2015 IL App (1st) 133998-U

SIXTH DIVISION
Order filed: November 20, 2015

No. 1-13-3998

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 06 CR 21549
	)	
GREGORY CASTELLANO,	)	Honorable
	)	Thaddeus L. Wilson,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: The trial court's summary dismissal of the defendant's *pro se* postconviction petition is affirmed where his claim of ineffective assistance of trial counsel is barred by *res judicata*.

¶ 2 The defendant, Gregory Castellano, appeals the dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). On appeal, the defendant argues that the trial court erred in dismissing his petition on *res judicata* grounds because the allegations of ineffective assistance of trial counsel contained within the petition are supported by evidence *dehors* the record. For the reasons that follow, we affirm.

¶ 3 Following a jury trial, the defendant was convicted of first-degree murder in connection with the shooting death of the victim, Gustavo Varela. The trial court sentenced him to 58 years' imprisonment.

¶ 4 On direct appeal, the defendant argued that the State failed to prove him guilty beyond a reasonable doubt; he was denied a fair trial; he was denied his sixth amendment right to confrontation; the State made improper comments during closing argument; the trial court failed to comply with Supreme Court Rule 431(b); and the trial court erred when it failed to rule on his motion *in limine*. The defendant also argued that his trial attorney was ineffective for failing to deliver on a promise made to the jury during opening statements that he would present the alibi testimony of his parents, Abraham and Sylvana Castellano. This court rejected each of the defendant's claims with the exception of his claim of ineffective assistance of counsel. With respect to that claim, this court remanded to the trial court "for an evidentiary hearing on *the very limited question* of why trial counsel failed to deliver the alibi defense as promised to the jury." (Emphasis in original.) *Castellano I*, No. 1-08-1709 (June 29, 2010).

¶ 5 On remand, the trial court conducted an evidentiary hearing and transmitted a report of its findings and a record of the proceedings. The court found that the defendant's ineffective assistance claim "lacks merit and pertains only to matters of trial strategy that developed during the course of the trial and would appropriately explain why [trial counsel] did not deliver that alibi during the course of the trial nor tie it up in the end." After we reviewed the trial court's findings, we issued a supplemental order affirming the judgment of the trial court with respect to the defendant's ineffective-assistance-of-counsel claim. *People v. Castellano*, No. 1-08-1709 (October 25, 2010) (*Castellano II*) (unpublished order under Supreme Court Rule 23).

¶ 6 Thereafter, our supreme court, pursuant to its supervisory authority, instructed this court to vacate the supplemental order and remand the cause for an evidentiary hearing on the defendant's claim of ineffective assistance of counsel, at which hearing the defendant should be appointed counsel.

¶ 7 On remand, the trial court held an evidentiary hearing, at which the defendant was appointed counsel. The defendant's trial attorney testified that he was retained by the defendant's family several months after the shooting death of the victim. Counsel explained that his investigator, Thomas Romano, interviewed Abraham and Sylvana. They told the investigator that, on August 11, 2006, the day Varela was shot, the defendant did not leave their house. Sylvana also informed the investigator that she did not work on August 11, 2006, but had worked the previous day. Counsel testified that, following the interview, the investigator obtained two handwritten notes signed by Abraham and Sylvana, stating that they remembered August 11, 2006, and that they were present with their son at their home. Counsel stated that he spoke with Abraham and Sylvana at his office and began preparing them for trial. According to counsel, he was concerned that Abraham would not be a good witness because he "became more and more agitated, more and more nervous" and stated that he did not want to testify because he was "very, very, very nervous." Nevertheless, based on the information counsel learned from Abraham and Sylvana, he told the jury in opening statements that the defendant's parents would testify as alibi witnesses.

¶ 8 Counsel explained, however, that he ultimately chose not to call the defendant's parents as alibi witnesses because, throughout the course of trial, his strategy changed to a theory of misidentification. He explained that during its case in chief, the State called Officer Hanrahan who testified that he prepared a report after speaking with witnesses at the scene that listed

Gregory Banks, an African-American, as a possible offender. It was only after the detectives interviewed the victim's friends, who witnessed the shooting, that the detectives learned the defendant was the person who committed the crime. After this information regarding a possible mistaken identity came out during cross-examination of the State's witnesses, counsel conferred with the defendant and his family and they agreed that they would rest their case without calling any alibi witnesses.

¶ 9 Counsel also testified that he chose not to call the defendant's parents as alibi witnesses because he was afraid that they could not withstand the scrutiny of cross-examination. Counsel stated that, after opening statements, the State told him that if he called Sylvana to testify, it would call a witness to impeach her based on her previous statements regarding where she worked, when she worked, and how often she worked. Furthermore, counsel felt that he might be suborning perjury if he called Abraham to testify. When asked why he failed to explain to the jury in closing arguments the reason for not calling the defendant's alibi witnesses, counsel stated that he did not want to call any attention to this fact. Rather, he wanted the jury to focus on the issue of misidentification.

