2016 IL App (1st) 133431-U

FIFTH DIVISION
MARCH 31, 2016

No. 1-13-3431

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 14703
	)	
WALTER POWELL,	)	Honorable
	)	Mary Colleen Roberts,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Reyes and Justice Simon concurred in the judgment.

O R D E R

¶1 ***Held:*** Summary dismissal of defendant's postconviction petition affirmed where defendant's claim of ineffective assistance is barred by the principles of forfeiture and *res judicata*.

¶ 2 Defendant Walter Powell appeals the summary dismissal of his petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2012)). He contends that he set forth an arguable claim of ineffective assistance based on trial counsel's failure to present handwriting analysis of a threatening letter mailed to the victim.

As a remedy, he requests this court to remand his petition for appointment of counsel and second-stage proceedings.

¶ 3 Following a bench trial on October 1, 2012, defendant was found guilty of harassment of a witness and sentenced to 30 years in prison. This court affirmed that judgment on direct appeal. *People v. Powell*, 2015 IL App (1st) 123146-U. The following is a summary of the relevant facts:

¶ 4 The evidence adduced at trial showed that in June 2008, defendant, who has a self-professed fascination with the Chicago Transit Authority (CTA), was arrested for burglarizing CTA property in a separate case. Following his arrest, Tracy Calloway, a train conductor for the CTA, identified defendant in a lineup, and agreed to prosecute the case involving the theft. However, she did not ultimately have to testify because defendant pleaded guilty to the charges stemming from that case, and was sentenced to six years in prison. *Powell*, 2015 IL App (1st) 123146-U, ¶¶ 4-5.

¶ 5 In August 2011, following his release from prison, defendant went to the victim's place of employment and, in a threatening manner, asked two of her coworkers where he could find her. A few days later, he boarded one of the CTA trains she was operating, and made gestures towards her. In particular, he pressed his face up against her enclosed compartment, winked at her, and stared at her continuously for about 25 minutes until she could stop at the next station and have defendant removed from the car. *Powell*, 2015 IL App (1st) 123146-U, ¶¶ 8-10.

¶ 6 The record also showed that while in prison, defendant had written the victim a threatening letter in which he stated that she made a mistake by previously identifying him out of

a lineup, and that he "got somethin for [her] ass bitch." The letter itself is unsigned and undated; however, the letter's envelope is postmarked October 3, 2008, is addressed to "CTA worker Tracie Calloway," and defendant is indicated as the return addressee, with his inmate address at the Cook County Department of Corrections. The letter was received by the CTA's head of security in July 2011, and he read it over the phone to the victim. This letter became the subject of heated argument at trial, and is at issue in the current appeal. See *Powell*, 2015 IL App (1st) 123146-U, ¶¶ 13-14.

¶ 7 Defense counsel filed a motion *in limine* to prevent the contents of the letter from being entered into evidence because defendant's authorship of the letter could not be authenticated, and its contents were more prejudicial than probative. The trial court, however, allowed the letter and its envelope into evidence, finding that circumstantial evidence indicated that defendant was its author. The court also stated that it would later determine what weight, if any, should be assigned to it. *Powell*, 2015 IL App (1st) 123146-U, ¶ 13.

¶ 8 At trial, defendant testified and denied meeting or contacting the victim, or making threatening gestures at her. The State introduced two of defendant's prior burglary convictions as impeachment, and the trial court ultimately found the testimony of the State's witnesses credible, and that of defendant incredible. The court then found defendant guilty of harassment of a witness, and sentenced him as a Class X offender to 30 years in prison followed by three years of mandatory supervised release. During allocution, defendant stated, *inter alia*, that he was not guilty, and that it was his attorney's "job to have the handwriting analysis in court," and he

wanted to "put this motion in this ineffective assistance of counsel in violation of 6-and 14th Amendment." *Powell*, 2015 IL App (1st) 123146-U, ¶¶ 20-23.

¶ 9 The record shows that defendant subsequently filed a series of handwritten, *pro se* post-trial motions, including one entitled, "Defendant's claim of ineffective assistance of counsel in violation of the 6th and 14th Amendment," on October 17, 2012, in which he argued that counsel was ineffective for failing to challenge the authenticity of the threatening letter received by the CTA, to file a motion *in limine* to have the letter found inadmissible, and to use a handwriting expert to prove that he had not written it. Defendant also filed a motion entitled "Petition for post-conviction relief," in which he made essentially the same arguments as the posttrial motion, and complained that his demands for trial transcripts had not been met. *Powell*, 2015 IL App (1st) 123146-U, ¶ 24.

