2015 IL App (1st) 123743-U

SECOND DIVISION
June 30, 2015

No. 12-3743

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. JOSE CARBAJAL-DIEGO, Petitioner-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 10 CR 902 Honorable Kay Marie Hanlon Judge Presiding

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PRESIDING JUSTICE SIMON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed defendant's postconviction petition at the first stage because the claims were patently without merit. Defendant's claims are barred by *res judicata* and forfeiture, they do not rely on newly discovered evidence, and trial counsel was not ineffective.

¶ 2 Defendant Jose Carbajal-Diego was charged and convicted of three counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. His convictions were affirmed on direct appeal. Defendant filed a postconviction petition interposing 17 arguments that he claims entitle him to relief. The trial court dismissed the petition at the first stage of the

proceedings finding that defendant's claims were frivolous and patently without merit. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant Jose Carbajal Diego was charged and convicted of three counts of predatory criminal sexual assault and one count of aggravated criminal sexual abuse. The testimony introduced at trial giving rise to his convictions was that, beginning in 2005 and continuing into 2009, defendant had an ongoing sexual relationship with his niece C.C. There was testimony from C.C. herself as well as from her mother and father. Through the trial testimony, the narrative constructed by the State was that defendant lived with C.C. and her parents and some other relatives. One morning, when C.C. was 10 years old, defendant called her over to him, removed her pants and underwear and had sex with her. After the first incident, defendant had sex with her almost every day for the next two or three years. On occasion, Defendant also had oral sex with C.C. and digitally penetrated her. The sexual contact continued until C.C. was close to 15 years old.

¶ 5 One instance, when C.C. was 12 years old, defendant was having sex with her in her bedroom when her father knocked on the door. Defendant hid in the bedroom and C.C. ran from the room, crying, covered in only a towel, and went to take a shower. C.C.'s father discovered defendant in the room wearing only his underwear. Months later, C.C.'s mother observed defendant, holding C.C. on his lap, kissing her. C.C.'s mother screamed at them and notified C.C.'s father who proceeded to beat up defendant. Defendant told C.C. on multiple occasions that no one would believe her if she reported the conduct, and on other occasions he told her that he would kill her if she told anyone. On December 9, 2009, C.C. reported the sexual contact to a

school counselor.

¶ 6 Defendant was arrested and interviewed by Officer Pinedo of the Wheeling police department. A detective and an assistant state's attorney were present. Defendant was advised of his *Miranda* rights and he signed a Spanish language pre-printed *Miranda* acknowledgment and waiver form. Pinedo orally confirmed that defendant understood his rights and defendant agreed to speak with the assistant state's attorney, with Pinedo translating. A summary of their conversation was printed and reviewed by defendant and defendant signed each page. Defendant made some corrections to the statement which were initialed and signed. Defendant also expressed desire to add a couple sentences at the end. The written statement is consistent with the testimony set forth above in all respects.

¶ 7 Defendant called one witness on his own behalf, but did not testify. The jury returned guilty verdicts on all counts. Defendant was sentenced to 24 years in prison and his motion to reconsider his sentence was denied. Defendant filed a direct appeal and the State Appellate Defender filed an *Anders* brief concluding that an appeal would be without arguable merit. Defendant filed a response to the brief claiming, among other things, that C.C. was obsessed with him and fabricated the accusations, and that his confession should not have been admitted because his request for counsel was ignored and he was coerced into signing the statement. In a summary order, we rejected defendant's arguments and affirmed the judgment of the circuit court. See *People v. Carbajal-Diego*, 2012 IL App (1st) 110072-U (May 23, 2012).

¶ 8 Defendant then filed this postconviction petition, but it was dismissed in the circuit court as frivolous and patently without merit. The postconviction petition contains 17 arguments and is supported by two affidavits made out by defendant himself. The appellate defender chose to take

up defendant's appeal of the dismissal of his postconviction petition. While this appeal was pending, defendant, acting *pro se*, filed: (1) a motion for forensic testing; (2) a motion for relief from judgment (735 ILCS 5/2-1401) arguing that his supervised release term was unconstitutional; (3) a second 2-1401 petition for relief from judgment arguing that his arrest was illegal, his conviction was obtained by fraud, and both his trial and appellate counsel were ineffective; and (4) a petition for mandamus to receive allegedly withheld documents. The trial court denied all of the motions and petitions and defendant appealed. The appellate defender filed a *Finley* brief asking to not represent defendant on those claims. Defendant filed a *pro se* response and, in a summary order, we affirmed the judgment of the circuit court. See *People v. Carbajal-Diego*, 2014 IL App (1st) 132508-U (May 20, 2014) (petition for leave to appeal denied at 20 N.E.3d 1257 (Table) (September 24, 2014)).