¶ 10 After hearing all of the testimony, the trial court found that the defendant's ineffective-assistance claim lacked merit. In a supplemental order, this court affirmed the judgment of the trial court. *People v. Castellano*, 2012 IL App (1st) 081709-U, ¶ 24 (*Castellano III*) (unpublished order under Supreme Court Rule 23).

¶ 11 In March 2013, the defendant filed a *pro se* postconviction petition, again claiming ineffective assistance of trial counsel. He alleged that his trial attorney was ineffective for failing to investigate and call his parents as alibi witnesses. In support of his petition, the defendant attached an affidavit attesting that his trial attorney lied at the evidentiary hearing. Specifically,

he attests that his father never displayed any reluctance or nervousness and was prepared to testify truthfully as an alibi witness. The defendant also attests that his trial attorney failed to adequately investigate Sylvana's work history and that such an investigation would have revealed that she was a more credible witness than counsel originally believed.[1]

¶ 12 The trial court dismissed the defendant's *pro se* petition at the first stage as "frivolous and patently without merit" because his claim of ineffective assistance of trial counsel was adjudicated on direct appeal and, therefore, barred by *res judicata*. This appeal followed.

¶ 13 A postconviction proceeding is not an appeal of the underlying judgment; rather, it is a collateral proceeding where the defendant may challenge a conviction or sentence for violations of constitutional rights. *People v. Tate*, 2012 IL 112214, ¶ 8. Thus, any issues that were raised and decided on direct appeal are barred by the doctrine of *res judicata*. *Id.* Similarly, issues that could have been presented on direct appeal, but were not, are forfeited. *Id.*

¶ 14 In a noncapital case, the Act creates a three stage procedure for post-conviction relief. At stage one, the trial court, without input from the State, examines the petition to determine whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2012). A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *Tate*, 2012 IL 112214, ¶ 9. The doctrines of *res judicata* and forfeiture are proper bases for first-stage dismissals. *People v. Blair*, 215 Ill. 2d 427, 443 (2005).

¶ 15 As the defendant's petition was dismissed at stage one, our review is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

[1] We note that the defendant's petition refers to exhibits B and C as two "new" affidavits from Abraham and Sylvana. However, these affidavits are not attached to the petition and are not in the record on appeal.

¶ 16 Here, the defendant contends that his petition stated the gist of a constitutional claim of ineffective assistance of counsel where his trial attorney made, then broke, a promise to the jury that he would call the defendant's parents as alibi witnesses. As the defendant acknowledges in his petition, this precise issue was raised on direct appeal. Indeed, this court thoroughly addressed, and ultimately rejected, the defendant's claim that trial counsel was ineffective for failing to call his parents as alibi witnesses. We explained, in pertinent part, as follows:

> "[Counsel] stated that he did not call Abraham and Sylvano [*sic*] Castellano as alibi witnesses as a matter of trial strategy. Specifically, [counsel] testified that based on the testimony at trial, he was able to adopt a defense theory of mistaken identity. Furthermore, he was informed after opening statements that a State witness would be called in rebuttal to potentially discredit Sylvana's recollection of the events on August 11, 2006. In addition, he feared defendant's parents would not withstand cross[-]examination. Also, [counsel] testified that he did not make any reference to the promised alibi during closing argument so as not to detract from the mistaken identification defense. Counsel's decisions here clearly fall within the ambit of trial strategy and the trial court correctly found as such." *Castellano III*, 2012 IL App (1st) 081709-U, ¶ 18.

Accordingly, the issue of whether trial counsel was ineffective for failing to call the defendant's parents as alibi witnesses was raised and decided on direct appeal, and any further consideration of the issue is barred by the doctrine of *res judicata*.

¶ 17 With regard to the defendant's claim that trial counsel was ineffective for failing to investigate his parents as alibi witnesses, we find that it is also precluded by *res judicata*. On direct appeal, this court found no ineffectiveness in trial counsel's failure to investigate the

defendant's parents. We stated that "the content of their testimony was known to counsel prior to trial since he had *adequately investigated* and had defendant's parents' affidavits." (Emphasis added.) *Castellano I*, No. 1-08-1709 (June 29, 2010).

¶ 18 Thus, on direct appeal in *Castellano I* and *Castellano III*, this court addressed the defendant's claim of ineffective assistance of trial counsel based upon his trial attorney's failure to investigate and call his parents as alibi witnesses. Accordingly, the defendant's claim of ineffective assistance of counsel based upon this argument is barred by *res judicata*.

¶ 19 The defendant maintains that his ineffective-assistance claim remains viable because his allegations are supported by evidence *dehors* the record—namely, his own version of the events. More specifically, he claims that due to the "very limited" scope of our remand order in *Castellano I*, he was never afforded the opportunity to testify at the evidentiary hearing or present evidence to challenge his trial attorney's testimony. He asserts that further proceedings should be held where trial counsel's account, as well as his testimony, and both of his parents, may be heard. The defendant cites *People v. Ligon*, 239 Ill. 2d 94 (2010), in support of his argument.[2]

¶ 20 In *Ligon*, 239 Ill. 2d at 105, our supreme court observed that claims of ineffective assistance of counsel may be better suited for a postconviction petition where the record on direct appeal lacks evidentiary support for the claim.