¶ 10 During the hearing on these posttrial motions on October 26, 2012, the trial court found defendant's ineffective assistance of counsel claim to lack merit. In particular, the court noted that counsel "zealously" advocated on behalf of defendant on the subject of the threatening letter, and the parties devoted a big part of the trial litigating the admissibility of the letter orally and in writing. The court then stated that "although there was a great amount of time dedicated to this letter, the weight that the Court assigned to this letter, I can state clearly on the record was very little." *Powell*, 2015 IL App (1st) 123146-U, ¶ 25.

¶ 11 The record shows that on November 14, 2012, defendant filed a petition for writ of *habeas corpus*, raising, *inter alia*, counsel's ineffectiveness for failing to use a handwriting expert to analyze the handwriting in the threatening letter. The trial court denied defendant's

petition in a written order on January 9, 2013, holding that defendant "fail[ed] to explain why his counsel should have obtained a handwriting expert and how the handwriting expert could have proved his innocence."

¶ 12 On direct appeal, defendant argued, *inter alia*, that his case be remanded for an inquiry into his posttrial claim of ineffective assistance of counsel pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984), because the court failed to address his claim that counsel was ineffective for failing to present expert testimony on the handwriting in the threatening letter. We rejected that claim, and found instead that the record showed that the trial court's inquiry into defendant's claim was sufficient. *Powell*, 2015 IL App (1st) 123146-U, ¶¶ 40-41.

¶ 13 The record further shows that on February 11, 2013, during the pendency of his direct appeal, defendant filed the handwritten, *pro se* postconviction petition at bar, requesting that the trial court's judgment be vacated. In support of his petition, defendant filed his own affidavit, in which he averred that he was wrongfully convicted, the trial court made several errors, the police did not have probable cause to arrest him, the State committed prosecutorial misconduct, and that his trial counsel was ineffective for failing to present a handwriting expert to testify to the authenticity and authorship of the threatening letter.

¶ 14 On May 1, 2013, the trial court timely examined defendant's petition, found that his claims were frivolous or patently without merit, and summarily dismissed the petition. In doing so, the court noted that defendant had raised the issue of counsel's ineffectiveness on the subject of the threatening letter in his *habeas* petition, and that he alleged no additional facts to support his claims. It also found that the petition was devoid of any facts supporting defendant's

contentions, or explaining why counsel should have obtained a handwriting expert and how that expert could have proven his innocence.

¶ 15 In the present appeal, defendant contends that his cause should be remanded for second-stage proceedings because he set forth the gist of an arguable claim of ineffective assistance of counsel. The Act provides a method by which a defendant may challenge his conviction or sentence for violations of federal or state constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2012); *People v. Hodges*, 234 Ill 2d 1, 9 (2009). Defendant need only present the "gist of a constitutional claim" at the first stage of proceedings (*People v. Edwards*, 197 Ill. 2d 239, 244 (2001)); however, section 122-2 of the Act requires that he clearly set forth the respects in which his constitutional rights were violated, and attach affidavits, records, or other evidence supporting the allegations or explain their absence (725 ILCS 5/122–2 (West 2010); *Hodges*, 234 Ill. 2d at 9-10). We review the circuit court's dismissal of defendant's postconviction petition *de novo* (*Hodges*, 234 Ill. 2d at 9), and thus may affirm on any ground substantiated by the record, regardless of the trial court's reasons for the dismissal (*People v. Lee*, 344 Ill. App. 3d 851, 853 (2003)).

¶ 16 Defendant contends that he stated an arguable claim that trial counsel was ineffective for failing to present expert testimony showing that he did not write the threatening letter to the victim. His claim is governed by the standard set forth in *Strickland v. Washington,* 466 U.S. 668, 687 (1984), pursuant to which, a petition alleging ineffective assistance may not be summarily dismissed at the first stage of postconviction proceedings under the Act, if (1) it is arguable that counsel's performance was deficient; and (2) the deficiency was prejudicial. *People*

v. Hughes, 2012 IL 112817, ¶ 44.

¶ 17 The State responds, however, that defendant raised this issue several times, and the trial and appellate courts have adjudicated the issue and determined that counsel was not ineffective. Thus, the State argues, defendant is barred from raising the issue again in his postconviction petition by the doctrine of *res judicata.*

¶ 18 A postconviction proceeding is a collateral proceeding, rather than an appeal of the underlying judgment, and therefore it allows inquiry only into constitutional issues that were not, and could not have been, adjudicated on direct appeal. *People v. Pitsonbarger*, 205 Ill. 2d 444, 455-56 (2002). As such, the State is correct in pointing out that issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*. *Pitsonbarger*, 205 Ill. 2d at 455-56. A claim barred by forfeiture or *res judicata* is necessarily "frivolous" or "patently without merit." *People v. Blair*, 215 Ill. 2d 427, 445 (2005).

