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2013 IL App (3d) 110584-U

Order filed August 30, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-11-0584
	)	Circuit No. 08-CF-420
	)	
DAMEKO S. BRICKHOUSE,	)	Honorable
	)	Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE McDADE delivered the judgment of the court.  
Presiding Justice Wright concurred in the judgment.  
Justice Schmidt dissented.

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**ORDER**

¶ 1 *Held:* Defendant's *pro se* postconviction petition is remanded for further proceedings.

¶ 2 Defendant, Dameko S. Brickhouse, appeals the first-stage dismissal of his *pro se* postconviction petition. On appeal, defendant contends that the trial court erred in dismissing his petition because it was at least arguable that he received ineffective assistance of trial and appellate counsel. We reverse and remand the cause for further proceedings.

¶ 3

## FACTS

¶ 4 On July 11, 2008, defendant was charged by indictment with two counts of armed robbery (720 ILCS 5/18-2(a)(2) (West 2008)). On May 12, 2009, the case proceeded to a jury trial. At trial, Rochelle Hicks testified that on July 1, 2008, she and her husband, Jeffrey Hicks, traveled from their home in Kankakee to a local credit union to withdraw \$1,000. Jeffrey gave Rochelle \$500, and the couple went to a currency exchange to pay their bills. While in the currency exchange, Rochelle saw defendant and Curtis Phillips walk past the building. Rochelle had known defendant for approximately three years and remembered that he wore a white t-shirt, blue jeans, and a black White Sox hat on the date of the incident.

¶ 5 As Rochelle and Jeffrey walked from the currency exchange to her sister-in-law's house, defendant approached them holding a "silver caliber handgun." Defendant directed the couple to give him all of their money before he killed them. Rochelle gave defendant her money, and defendant ordered the couple to walk away. As Rochelle and Jeffrey walked away, Rochelle saw defendant run up the alley. Once Rochelle reached her sister-in-law's house, she called the police.

¶ 6 At the police station, Rochelle identified defendant from a photographic lineup. Rochelle told the police that defendant carried a short silver gun. The police showed Rochelle a photograph of a gun; however, Rochelle stated that the gun in the picture was not the gun used in the robbery. Rochelle also identified defendant's hat from a police photograph.

¶ 7 On cross-examination, Rochelle admitted that she received social security payments because she had a learning disability. Additionally, she admitted that she did not know what a "silver caliber handgun" meant, but Jeffrey had told her the name of the gun.

¶ 8 Jeffrey testified, similar to Rochelle, that on July 1, 2008, the couple went to a credit union and currency exchange to pay some bills. After leaving the currency exchange, Jeffrey and Rochelle were confronted by defendant in an alley. Jeffrey recalled that defendant jumped out of the bushes, demanded money, and threatened to shoot the couple with a silver-colored gun. Jeffrey thought that the gun was a .38 caliber. Jeffrey instructed Rochelle to give defendant the money. Defendant then directed Jeffrey and Rochelle to walk away, and defendant ran in the opposite direction.

¶ 9 Later, Jeffrey told the police that the assailant wore a black White Sox hat, white t-shirt, and blue jeans. Jeffrey identified defendant from a photographic lineup. On cross-examination, Jeffrey remembered telling the police that the assailant had braids in his hair.

¶ 10 Phillips testified that he met up with defendant on the morning of the robbery. Later in the day, Rochelle and Jeffrey told Phillips that they had been robbed by defendant. When Phillips returned home, he found defendant and his uncle at his house. Phillips stated that defendant appeared to have been working because he had putty on his hand. Phillips also noted that his uncle had a construction business. Phillips said that defendant always had his hair cut and he did not remember him having braids.

¶ 11 In the afternoon, Phillips was taken to the police station where he identified defendant from a photographic lineup. Eventually, Phillips returned home where he received a telephone call from a person identifying himself as defendant. The person asked Phillips to "see if they want the money back \*\*\* so they can drop the charges."

¶ 12 Detective Tim Kreissler testified that he conducted a video- and audio-recorded interview with defendant. Before the interview began, Kreissler read defendant a *Miranda* form that

explained his rights. Defendant indicated that he understood his rights and signed the *Miranda* form.

¶ 13 During Kreissler's testimony, the State introduced the video recording of defendant's interview. At the beginning of the recording, and before being *Mirandized*, defendant asked Kreissler, "I can't ask for a lawyer?" Kreissler responded, "Well, we'll get to that point." Defendant insisted he had not done anything wrong, and Kreissler said, "Well, you just said you know can you have your lawyer present, if you didn't." Kreissler then paused for a moment and read defendant his *Miranda* warnings. Defendant initialed and signed the *Miranda* warnings form, and Kreissler interrogated defendant.

