilt presented at trial

consisted primarily of his videotaped confession, and defense counsel argued that the statement was coerced and involuntarily given. Thus, suppression of the confession constituted defendant's strongest defense because it would have deprived the State of its primary and strongest piece of evidence and the failure to bring such a motion cannot be considered sound or valid trial strategy. As such, we must now determine whether it is arguable that such a motion would have succeeded to determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness.

¶ 19 A determination of whether a statement has been voluntarily given depends on the totality of the circumstances. *People v. Clark*, 114 Ill. 2d 450, 457 (1986). For a confession to be deemed involuntary, the defendant's will must be overborne at the time it was given, "such that the confession 'cannot be deemed the product of a rational intellect and free will.' " *People v. Foster*, 168 Ill. 2d 465, 475-76 (1995) (quoting *People v. Kincaid*, 87 Ill. 2d 107, 117 (1981)). In determining a confession's voluntariness, relevant factors to consider include "the defendant's age, intelligence, background, experience, mental capacity, education and physical condition at the time of questioning; the legality and duration of the detention; the duration of the questioning; and any physical or mental abuse by police." *People v. Gilliam*, 172 Ill. 2d 484, 500-01 (1996). On a motion to suppress a confession, the State bears the burden of proving the confession was voluntary by a preponderance of the evidence. *People v. Braggs*, 209 Ill. 2d 492, 505 (2003).

¶ 20 In this case, defendant has alleged a number of facts which, when taken as true, support his claim that his videotaped confession was involuntary. Specifically, defendant has alleged that

he was taking Trazadone and Prozac for mental depression and Vicodin for a slipped disc in his back at the time of his interrogation and that he told police that he needed his medication, but was refused such medication the entire time he was at the police station. Defendant also alleged that he was handcuffed, hit in the back with a rod, and slapped in the face every time he started to fall asleep during his interrogation; that police officers told him what to say and do during the videotaped statement; that the man who conducted his medical intake did not actually examine him; and that he was held for questioning for four days. Defendant further alleged that he agreed to follow the officers' directions during his videotaped statement because he was in physical pain, mentally depressed, and starving.

¶ 21 Thus, defendant's allegations, when taken as true and liberally construed in his favor, show that he was of diminished physical and mental capacity at the time of questioning, he was subjected to physical and mental abuse by the police, he was detained and questioned for a long period of time, he was directed as to what to say and do during his videotaped statement by the police, and his confession was obtained as a result of these factors. We therefore determine that it is at least arguable that a motion to suppress defendant's confession as involuntary would have succeeded. We therefore also determine that it is at least arguable that counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced where such a motion was defendant's strongest defense and it is reasonably probable that the result of his trial would have been different had the State been deprived of its primary and strongest piece of evidence. As such, we conclude that defendant's claim of ineffective assistance of trial counsel for failing to file a motion to suppress his confession as involuntary is not frivolous or patently

without merit where it arguably has bases in law and in fact.

¶ 22 Our supreme court has held that where a postconviction petition contains one claim that is not frivolous or patently without merit, the entire petition must advance to the second stage of proceedings. *People v. Rivera*, 198 Ill. 2d 364, 370 (2001). Thus, having concluded that the circuit court erred by dismissing defendant's petition on the basis of *res judicata* and waiver and that summary dismissal of his claim of ineffective assistance for failing to file a motion to suppress his confession would not be appropriate, we need not also consider whether the other claims raised in his petition are frivolous or patently without merit.

¶ 23 CONCLUSION

¶ 24 Accordingly, we reverse the dismissal of defendant's postconviction petition and remand the matter to the circuit court of Cook County for second-stage proceedings under the Act.

¶ 25 Reversed and remanded.