2016 IL App (1st) 140133-U

FOURTH DIVISION
April 21, 2016

No. 1-14-0133

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. 08 CR 22741
	)	
MARIA GARCIA-OLVERA,	)	Honorable
	)	Nicholas R. Ford,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's *pro se* post-conviction petition affirmed where her claim of ineffective assistance of trial counsel on appeal is not the same claim raised in her petition and thus forfeited, she waived her claim of ineffective assistance of appellate counsel, and her claims were positively rebutted by the record and unsupported, subjecting her petition to summary dismissal.

¶ 2 Defendant Maria Garcia-Olvera appeals from an order of the circuit court of Cook County summarily dismissing her *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). She contends that the court erred in

summarily dismissing her petition where she set forth claims of ineffective assistance of trial and appellate counsel that had an arguable basis in law and fact.

¶ 3 In 2010, following a jury trial, defendant was convicted of heinous battery of Esperanza Medina for her participation in an acid attack on the victim at 6:30 a.m. on July 28, 2008, which resulted in three juveniles attacking the victim and defendant being sentenced to 42 years' imprisonment for her involvement.

¶ 4 At the jury trial, defendant was tried with codefendant Garcia before separate juries. The evidence adduced at trial showed that Gustavo Alvarez testified that he had a relationship with Garcia from 1975 until 2007. In November 2007, Alvarez moved out of the home he shared with Garcia and moved in with the victim.

¶ 5 The juvenile ex-girlfriend of defendant's son testified that the day before the attack she and another female juvenile went to Garcia's home where Garcia told them that she wanted them to hurt the victim whom she suspected was "messing around with or talking to her husband." They were told they had to stay the night and Garcia's friend would take them to the job in the morning. Both juveniles testified that Garcia told them her friend would give them a bottle to splash on the victim and they should take her bag to make it look like a robbery. Garcia told them to be careful with the contents of the bottle because it might burn.

¶ 6 The next morning, defendant picked up the two female juveniles, and had a male juvenile in the car already. Defendant would not tell them what was going on, and drove them to Chicago, and stopped to buy them food. Defendant told them she would drop them off because she had to go to work but Linda Dirzo would pick them up. Dirzo picked up the three juveniles and gave

them a big bottle of bleach. She then told them the victim was outside and they got out of the vehicle. One of the female juveniles splashed the victim with the contents of the bottle, and the male juvenile hit her on the back with a bat. They then returned to Dirzo's car, and she called someone and told that person that everything turned out well.

¶ 7 Defendant, who spoke Spanish, gave a statement to Detective Pagan, and the Assistant State's Attorney (ASA). The ASA explained that he understood most of what defendant said to him, used to be able to write Spanish fluently, and could still "get by." However, because it had been a few years since he had spoken Spanish, he asked for a translator "to be on the safe side." Detective Pagan served as defendant's interpreter.

¶ 8 Detective Pagan testified that he was raised in Puerto Rico for five years from age 9 to age 14, where Spanish was spoken exclusively, that he spoke Spanish with his family and fluently understood Spanish. Detective Pagan advised defendant of her *Miranda* rights in Spanish, which she indicated that she understood. When the ASA asked defendant questions regarding what took place on the day in question, Detective Pagan translated for defendant. The ASA wrote down defendant's statement in English and recited it, and Detective Pagan repeated it in Spanish. Detective Pagan noted that he told defendant that if she did not understand his Spanish, she should ask, and that from what he could tell, she seemed comfortable with his Spanish.

¶ 9 The ASA testified that he read defendant her *Miranda* rights and Detective Pagan translated them into Spanish. The ASA testified that after defendant provided her statement, he read the statement to her and Detective Pagan translated. Detective Pagan testified that defendant

made one correction to the statement and initialed it, and when she was satisfied with the statement, she signed each page.

¶ 10 Defense counsel objected to the ASA reading the statement to the jury, and a side bar was held on the issue. Counsel argued that the statement was not defendant's and it was the record of Detective Pagan. Over counsel's objection, the statement was allowed to be read to the jury. A copy of the written statement was not included in the record filed on post-conviction appeal.

¶ 11 According to defendant's statement, as read by the ASA, defendant was advised of her *Miranda* rights, and that understanding these rights, she wished to give the statement. Below that was defendant's signature. Substantively, the statement provided that Garcia was enraged because she believed Alvarez had taken the victim to Mexico. As a result, on a July Monday morning, Garcia called defendant and stated she needed her to take three juveniles to meet the victim. The male juvenile was going to hit the victim with a bat to make it look like a robbery, and the two juvenile girls were going to take the victim's bag, and throw battery acid on her. On July 28, 2008, the morning of the acid attack, defendant took the teenagers to Logan Square, then left because she was late for work.

¶ 12 The statement further provided that defendant was treated well by police and the ASA, that no threats or promises were made in exchange for the statement, and that she had a hamburger. Defendant signed below this paragraph as well as the following paragraph that the ASA read the statement out loud to her before she signed it, and she was allowed to make any changes she wanted.

