2015 IL App (1st) 132727-U

SIXTH DIVISION
December 30, 2015

No. 1-13-2727

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	01 CR 28900
	)	
MARCELLOUS PITTMAN,	)	Honorable
	)	Kenneth J. Wadas,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Rochford and Justice Delort concurred in the judgment.

ORDER

HELD: The trial court erred in summarily dismissing defendant's *pro se* postconviction petition.

¶ 1 Defendant Marcellous Pittman appeals the summary dismissal of his *pro se* postconviction petition brought under the Illinois Post-Conviction Hearing Act (Act) (725 ILCS

5/122-1 *et seq*. (West 2008)). The defendant's primary arguments on appeal relate to whether the allegations in his petition sufficiently stated the gist of a meritorious claim of a due process violation caused by the use of his videotaped confession at trial, which he alleges was physically coerced. And further, whether he sufficiently stated the gist of a meritorious claim of ineffective assistance of trial counsel regarding counsel's decision to withdraw a previously filed motion to suppress the confession. For the reasons that follow, we reverse and remand for second-stage proceedings under the Act.

¶ 2 The factual and procedural background giving rise to the issues on appeal is as follows. Defendant was charged by indictment with attempted first-degree murder of a police officer (Officer Patrick Doyle), attempted first-degree murder of Vashon Prince, a rival gang member, and aggravated battery with a firearm of Officer Doyle stemming from a shooting that occurred on October 31, 2001. The day after the shooting, defendant learned the police were looking for him. He subsequently turned himself in to the police. Defendant was Mirandized and interrogated by Detectives Jim O'Brien and John Halloran. Defendant ultimately gave a videotaped statement implicating himself in the shooting.

¶ 3 Defendant was initially represented by private counsel. On July 1, 2002, the trial court granted counsel's petition to withdraw from the case and advised defendant that it was appointing the Public Defender's Office to represent him. On July 29th, Assistant Public Defender (APD) Jeffrey Henry informed the trial court that he had received defendant's case file from the private attorney along with some discovery and requested a 30-day date, which was granted. From July 2002 to March 2003, the case was continued by agreement several times.

¶ 4 On April 2, 2003, APD Henry filed a motion to suppress statements alleging, among other things, that defendant's confession was the product of physical coercion perpetrated by

Detectives O'Brien and Halloran. In response, the State filed a motion requesting the trial court to either strike certain paragraphs of the motion to suppress on the grounds of factual insufficiency or order defense counsel to make his motion to suppress "more specific as to date, time, place, persons involved and nature of conduct involved."

¶ 5 At the next court date, the assistant state's attorney informed the trial court that he had spoken with defense counsel and that counsel had indicated he had "certain amendments to discuss with regards to the motion." The court told defense counsel to put the amendments in writing.

¶ 6 On July 8, 2003, APD Henry was not in court and the assistant public defender standing in for him informed the trial court that she was not prepared to go forward on the suppression motion. The case was continued by agreement. On August 6, 2003, APD Henry appeared in court and notified the judge that he had been reassigned and would no longer be handling defendant's case. The matter was continued by agreement.

¶ 7 On September 2, 2003, APD Marcos Reyes appeared in court on behalf of defendant and requested a status date on the suppression motion as well as a continuance for a possible Rule 402 conference (S. Ct. R. 402(d) (eff. July 1, 2012)). On October 16, 2003, an unsuccessful 402 conference was held. APD Marcos Reyes asked for and was granted a continuance by agreement to "determine whether the previously-filed Motion to Suppress Statement will go forward."

¶ 8 On October 30, 2003, APD Marcos Reyes informed the trial court that he was adopting the previously filed motion to suppress. The case was then continued by agreement for a hearing on the motion. From January 2004 to July 2004, the case was continued by agreement several times for various reasons.

¶ 9 On July 14, 2004, APD Renee Frisch appeared in court and notified the judge that she would now be representing defendant. APD Frisch told the trial court that she had reviewed defendant's file and had informed the assistant state's attorney handling the case that she would not be ready to go forward on the motion to suppress and would be requesting a continuance. The case was continued by agreement to August 5, 2004, for a hearing on the motion.

¶ 10 On August 5, 2004, an assistant state's attorney standing in for assistant state's attorney (ASA) Joseph Keating who had been assigned to defendant's case, informed the trial court that ASA Keating would not be able to make it to court that day. APD Frisch then informed the trial court that she was withdrawing the previously filed motion to suppress statements. She did not give a reason for withdrawing the motion. The case was continued by agreement.

