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2013 IL App (3d) 110774-U

Order filed May 20, 2013

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 14th Judicial Circuit,
Plaintiff-Appellee,) Rock Island County, Illinois,
)
v.) Appeal No. 3-11-0774
) Circuit No. 05-CF-1081
LEONEL C. ALANIS,)
) Honorable
Defendant-Appellant.) F. Michael Meersman,
) Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court did not err when it dismissed defendant's postconviction petition without an evidentiary hearing.
- ¶ 2 Defendant, Leonel C. Alanis, was convicted of four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)), and sentenced to four consecutive terms of life in prison. Defendant's convictions and sentences were affirmed on appeal. *People v. Alanis*, No. 3-08-0839 (2010) (unpublished order under Supreme Court Rule 23). Thereafter, defendant

filed a *pro se* postconviction petition. The court appointed counsel, and an amended petition was filed. The State filed a motion to dismiss the amended petition, which the trial court granted. Defendant appeals the dismissal, arguing that the cause should be remanded for an evidentiary hearing. Specifically, defendant claims that the court erred in dismissing his claims that: (1) the trial court erroneously published the audio recording of H.R.'s testimony to the jury without a written transcript; and (2) trial counsel was ineffective for failing to impeach a witness's testimony with a videotape of her interview with one of the victims. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with four counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2004)). The cause proceeded to a jury trial, where the State introduced evidence to establish that defendant committed acts of sexual assault on M.S. and H.R. As part of its case-in-chief, the State presented the testimony of M.S. and H.R. It also presented the testimony of Heather Blancke. She testified that she was employed by the Department of Children and Family Services and, while so employed, conducted a forensic interview of M.S. Blancke stated that during the interview, M.S. described how she had been sexually assaulted by defendant.

¶ 5 During jury deliberations, the jury asked for a transcript of H.R.'s testimony. The court responded by playing the audio recording of her testimony at trial. Thereafter, the jury found defendant guilty on all four counts. The trial court sentenced defendant to four mandatory consecutive sentences of natural life imprisonment due to his prior conviction for aggravated criminal sexual assault. Defendant's convictions and sentences were affirmed on appeal. *Alanis*, No. 3-08-0839.

¶ 6 Thereafter, defendant filed a *pro se* postconviction petition. The trial court appointed counsel

to represent defendant, and counsel filed an amended petition for postconviction relief. The amended petition alleged that: (1) the trial court erroneously published the audio recording of H.R.'s testimony to the jury without a written transcript; (2) trial counsel was ineffective for failing to impeach Blancke's testimony with a videotape of her interview with M.S.; (3) trial counsel was ineffective for failing to tender an instruction advising the jury that it should not consider defendant's refusal to testify against him; and (4) trial counsel's overall representation was ineffective.

¶ 7 After receiving the amended petition, the State filed a motion to dismiss. The trial court granted the State's motion. In doing so, it stated that defendant's first claim was procedurally defaulted and trial counsel was not ineffective for: (1) failing to urge the court to provide a transcript of H.R.'s testimony instead of, or in addition to, the audio recording; or (2) for failing to publish a video of M.S.'s interview with Blancke. Defendant appeals.

¶ 8 ANALYSIS

¶ 9 Defendant argues that the trial court erred when it dismissed his postconviction petition without an evidentiary hearing. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing Act provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2010). At the first stage, the trial court must independently determine whether the petition is frivolous or patently without merit. *People v. Morris*, 236 Ill. 2d 345 (2010). During the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261 (2002). In doing so, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *People v. Childress*, 191 Ill. 2d 168 (2000). A petition will move to the third stage only if defendant has made a substantial showing of

a constitutional violation. *Id.* We review a trial court's decision to dismiss a postconviction petition at the second stage *de novo*. *Id.*

¶ 10 Defendant first argues that his claim that the trial court erroneously published the audio recording of H.R.'s testimony to the jury without a written transcript was sufficient to proceed to a third stage evidentiary hearing. Defendant argues that the postconviction court erred by misapprehending the claim as one of ineffective assistance of counsel. Defendant is correct in stating that the court partially misapprehended the issue, as the petition framed the issue as an evidentiary question but the court's substantive ruling spoke in terms of ineffective assistance. The court, however, also dismissed the claim by stating that it had been procedurally defaulted. A claim is procedurally defaulted in a postconviction petition when it could have been raised on direct appeal. *People v. Ligon*, 239 Ill. 2d 94 (2010). Here, the alleged error occurred during trial. Although the error was not objected to or raised in a posttrial motion, it could have been raised on direct appeal under the plain error doctrine. See Ill. S. Ct. R. 615(a) (eff. Aug. 27, 1999). Therefore, we conclude that the issue was procedurally defaulted.

¶ 11 Defendant next contends that the trial court should have proceeded to a third stage evidentiary hearing based on his claim that trial counsel was ineffective for failing to impeach Blancke's testimony with a videotape of her interview with M.S. Defendant has failed to state, with facts from the record or an affidavit, that a video existed and how it could have been used to impeach Blancke. Without more than a mere allegation, we cannot find that defendant has established a substantial showing of a constitutional violation. See *People v. Turner*, 187 Ill. 2d 406 (1999) (a mere allegation of a constitutional violation is insufficient to justify an evidentiary hearing on a postconviction petition).

¶ 12 Having found that defendant's first issue was procedurally defaulted and that the second issue failed to amount to a substantial showing, we conclude that defendant was not entitled to a third-stage evidentiary hearing on his postconviction petition. Therefore, we affirm the trial court's second-stage dismissal of defendant's postconviction petition.

¶ 13 CONCLUSION

¶ 14 The judgment of the circuit court of Rock Island County is affirmed.

¶ 15 Affirmed.