¶ 14 On July 2, 2008, Kreissler interviewed defendant a second time. Defendant refused to allow the interview to be recorded, but he signed a *Miranda* waiver form. During the interview, defendant allegedly told Kreissler he was sorry that he had robbed Rochelle and Jeffrey. Defendant indicated that he would give the money back and turn the gun over to the police if the charges were dropped. Kreissler responded that he could not make that deal.

¶ 15 Kreissler also conducted a search of defendant's bedroom. Inside the bedroom, Kreissler discovered a black White Sox hat and a black BB gun. Kreissler and another detective photographed the discovered items.

¶ 16 Officer Robin Passwater testified that she attempted to interview defendant a third time on July 3, 2008, about the location of the gun used in the robbery. Defendant asked Passwater to reduce the charges in exchange for his signature on the *Miranda* waiver form. Passwater told defendant that only the State's Attorney could change the charges. Defendant indicated that he could retrieve the gun, but he did not tell Passwater where it was located. Ultimately, defendant

refused to sign the *Miranda* waiver.

¶ 17 After closing arguments, the case proceeded to deliberations. The jury requested, and was allowed to review, several items including defendant's video-recorded interview. Thereafter, the jury found defendant guilty of both counts of armed robbery.

¶ 18 On June 17, 2009, defense counsel filed a motion for new trial. The motion alleged, *inter alia*, that a new trial was warranted because defendant believed that counsel had made a mistake in failing to move to suppress his statements to the police. On July 24, 2009, defendant sent an *ex parte* letter to the court which made various allegations of ineffective assistance of trial counsel. At the hearing on the motion, counsel stated that she had discussed with defendant whether he should testify and noted that defendant wanted to testify to discredit Rochelle's testimony that she had known defendant for three years. Counsel represented that defendant had been incarcerated during the referenced period. The court found defendant's claims were without merit and denied the motions.

¶ 19 After a sentencing hearing, the trial court sentenced defendant to two concurrent terms of 30 years' imprisonment.

¶ 20 On direct appeal, we affirmed defendant's convictions and sentence. *People v. Brickhouse*, 2011 IL App (3d) 100289-U.

¶ 21 On August 2, 2011, defendant filed a *pro se* postconviction petition. Defendant's petition alleged that he received ineffective assistance of trial counsel when counsel failed to move to suppress his statement to the "arresting officer." Defendant's petition included a letter from counsel that stated that counsel would not provide an affidavit in support of the petition because the issue was dealt with in her motion for new trial. On August 9, 2011, the trial court

summarily dismissed defendant's petition, ruling that defendant's claims were barred by *res judicata* and the petition lacked the necessary supporting affidavits or records. Defendant appeals.

¶ 22

#### ANALYSIS

¶ 23 Defendant argues that his postconviction petition, liberally construed, made the gist of a claim of ineffective assistance of counsel. Namely, defendant contends that counsel failed to file a motion to suppress defendant's statements to the police that were obtained in violation of his right to counsel. See *Edwards v. Arizona*, 451 U.S. 477 (1981). Defendant further argues that this claim was not advanced on direct appeal as a result of ineffective assistance of appellate counsel.

¶ 24 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a three-stage process for the adjudication of postconviction petitions. *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2010). The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim. *People v. Harris*, 224 Ill. 2d 115 (2007). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 25 At the first stage of postconviction proceedings, a petition that alleges ineffective assistance of counsel may not be summarily dismissed if it is arguable that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) the defendant was prejudiced. *People v. Tate*, 2012 IL 112214. First-stage postconviction petitions that allege ineffective assistance of counsel are judged by a lower pleading standard than such petitions at

the second stage of proceedings. *Id.*

¶ 26 Here, defendant argues that his postconviction petition presented the gist of a claim for ineffective assistance of counsel because trial counsel failed to file a motion to suppress evidence. Such a motion finds support in the record, as the video recording of defendant's first interrogation shows that defendant requested counsel before he received his *Miranda* warnings. Nonetheless, Kreissler continued the interrogation without allowing defendant to obtain counsel.

¶ 27 Before beginning a custodial interrogation, a law enforcement officer must warn a suspect that: (1) he has the right to remain silent; (2) anything he says can be used against him in a court of law; (3) he has the right to have an attorney present; and (4) if he cannot afford an attorney, one will be appointed for him before questioning if he so desires. *People v. Hunt*, 2012 IL 111089. These warnings protect a suspect's fifth amendment privilege against compelled self-incrimination from the " 'inherently compelling pressures' of custodial interrogation." *Id.* ¶ 23 (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). When a suspect invokes his right to counsel during a custodial interrogation, he cannot be questioned further until counsel has been made available, unless the suspect initiates further communication. *Edwards*, 451 U.S. 477. If the police initiate conversation after a suspect's invocation of his right to counsel, the accused's statements are presumed involuntary and any subsequent waiver is presumed invalid. *People v. Woolley*, 178 Ill. 2d 175 (1997).