¶ 13 This court affirmed defendant's 2010 jury conviction for heinous battery and sentence of 42 years' imprisonment. *People v. Garcia-Olvera*, 2012 IL App (1st) 110243-U. In doing so, this court rejected, *inter alia*, defendant's contention that she was entitled to the bracketed language of Illinois Pattern Jury Instruction No. 3.06-3.07 (IPI Criminal 4th, No. 3.06-3.07), namely, "[y]ou have before you evidence that the defendant made a statement relating to the offense charged in the indictment. It is for you to determine [whether the defendant made the statement, and if so], what weight should be given to the statement." Defendant maintained that the jury should have been given the bracketed language so that it could consider whether she actually made the hand-written statement attributed to her, and that trial counsel was ineffective for failing to object to the introduction of the instruction given without the bracketed phrase. This court found that it has consistently held that the instruction is proper without the bracketed phrase where defendant, as in its case, presented no evidence that she denied making the statement. *Garcia-Olvera*, 2012 IL App (1st) 110243-U, ¶39.

¶ 14 On September 27, 2013, following the affirmation by this court of defendant's conviction and sentence, defendant filed a *pro se* post-conviction petition alleging a number of constitutional violations. She alleged, in relevant part, that under the fifth amendment of the United States Constitution, she was not informed of her *Miranda* rights and there was a language barrier. Defendant further alleged that under the sixth amendment, counsel was ineffective because he "[f]ailed to file motion to suppress the statement and/or quash evidence." Defendant then alleged that she was subject to cruel and unusual punishment in violation of the eighth amendment because she was fearful of police intimidation, she suffered a panic attack, and was

denied meals and use of the bathroom until she cooperated with police questioning. She also alleged that her children were unlawfully held in police custody to coerce her into giving a statement. Defendant attached her verification affidavit, but did not attach any supporting documentation for her petition.

¶ 15 On December 16, 2013, the circuit court summarily dismissed defendant's petition in a written order finding it frivolous and patently without merit. The court found, in pertinent part, that defendant's claim that her confession was coerced, and thus involuntary, was waived because she failed to raise it at trial or on direct appeal. The court further found that defendant's claim that counsel failed to file a motion to quash her arrest and suppress her statement was contradicted by the record where counsel had filed such a motion, the trial court held a full hearing on it, and the court denied it. The court also noted that courts will indulge in the strong presumption that counsel's performance fell within a wide range of reasonable professional assistance, and that counsel's strategic decisions would not be second guessed. The court concluded that defendant failed to show that it was arguable that counsel's performance fell below an objective standard of reasonableness and that she was arguably prejudiced.

¶ 16 On appeal, defendant contends that the circuit court erred in summarily dismissing her petition where her claim of ineffective assistance of trial counsel had an arguable basis in law and fact based on counsel's failure to move to suppress her confession on grounds that it was involuntary based on a language barrier where no interpreter was provided, and she did not speak or read English, and thus did not understand the *Miranda* rights. She also contends that counsel was ineffective for failing to suppress her confession on grounds that it was the product of police

coercion and intimidation where she suffered a panic attack, was denied meals and use of the bathroom until she cooperated with police, and her children were unlawfully held in police custody to coerce her into giving a statement. She also alleges that appellate counsel's failure to raise ineffective assistance of trial counsel based on the above on direct appeal had an arguable basis in law and fact. Defendant raises no issue regarding the other allegations in her petition, and has thus waived them for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006).

¶ 17 At the first stage of post-conviction proceedings, a *pro se* defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring that defendant only plead sufficient facts to assert an arguably constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of a first-stage dismissal is *de novo. People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 18 To prevail on a claim of ineffective assistance of counsel, defendant must show that counsel's performance was objectively unreasonable and that she was prejudiced as a result thereof. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶19. Where an ineffectiveness claim is based on counsel's failure to file a motion to suppress, defendant must demonstrate that the unargued suppression motion would

be meritorious, and that there is at least a reasonable probability that the trial outcome would have been different had the evidence been suppressed. *People v. Henderson*, 2013 IL 114040, ¶¶12, 15.

¶ 19 The State responds that defendant has abandoned all but one of her post-conviction claims. The State contends that defendant improperly attempts to merge several claims into her *Strickland* argument, where no such assertions were made by her in the petition. In particular, the State notes that defendant never claimed that counsel be deemed ineffective for failing to file a motion to suppress on the basis of translations, and that her petition only claims that counsel was ineffective for failing to file a motion to suppress. The State further responds that defendant's claims are refuted by the record, subjecting them to summary dismissal.