¶ 9 Although defendant's postconviction petition contains 17 arguments, his brief focuses on two issues. Wisely, because the other 15 are clearly not meritorious. Thus, we are called to address whether the trial court should have dismissed the petition at the first stage in the face of defendant's contentions that: (1) trial counsel was ineffective for failing to present evidence that C.C. fabricated her testimony as retaliation; and (2) trial counsel was ineffective for failing to file a motion to suppress his statement since he asked for and was denied a lawyer and he was threatened with violence and deportation.

¶ 10 ANALYSIS

¶ 11 The Postconviction Hearing Act (725 ILCS 5/122-1 *et seq*.) provides a process by which a criminal defendant may challenge his or her conviction by filing a petition in the circuit court. 725 ILCS 5/122–1. The Act provides for a three-stage process for adjudicating

postconviction petitions. *People v. Harris*, 224 Ill.2d 115, 125 (2007). At the first stage, the court independently assesses the merit of the petition. 725 ILCS 5/122-2.1. If the court finds the petition to be "frivolous" or "patently without merit," the court shall dismiss the petition. 725 ILCS 5/122.1(a)(2). At the first stage of postconviction proceedings, the circuit court must take the petition's factual allegations as true, unless those allegations are contradicted by the record. *People v. Coleman*, 183 Ill.2d 366, 382 (1998).

¶ 12 The postconviction setting does not act as a substitute for or an addendum to a direct appeal. *People v. Brown*, 2015 IL App (1st) 122940, ¶ 43. Generally, if an issue was actually decided on direct appeal, *res judicata* precludes it from being raised again in a postconviction petition, and if an issue could have been presented on direct appeal but was not, it is forfeited. *People v. Evans*, 186 Ill. 2d 83, 89 (1999). We have previously held that *res judicata* and forfeiture principles apply even where the appellate defender withdraws in the direct appeal pursuant to *Anders v. California*, 386 U.S. 738, 744 (1967), but the defendant still raises the arguments and they are considered and rejected. *People v. Addison*, 371 Ill. App. 3d 941, 947 (2007). Here, on direct appeal and in a section 2-1401 petition we considered and rejected the contentions defendant raises here: that C.C. was obsessed with him and fabricated the accusations, and that he only confessed because his request for counsel was ignored and he was threatened. However, even if *res judicata* and forfeiture were relaxed here, defendant's appeal would still fail.

¶ 13 Defendant claims that he is actually innocent and that his right to postconviction relief is based on new evidence. But the only evidence supporting his postconviction petition is his own affidavit which is directed wholly at events that occurred prior to trial. A court should only grant

relief on a postconviction claim of actual innocence where the petitioner presents supporting evidence that is new, material, noncumulative, and, critically, of a character so conclusive that it would probably change the result on retrial. *People v. Montes*, 2015 IL App (2d) 140485, ¶ 21. Usually, to qualify as "new evidence" to support postconviction relief, the *facts* comprising that evidence must be new and undiscovered as of trial, in spite of the exercise of due diligence. *Id*. at ¶ 24. "Evidence is not 'newly discovered' when it presents facts already known to the defendant at or prior to trial." *Id*. C.C.'s accusations were made before, and reiterated at, trial. Defendant confessed before trial. Neither is new. If defendant's self-serving, belated, uncorroborated statement attempting to contradict trial testimony that was credited by the jury were enough to entitle him to relief, our court system would be overwhelmed and there would never be finality.

¶ 14 Defendant positions his arguments here in a way to try to avoid *res judicata* and forfeiture as well as his lack of new evidence. He raised his arguments around the premise that his trial counsel was ineffective for failing to raise these issues, so he should not be aggrieved for not presenting them prior to being convicted. Really, the only new "fact" interposed by defendant at all is that his trial counsel only consulted with him once prior to trial. This also could have, but was not, raised on direct appeal. But even taking this "new" "fact" as true, it does not establish ineffectiveness of counsel. There is no *per se* rule that defense counsel can be deemed ineffective based on the number of client consultations before trial. We analyze questions of ineffective assistance by considering the entire record. *People v. Hommerson*, 399 Ill. App. 3d 405, 415 (2010). The only relevant questions are whether defendant received adequate representation so that he received a fair trial and whether any prejudicial error resulted from his counsel's errors, if any. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). Accordingly, we proceed to the

asserted errors.