¶ 11 Following a jury trial, defendant was convicted of attempted first-degree murder of Officer Doyle, attempted first-degree murder of Vashon Prince, and aggravated battery with a firearm of Officer Doyle. Defendant was sentenced to 80 years' imprisonment for attempted first-degree murder of Officer Doyle, 30 years' imprisonment for attempted first-degree murder of Prince, and 30 years' imprisonment for aggravated battery with a firearm, all sentences to run concurrently.

¶ 12 On direct appeal, we: (1) vacated defendant's conviction for aggravated battery with a firearm based on the one-act, one-crime doctrine; (2) affirmed his conviction and sentence for attempted first-degree murder of Prince; (3) affirmed his conviction for attempted first-degree murder of Officer Doyle, but reduced the 80-year sentence of imprisonment to 30 years; (4) corrected the mittimus; and (5) vacated the $4 criminal/traffic surcharge imposed under the then-repealed section 5-9-1(c-9) of the Unified Code of Corrections (730 ILCS 5/5-9-1(c-9) (West

2004)). *People v. Pittman*, No. 1-05-3598 (2008) (unpublished order under Supreme Court Rule 23).

¶ 13 On April 19, 2013, defendant filed a *pro se* postconviction petition, which the trial court summarily dismissed as frivolous and patently without merit. Defendant now contends on appeal that the trial court erred in dismissing the petition. The underlying facts of this case have already been set forth at length in our previously filed Rule 23 order and need not be repeated here. To the extent particular facts are important to the issues before us they will be discussed.

¶ 14 ANALYSIS

¶ 15 The Illinois Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2000)), provides a procedure by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their federal or state constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction action is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). The Act gives criminal defendants the opportunity to present claims that were either neglected on direct appeal or based on matters outside of the record. *People v. Chatman*, 357 Ill. App. 3d 695, 698 (2005). In noncapital cases such as this one, the Act sets forth a three-stage process for adjudicating a defendant's request for collateral relief. *Beaman*, 229 Ill. 2d at 71. We review this case at the first stage of the post-conviction process.

¶ 16 At the first stage, the trial court evaluates the petition on its face and determines whether the "petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief under the Act." *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). At this stage, the trial court may summarily dismiss the petition if it finds that the allegations in the petition are frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2000).

¶ 17 A postconviction petition is considered frivolous and patently without merit only if the allegations in the petition, when taken as true and liberally construed, fail to present the "gist" of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244. The "gist" standard is low, since in many cases a defendant initially files his postconviction petition *pro se* without the aid of counsel. *Gaultney*, 174 Ill. 2d at 418. In order to set forth the "gist" of a constitutional claim, the postconviction petition need only present a limited amount of detail and need not include legal arguments or citations to legal authority. *Id.* A trial court's summary dismissal of a defendant's postconviction petition is reviewed *de novo*. *People v. Barrow*, 195 Ill. 2d 506, 519 (2001).

¶ 18 On appeal, defendant initially contends we should reverse the summary dismissal of his petition and remand for second-stage proceedings on the grounds that he sufficiently alleged the gist of a constitutional claim that his due process rights were violated when he was convicted based on a physically coerced confession. We agree.

¶ 19 In this case, a review of the record shows that defendant's assertion that his videotaped confession was obtained through physical coercion has never been reviewed. Prior to trial, defendant's initial APD filed a motion to suppress statements alleging that defendant's confession was the product of physical coercion inflicted by Detectives O'Brien and Halloran. The motion remained pending in the trial court for approximately 15 months and a hearing on the motion was continued several times in part because the detectives were unavailable. When a subsequent APD took over defendant's case, she inexplicably withdrew the motion.

¶ 20 We acknowledge that defendant did not raise the allegations of physical coercion on direct appeal. However, in his *pro se* postconviction petition, defendant argued, among other things, that his trial counsel was ineffective for withdrawing his previously filed motion to suppress statements. He claimed the APD withdrew the motion over his objections despite the

fact that he informed her about the physical abuse. In rejecting defendant's ineffective assistance claim, the trial court stated in relevant part:

> "Petitioner merely states that he was beaten and tortured into confession by Detectives John Halloran James O'Brien. Petitioner provides no other details or facts. Moreover, even if his confession were suppressed, it is unlikely the outcome of his trial would be different."