¶ 19 Here, defendant has argued on several occasions that trial counsel was ineffective for failing to present a handwriting expert to testify about the threatening letter, including at trial, in his posttrial motions, in his *habeas corpus* petition, and on direct appeal before this court. The trial court thoroughly examined the issue and found it to lack merit each time. Furthermore, we observed in our order that defendant's *Krankel* claim of ineffective assistance of counsel failed because "counsel zealously advocated on defendant's behalf in connection with the letter, and *** the [trial] court assigned very little weight to it in reaching its decision," and that defendant was ultimately found guilty of harassment of a witness based on the credible testimony of the State's witnesses. *People v. Powell*, 2015 IL App (1st) 123146-U, ¶¶ 40-41. To the extent that the

issue was litigated on direct appeal and decided by this court, *res judicata* bars defendant from raising it in his postconviction petition.

¶ 20 Defendant argues, nevertheless, that *res judicata* does not apply, because his current iteration of the ineffective assistance claim is not identical to the claim presented in his direct appeal. He maintains that the claim raised on direct appeal was in the context of a *Krankel* inquiry, whereas here, it is in the context of a postconviction petition.

¶ 21 To the extent that defendant's claim is not identical to that raised and decided on direct appeal, we find that the principles of forfeiture bar him from raising the claim in his post-conviction petition. *People v. Terry*, 2012 IL App (4th) 100205, ¶ 17 (issues that could have been presented on direct appeal, but were not, are forfeited). Here, defendant could have presented the identical ineffective assistance claim he raises in his postconviction petition on direct appeal, but failed to do so, and he has therefore forfeited that claim. *Terry*, 2012 IL App (4th) 100205, ¶ 17.

¶ 22 Defendant maintains, however, that his current claim is "supported by new documentary evidence—the handwriting in the petition itself," and that therefore the rules of *res judicata* or forfeiture should be relaxed because the facts relating to the issue of ineffectiveness do not appear on the face of the original record. *People v. Eddmonds*, 143 Ill. 2d 501, 528 (1991). We disagree. Defendant's handwritten postconviction petition is not "new documentary evidence," where, as defendant concedes, he made several handwritten filings with the trial court. The record contains various samples of defendant's handwriting, refuting his argument that the handwriting in the petition is *dehors* the record. As such, defendant's handwriting in his post-

conviction petition is not new evidence that was discovered since the trial or of such a nature that it could not have been discovered prior to trial, and therefore we find no reason to relax the rules of forfeiture. *Terry*, 2012 IL App (4th) 100205, ¶ 30.

¶ 23 Finally, defendant argues that there was a "reasonable probability that if defense counsel had sought to obtain expert handwriting analysis, [he] would have been acquitted." The State responds that defendant's claim is contradicted by the record, and the facts show that defendant was not prejudiced by counsel's failure to produce a handwriting expert. Even if we ignore the procedural bars of forfeiture or *res judicata*, which we do not, we agree with the State that defendant's claim lacks merit. Defendant has failed to attach any affidavits, records, or other evidence supporting the allegations about what a handwriting expert would have testified to at trial, or explain the absence of these materials, and thus his claim amounts to nothing more than a broad conclusory allegation of ineffective assistance of counsel, which is not permitted under the Act (725 ILCS 5/122-2 (West 2010); *People v. Delton*, 227 Ill. 2d 247, 258 (2008)).

¶ 24 Moreover, the record shows that defense counsel zealously litigated the issue of the threatening letter at trial, and in any event, the trial court gave little weight to the contents of the letter in reaching its ultimate decision. Instead, the court relied on the credible testimony of the State's witnesses regarding defendant's actions to find him guilty. *Powell*, 2015 IL App (1st) 123146-U, ¶¶ 40-41. On this record, defendant cannot show that the outcome of the trial would have been different but for counsel's failure to present a handwriting expert on the subject of the threatening letter and he therefore fails to show prejudice. *People v. Coleman*, 183 Ill. 2d 366, 397-98 (1998) ("[L]ack of prejudice renders irrelevant the issue of counsel's performance.").

¶ 25 For the reasons stated, we conclude that defendant's postconviction petition was frivolous and patently without merit (*Blair*, 215 Ill. 2d at 445), and the summary dismissal of defendant's postconviction petition was proper. Accordingly, we affirm the judgment of the circuit court of Cook County to that effect. *People v. Kimble*, 348 Ill. App. 3d 1031, 1034 (2004).

¶ 26 Affirmed.