¶ 15 We begin with defendant's argument concerning the admission of his confession. The strategy pursued at trial was that the summary confession statement that was admitted could not have come from defendant because defendant did not understand English. We generally will not reverse a strategic decision unless trial counsel's chosen strategy is so unsound that counsel completely fails to conduct any meaningful adversarial testing. *People v. Leeper*, 317 Ill. App. 3d 475, 482 (2000). The strategy employed was a reasonable attack on the evidence, but it was refuted by Officer Pinedo's testimony that he translated for defendant. Now, however, defendant contends he signed the confession after requesting, but not being given, a lawyer and because he was threatened with violence and the deportation of his family. Defendant's contentions are refuted by the record. Officer Pinedo testified that defendant was given his *Miranda* warnings multiple times, stated that he understood, and signed a *Miranda* waiver form that was printed in Spanish in the presence of the assistant state's attorney. Pinedo testified that he translated the conversation between defendant and the assistant state's attorney and reviewed the summarized statement with defendant. Defendant signed and initialed the statement and even made revisions to aspects that he felt were not accurate. Defendant even expressed a desire to add a sentence or two to the end of the statement which he did. He even expressed remorse for his conduct.

¶ 16 Defendant's current contentions are also undercut by the fact that the details given in the confession match all of the trial testimony, including that of C.C.'s parents. It seems apparent that it would have been impossible for the officers to fabricate the details within that statement at the time it was given. Defendant was also advised that he had the right to testify. He had the opportunity to testify that he was threatened and that the statement was not his own. Again, if a

postconviction petitioner were able to go forward by simply asserting for the first time at this stage that he requested but was denied the right to counsel or that his confession was involuntary because he was threatened, our courts could not effectively function and the significance of a jury verdict would be abrogated. Defendant had the opportunity to, and did, cross-examine Pinedo on the voluntariness of the statement, but attacked it on different grounds. Pinedo's testimony was unimpeached on defendant being treated well and making a statement on his own accord. Accordingly, defendant cannot make out an arguable claim that his trial counsel's representation fell below the objective standard of reasonableness or that he was prejudiced by his attorney not filing a motion to suppress.

¶ 17 We could affirm solely on the basis that the confession was properly admitted and, along with the other unchallenged evidence, there was sufficient evidence for the jury to convict. Nonetheless, we turn to defendant's other argument concerning C.C.'s testimony. Defendant claims that his attorney was ineffective for failing to cross-examine C.C. about whether she was obsessed with him and whether that obsession caused her to fabricate the accusations of a sexual relationship between them. Buttressing this claim, defendant argues that his trial counsel was ineffective because the attorney broached the subject of C.C. being obsessed with defendant during opening statements, but never pressed the issue at trial.

¶ 18 The record actually reveals that trial counsel did attempt to elicit testimony on C.C.'s alleged obsession with defendant, but an objection to the inquiry was sustained. The attorney also did challenge C.C.'s credibility. The jury had the opportunity to observe C.C. testify both directly and in the light of cross-examination and was free to believe her or not. Moreover, it is certainly a reasonable strategy, particularly in cases like this one, to avoid shifting blame to the purported

victim so as not to alienate the jury. Instead, in this case, trial counsel attempted to attack the lack of physical evidence and the lack of any direct eyewitnesses—a reasonable trial strategy.

¶ 19 C.C.'s testimony was also corroborated by the testimony of her parents. C.C.'s father testified about the time he found defendant in C.C.'s room in only his underwear and she left the room wrapped in a towel, crying. C.C.'s mother testified about the time she observed defendant holding C.C. on his lap kissing her. On the other side, defendant's contentions, even at this point, have no corroboration whatsoever. Defendant also was advised that he had the right to testify and he could have presented this obsession theory to the jury.

¶ 20 Based on the foregoing, the trial court properly dismissed defendant's postconviction petition as all the claims made therein are patently without merit. Defendant's claims are barred by *res judicata* and forfeiture and they do not rely on newly discovered evidence. Regardless, defendant's trial counsel was not ineffective for not filing a motion to suppress his statement on the basis that he was denied a lawyer or threatened, or for not challenging C.C.'s accusations as fabricated for a retaliatory purpose.

¶ 21 CONCLUSION

¶ 22 Accordingly, we affirm the judgment of the circuit court.

¶ 23 Affirmed.