¶ 21 Bearing in mind the low pleading threshold required under the first stage of the Act, we believe that on its face, defendant's petition sufficiently alleges the gist of a meritorious claim of a due process violation based on his claim that his videotaped confession was physically coerced. Defendant's videotaped confession was used as substantive evidence of his guilt at trial. The admission of an involuntary confession into evidence is a violation of a defendant's constitutional right to due process. *People v. Veal*, 149 Ill. App. 3d 619, 622 (1986).

¶ 22 Defendant has consistently claimed that his confession was the product of physical coercion perpetrated by Detectives O'Brien and Halloran. His claims of abuse are strikingly similar to other claims of abuse involving officers supervised by former Commander Jon Burge. See *People v. Patterson*, 192 Ill. 2d 93, 145 (2000) (defendant's allegations of abuse strikingly similar to allegations of other criminal suspects); *People v. Wrice*, 2012 IL 111860, ¶ 43 (defendant's claims of being beaten strikingly similar to those of other prisoners at Area 2); *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 40 (defendant's claim of being beaten strikingly similar to claims of other criminal suspects interrogated at Areas 2 and 3). Defendant alleged that the detectives beat, choked, and slapped him until he told them what they wanted to hear. As our court has observed, "Minor differences in technique do not alter the nature of the torturer's work." *People v. Cannon*, 293 Ill. App. 3d 634, 642 (1997). And moreover, the same

two detectives who interrogated defendant have been identified in other allegations of torture. See *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 48; *People v. Weathers*, 2015 IL App (1st) 133264, ¶ 14.

¶ 23 The defendant claims he can present evidence that the two detectives who interrogated him systematically tortured other suspects to obtain their confessions at or near the time he was interrogated. "If he can deliver on that offer, the trial court should consider the evidence. It fits the definition of relevance: evidence that makes the existence of any fact of consequence more or less probable." *Cannon*, 293 Ill. App. 3d at 640.

¶ 24 The evidence against defendant was certainly sufficient to affirm his convictions on direct appeal. It is certainly arguable, however, that the outcome of defendant's trial might have been different had his confession been suppressed. His videotaped confession was a key piece of evidence identifying him as the shooter. Absent the confession, the State's remaining evidence was not overwhelming.

¶ 25 Vashon Prince heard the gunshots, but never saw who fired them and never saw defendant with a gun. At trial, Eric Plunkett denied telling detectives that he saw defendant with a gun. Although the State impeached Plunkett's trial testimony by means of his prior written statements to detectives, he disavowed these statements and claimed they were the result of coercion by the police (incidentally the same detectives who interrogated defendant). Thus, it is certainly arguable that the outcome of defendant's trial might have been different if the State's only evidence identifying defendant as the shooter was a recanted identification allegedly coerced by the same detectives defendant claims coerced his confession.

¶ 26 The issue here is not whether defendant was guilty. Rather, it is simply whether defendant has presented the gist of a constitutional claim that his videotaped confession was

coerced. Because we reach this conclusion based solely on the allegations in the petition, we need not consider the defendant's request that we take judicial notice of material regarding similar coerced confessions that were not presented to the trial court. We reverse the summary dismissal of defendant's petition and we remand the case for the appointment of counsel and second-stage proceedings under the Act.

¶ 27 Due to our conclusion in this matter, we need not address defendant's remaining arguments from his petition or his brief before this court. See *People v. Rivera*, 198 Ill. 2d 364, 370-71 (2001) (holding that a defendant's entire postconviction petition must be docketed for second-stage proceedings where at least one allegation is not frivolous or patently without merit).

¶ 28 Finally, we reject defendant's request that this matter be assigned to a different judge upon remand. "[T]he same judge who presided over the defendant's trial should hear his post-conviction petition, unless it is shown that the defendant would be substantially prejudiced." *People v. Hall*, 157 Ill. 2d 324, 331 (1993). "To conclude that a judge is disqualified because of prejudice is not *** a judgment to be lightly made." *People v. Vance*, 76 Ill. 2d 171, 179 (1979). We have reviewed this record carefully and have seen nothing that would indicate that this judge is unable to decide this matter in a completely fair and unbiased manner. We are confident the judge will do so.

¶ 29 Accordingly, we reverse the summary dismissal of the defendant's *pro se* postconviction petition and remand the case for second-stage proceedings under the Act.

¶ 30 Reversed and remanded.