2015 IL App (2d) 140102-U
No. 2-14-0102
Order filed September 30, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 06-CF-2553
PABLO AGUILAR,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly summarily dismissed defendant's postconviction petition, which alleged that trial counsel was ineffective for failing to present three claims as to why defendant's confession was invalid. One claim was barred by *res judicata*, and the other two were not supported by affidavits from the witnesses whom counsel allegedly should have investigated.

¶ 2 Defendant, Pablo Aguilar, appeals the trial court's order summarily dismissing his postconviction petition. Defendant contends that the dismissal was erroneous because the petition stated the gist of a claim that trial counsel was ineffective for failing to investigate defendant's contentions that, prior to his videotaped confession, officers beat him, threatened to

file neglect and immigration charges against his parents, and refused his request to call his mother. We affirm.

¶ 3 Defendant was convicted of first-degree murder in connection with the June 22, 2006, drive-by shooting death of William Guzman. A key piece of evidence for the prosecution was defendant's videotaped confession. Defendant gave his confession in February 2007, after he was arrested by San Diego, California police on an outstanding warrant. Waukegan detectives Andy Ulloa and Larry Holman flew to San Diego, where they interviewed defendant, who was 16 years old at the time.

¶ 4 Defendant moved to suppress the confession. During a hearing on the motion, Ulloa testified that he gave defendant a special juvenile version of the *Miranda* warnings. Approximately 10 minutes into the interview, defendant admitted involvement in the homicide and agreed to give a written statement. Ulloa showed defendant three photo arrays, each containing a photo of one of the other suspects in the case. Defendant circled a photo of Bicente Lash, noting that he was the driver "and the person with the plan and the gun." On another array, defendant circled a photo of Louis Petrick, noting that "[t]his is the one who was approaching me to pull the trigger." Finally, he circled a photo of Juan Serrano and made the notation, "He was besides [*sic*] me when I shoot."

¶ 5 Ulloa acknowledged that he did not attempt to contact defendant's relatives. He stated that he did not know with whom defendant was living in California. Ulloa had previously had contact with defendant's mother in Waukegan, but he had lost track of her. He later learned that she had been in California when defendant was interviewed, but he did not know this at the time. The trial court denied the motion to suppress.

¶ 6 The jury found defendant guilty and the trial court sentenced him to four concurrent terms of 50 years in prison. Defendant filed a direct appeal, arguing that the trial court should have suppressed his confession. He contended that his statement was involuntary because the officers who interviewed him falsely implied that the case might proceed in juvenile court and the officers admittedly did not attempt to contact any of his relatives before interviewing him. We rejected these arguments and affirmed defendant's conviction of one count of first-degree murder, although we vacated the three duplicative convictions and sentences. *People v. Aguilar*, 2012 IL App (2d) 100797-U.

¶ 7 Defendant then filed a postconviction petition. In it, he alleged, among other things, that trial counsel was ineffective for failing to investigate his claims that, before taking his statement, Ulloa and Holman beat him, threatened to file neglect and immigration charges against his parents, and refused his request to call his mother and have her present during questioning. Specifically, defendant alleged that trial counsel failed to "properly investigate the nature of this matter as well as to talk to both Detectives that were in the San Diego (Poway) Sheriff's Department[,] Det. Dinger and Corporal Fortson[,] to clarify or to find out the truth of the matter." In an attached affidavit, defendant stated that he told trial counsel about the conversations that occurred before the recording began but counsel told defendant not to mention them because he had no proof and they "would not be necessary."

¶ 8 The trial court summarily dismissed the petition, finding it frivolous and patently without merit. Defendant timely appeals.

¶ 9 Defendant contends that the trial court should not have dismissed his petition, because it stated at least the gist of a claim that counsel was ineffective for failing to investigate defendant's contentions that, prior to his videotaped confession, officers beat him, threatened to file neglect

and immigration charges against his parents, and refused his request to call his mother. The State responds that defendant's arguments are curious because his own filings make clear that counsel was aware of the substance of his allegations before trial. Moreover, the record shows that the allegation regarding the failure to call defendant's mother was in fact raised at the hearing on the motion to suppress and again on direct appeal. Defendant insists that this does not matter, because he argues that counsel should have further investigated his allegations.

¶ 10 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)) provides a procedure by which criminal defendants may assert that their convictions or sentences resulted from substantial denials 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 proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Claims that could have been raised earlier but were not are forfeited. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005). Claims that were resolved earlier are barred by *res judicata*. *Id.*

¶ 11 A postconviction proceeding has three distinct stages. In the first stage, the defendant files a petition and the trial court determines whether it is frivolous or patently without merit. To survive dismissal at this stage, a petition need only present the gist of a constitutional claim. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1988). This is a low threshold, and a defendant must present only a limited amount of detail. The defendant need not make legal arguments or cite to legal authority. *Id.* However, the Act provides that the petition must be supported by " 'affidavits, records, or other evidence supporting its allegations' " or " 'state why the same are not attached.' " *Id.* (quoting 725 ILCS 5/122-2 (West 1992)). If the trial court does not dismiss the petition at the first stage, it is then docketed for further consideration. *Id.* We review *de novo* a first-stage dismissal. *Hodges*, 234 Ill. 2d at 9.

¶ 12 Claims of ineffective assistance of counsel are generally evaluated under the two-part test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *People v. Harris*, 225 Ill. 2d 1, 20 (2007). Under *Strickland*, defense counsel was ineffective only if (1) counsel's performance fell below an objective standard of reasonableness; and (2) counsel's error prejudiced the defendant. Failure to establish either prong defeats the claim. *Strickland*, 466 U.S. at 687. "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Ramsey*, 239 Ill. 2d 342, 433 (2010). Counsel's strategic choices that are made after investigation of the law and the facts are virtually unassailable. *Id.*

¶ 13 Here, as defendant's affidavit makes clear, trial counsel was aware before trial of defendant's claims that the detectives beat him, threatened his family, and failed to contact his mother. Counsel in fact raised the third claim during the hearing on the motion to suppress. We specifically addressed that claim on direct appeal, and thus it is barred by *res judicata*. Other claims that defendant could have raised at that time are procedurally defaulted. *Whitfield*, 217 Ill. 2d at 183. Moreover, as for the first two claims, counsel elected not to present those claims for essentially strategic reasons, *i.e.*, that corroborating evidence was not available. Defendant's present argument, then, is essentially that counsel should have investigated further to try to find witnesses to corroborate defendant's claims.

¶ 14 A claim that trial counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Harris*, 224 Ill. 2d 115, 142 (2007) (citing *People v. Enis*, 194 Ill. 2d 361, 380 (2000)). In the absence of such an affidavit, we cannot decide whether the proposed witness's testimony would have been favorable to the defense, and "further review of the claim is unnecessary." *Enis*, 194 Ill. 2d at 380. In *Harris*, the supreme court

affirmed the dismissal of a postconviction petition accompanied by unsigned affidavits from proposed witnesses. The trial court had found that they were "merely what defendant wished these people would say." *Harris*, 224 Ill. 2d at 142.

¶ 15 Here, we do not even have that much. The only potential witnesses defendant names are Dinger and Fortson, the California detectives, and he does not indicate what they might have said. Defendant apparently wanted counsel to talk to the detectives only to "to clarify or to find out the truth." Without knowing what the detectives would have said, we cannot evaluate defendant's claim that counsel was ineffective for failing to talk to them.

¶ 16 The judgment of the circuit court of Lake County is affirmed. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002(a) (West 2014); see also *People v. Nicholls*, 71 Ill. 2d 166, 179 (1978).

¶ 17 Affirmed.