¶ 21 In *Castellano I*, we acknowledged that "where information not of record is critical to a defendant's claim, it must be raised in a collateral proceeding." *Castellano I*, No. 1-08-1709

[2] The defendant also argues that developments in federal *habeas corpus* law "underscore why Illinois should ensure petitioners a forum for the comprehensive development of the facts underlying an ineffectiveness claim." This case, however, involves postconviction proceedings under state, not federal, law. And, as discussed below, the defendant was afforded an opportunity to develop an evidentiary basis for his ineffective-assistance claim.

(June 29, 2010). We found, however, that the record on appeal contained the defendant's parents' affidavits and the only evidence missing was an explanation from defense counsel as to why he did not present alibi evidence. We found no reason to postpone the inquiry until the postconviction stage and we, therefore, remanded to the trial court for an evidentiary hearing. *Id*. On remand, the defendant was appointed counsel and both sides were afforded an opportunity to develop the record on the defendant's specific claim of why trial counsel failed to deliver the alibi defense as promised to the jury. Thus, the defendant's reliance on *Ligon* is misplaced.

¶ 22 We also reject the defendant's assertion that he was not allowed to present evidence or challenge his trial attorney's testimony at the evidentiary hearing. Our review of the record shows that the defendant was present in the courtroom on the date of the evidentiary hearing, but he did not inform the court that he wished to testify. In fact, when the trial court specifically asked the defense if it had any other witnesses, the defendant said nothing. If the defendant wished to testify at the evidentiary hearing, he should have brought this up at the hearing, rather than wait for postconviction proceedings.

¶ 23 Next, the defendant seeks an exception to *res judicata*, arguing that his own affidavit asserts matters outside the record. We disagree. The defendant has presented nothing outside the record in his instant petition and affidavit. Rather, he merely reasserts that counsel failed to investigate and call his parents as alibi witnesses, and lied at the evidentiary hearing. Even assuming these allegations are not conclusions (*People v. West*, 187 Ill. 2d 418, 426 (1999) (nonfactual and nonspecific allegations in a postconviction petition are not allowed)), the petition says nothing as to how counsel's performance fell below an objective level of reasonableness. More importantly, this conclusory claim does not rebut our previous observation that counsel "adequately investigated" the defendant's parents. Therefore, the petition contains nothing but

the bare assertion that counsel failed to call his parents as alibi witnesses, which was also rejected by this court on direct appeal. Hence, there is nothing on this issue which has not previously been addressed by the trial court and this court on direct appeal. The procedural bar of *res judicata* cannot be avoided by simply rephrasing the issue and attaching an affidavit to a postconviction petition years after the issue was originally addressed. *People v. Simpson*, 204 Ill. 2d 536, 559 (2001).

¶ 24 Moreover, the defendant cannot assert an exception to *res judicata* based upon newly discovered evidence. Newly discovered evidence is evidence that was unavailable at trial and could not have been discovered sooner through due diligence. *People v. Harris*, 206 Ill. 2d 293, 301 (2002). Here, the facts regarding his parents' alibi testimony were already in the record and the defendant presents no new evidence in his petition that could not have been discovered prior to trial. Likewise, the information contained in the defendant's affidavit is not new evidence. See *People v. Jones*, 399 Ill. App. 3d 341, 364 (2010) ("evidence is not newly discovered when it presents facts already known to a defendant at or prior to trial"). To proceed on the defendant's petition in light of the "new evidence" would be to proceed in a manner specifically discouraged by our supreme court: "A defendant is not permitted to develop the evidentiary basis for a claim in a piecemeal fashion." *People v. Davis*, 2014 IL 115595, ¶ 55. We need not entertain further claims as they occur to the defendant.

¶ 25 Finally, the defendant asserts that his claim of ineffective assistance remains viable because the allegations are supported by new evidence, namely the disciplinary proceedings against his trial attorney. The defendant fails to provide this court with any explanation as to how the disciplinary proceedings, raised for the first time in his reply brief, suggest an objectively unreasonable performance by trial counsel and resultant prejudice against him. A

reviewing court is entitled to have the issues before it clearly defined and is not simply a repository in which appellants may dump the burden of argument and research; an appellant's failure to properly present his own arguments can amount to waiver of those claims on appeal. *People v. Clark*, 2014 IL App (4th) 130331, ¶ 18. Without proper explanation as to how the cited evidence substantiates the defendant's postconviction claims, we will not overturn the trial court's dismissal of his petition.

¶ 26 In sum, we conclude that all of the issues raised in the defendant's petition were previously raised during his direct appeal or, alternatively, could have been raised. Further, we find that none of the exceptions to the doctrine of *res judicata* are applicable here. Since the Act permits summary dismissals of non-meritorious petitions without an evidentiary hearing (*Blair*, 215 Ill. 2d at 443), and because we find that the defendant did not present any claim which was not barred by the doctrine of *res judicata*, we affirm the first-stage dismissal of the defendant's claim for postconviction relief based upon ineffective assistance of counsel.

¶ 27 Affirmed.