¶ 28 To determine if suppression of defendant's statement is warranted, we must first determine whether he invoked his right to counsel. Police interrogation must stop when a defendant requests counsel. *People v. Ravellette*, 263 Ill. App. 3d 906 (1994). A defendant must articulate his desire for counsel in a clear manner such that a reasonable officer in the

circumstances would understand the statement to be a request for an attorney. *Davis v. United States*, 512 U.S. 452 (1994).

¶ 29 In the present case, defendant is seen and heard in the video recording asking: "I can't ask for a lawyer?" Despite defendant's question, Kreissler continues the interview and, before reading the *Miranda* warnings to defendant, begins to ask defendant why he would need counsel. Under the lower standard of review of a first-stage postconviction petition, defendant's statement, viewed in light of the instant scenario, could be construed as an invocation of defendant's right to counsel. Therefore, it is arguable that counsel's performance was deficient when she did not pursue a motion to suppress evidence. Further, the outcome of defendant's trial might have differed if the motion were presented. This case was largely dependent on the eyewitness testimony of Rochelle and Jeffrey, as well as defendant's police interviews. Absent the information from defendant's interviews, the State's remaining evidence was problematic. Rochelle's testimony was called into question by her learning disability and her statement that she provided information about the gun from Jeffrey. Jeffrey's assailant identification testimony was questioned by Phillips' statement that defendant did not have braids in his hair. Considering these issues and the fact that the jury requested to review the video-recorded interview, a motion to suppress may well have altered the outcome of the case.

¶ 30 Finally, the trial court's ruling that defendant's petition was barred by *res judicata* and was not properly supported by affidavit was in error. While defendant's ineffective assistance claim was raised by trial counsel in her motion for a new trial, it was not vigorously argued by independent counsel and was not raised on direct appeal. Therefore, *res judicata* should not bar defendant from presenting these claims anew with the benefit of independent counsel review at

the second stage of postconviction proceedings. Similarly, defendant has not waived review of this issue because he alleged that appellate counsel was ineffective for failing to raise this issue on direct appeal. See *People v. Fair*, 193 Ill. 2d 256 (2000) (ineffective assistance is a recognized exception to the waiver doctrine in postconviction proceedings). Defendant's petition was also properly supported with a letter from trial counsel stating that she would not provide an affidavit. See *People v. Hall*, 217 Ill. 2d 324 (2005) (failure to attach an affidavit in support of a petition may be excused where the only affidavit defendant could furnish was that of the attorney whose performance is challenged). Therefore, we remand the cause for further postconviction proceedings.

¶ 31

#### CONCLUSION

¶ 32 For the foregoing reasons, the judgment of the circuit court of Kankakee County is reversed, and the cause is remanded for further proceedings.

¶ 33 Reversed and remanded.

¶ 34 JUSTICE SCHMIDT, dissenting.

¶ 35 After reviewing the videotape of the interrogation, it is clear that no motion to suppress would have been granted in this case. The videotape shows that the detective was talking to defendant and explaining the audio visual recording that he wanted to take during questioning. He asked defendant to sign or initial a form allowing audio visual recording of any questioning. The videotape shows a time meter. At 15:44:23 hours, defendant states, "I can't ask for a lawyer?" The detective replies, "When we'll get to that point, but we're not there yet." The defendant then states, "I didn't do nothing." The detective then responded, "You just said can you have a lawyer present. If you didn't \*\*\*" and the detective stops there. At 15:44:53 hours, 30 seconds after defendant asked whether he could ask for a lawyer, the detective reads him his

rights and defendant responds that he understands each of his rights; specifically, he understood that he had right to have a lawyer present with him during any questioning and if he could not afford one, one would be provided for any questioning. The detective then had defendant read the written *Miranda* warnings, confirmed that defendant could read them, and then asked him to initial each warning.

¶ 36 First of all, the question "I can't ask for a lawyer?" is hardly an unequivocal request for counsel. Secondly, there was no interrogation between that question by defendant and the explanation of his rights under *Miranda* 30 seconds later. Third, after receiving the *Miranda* warnings, defendant did not ask for an attorney. Therefore, any allegation that counsel was ineffective for failing to move to suppress defendant's statement based upon a *Miranda* violation is positively rebutted by the record and therefore frivolous and patently without merit. As the majority points out, we review a first-stage dismissal of a postconviction petition *de novo*.

¶ 37 The majority concludes at paragraph 26 that the video recording shows defendant requested counsel before he received his *Miranda* warnings. I submit that defendant's question was not a request for counsel. This is especially clear in light of the fact that the detective provided defendant with *Miranda* warnings 30 seconds after defendant asked that question and before any interrogation.

¶ 38 For these reasons, I respectfully dissent from the majority's conclusion. I would affirm the trial court's dismissal.