¶ 20 At the summary dismissal stage a *pro se* petition should be given a "liberal construction." *Hodges*, 234 Ill. 2d at 21. However, where the argument raised on appeal was not raised in the petition, it is forfeited for review. *People v. Cathey*, 2012 IL 111746, ¶21; *People v. Jones*, 213 Ill. 2d 498, 508 (2004). Here, defendant sets forth in her petition separately numbered paragraphs for different constitutional violations. Defendant's allegations under the fifth and eighth amendments were separate from her allegation of ineffective assistance of counsel. They were clearly set forth distinctly from defendant's claim of ineffective assistance of trial counsel. *People v. Reed*, 2014 IL App (1st) 122610, ¶61. Specifically defendant alleged that trial counsel was ineffective in that he "[f]ailed to file motion to suppress the statement and/or quash evidence." To construe the fifth and eighth amendment claims as one of ineffective assistance of trial counsel would require more than a liberal construction. *Id.* It is readily apparent that

defendant did not allege the ineffective assistance of trial counsel claim raised here in her petition, and that she cannot characterize her claims as one of ineffective assistance of counsel where she did not do so below. *People v. Taylor*, 237 Ill. 2d 68, 75-76 (2010). Defendant's failure to clearly set forth the claims of ineffective assistance of trial counsel now raised on appeal in her petition results in forfeiture of these claims on appeal. *Jones*, 213 Ill. 2d at 508.

¶ 21 Defendant, nonetheless, further contends that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness on direct appeal. However, defendant did not raise this issue in her post-conviction petition, and thus cannot raise it for the first time on appeal. *People v. Jones*, 213 Ill. 2d 498, 508 (2004).

¶ 22 Notwithstanding, defendant contends that fundamental fairness should not preclude our review of this issue where she merely failed to include the word, appellate, in her petition, citing *Boyd*, 347 Ill. App. 3d 321. In *Boyd*, this court addressed an issue raised for the first time on post-conviction appeal. *Boyd*, 347 Ill. App. 3d at 334-35. Quoting the supreme court decision in *People v. De La Paz*, 204 Ill. 2d 426, 432 (2003), this court noted in *Boyd*, 347 Ill. App. 3d at 334, that "[t]he court may, as a matter of grace, in a case involving deprivation of life or liberty, take notice of errors appearing upon the record which deprived the accused of substantial means of enjoying a fair and impartial trial, although no exceptions were preserved or the question is imperfectly presented." [Citations.] This court then held that in the interest of judicial economy and because the issues have been fully briefed, it would address them. *Boyd*, 347 Ill. App. 3d at 335. In *Jones*, however, the supreme court held that issues not raised in a post-conviction petition cannot be raised for the first time on appeal, and that an appellate court does not have the

supervisory powers of the supreme court to address waived issues, as the supreme court did in *De La Paz*. *Jones*, 213 Ill. 2d at 506-08. Given that decision, we adhere to our determination that defendant is barred from raising the issue of ineffective assistance of appellate counsel for the first time on appeal.

¶ 23 Although defendant's claims of ineffective assistance of trial counsel are waived, we further find defendant's claims clearly refuted by the record. Defendant's claim that her confession was involuntary on the basis that she did not speak or read English is refuted by the record which shows that Detective Pagan, who was fluent in Spanish, acted as a translator for her. In addition, Detective Pagan translated her *Miranda* rights, which defendant indicated that she understood, and when the ASA asked her questions regarding the incident, Detective Pagan repeated them in Spanish and then translated for the ASA as well. Defendant signed each page of the statement after it was read to her in Spanish, and made one change, which she initialized. She thus clearly understood all of the translations. Furthermore, the ASA, who took down defendant's statement, understood the majority of what she said in Spanish. Defendant's claim is thus positively rebutted by the record. *People v. Childress*, 191 Ill. 2d 168, 174 (2000).

¶ 24 Moreover, during pre-trial proceedings, defendant's counsel noted that he had been able to communicate with defendant without an interpreter. In addition, when the court asked defendant if she wished to pay her counsel with her bond money, she responded, "[t]hat's right." The trial record thus refutes defendant's claim that she did not understand or speak English. *Id.*

¶ 25 Defendant further claims that her statement was coerced where she had a panic attack. However, having a panic attack is not coercion. In addition, defendant's claim that she was

coerced in that food and the bathroom facilities were withheld is rebutted by the record. Her signed statement provides that she was treated well and was given a hamburger. She also stated in her statement that she was not threatened or promised anything in exchange for her statement. Thus, her claim is positively rebutted by the record, subjecting her petition to summary dismissal. *People v. Payne*, 336 Ill. App. 3d 154, 165 (2002) (citing *People v. Rogers*, 197 I ll. 2d 216, 222 (2001).

¶ 26 Defendant finally claims that her children, ranging in ages from 12 to 18, were held in police custody to coerce her statement. Defendant, however, has not attached any supporting documentation for this allegation. *People v. Smith*, 352 Ill. App. 3d 1095, 1105 (2004). The facts of this would have been within defendant's knowledge (*People v. Delton*, 227 Ill. 2d 247, 258 (2008)), and she has failed to explain their absence (725 ILCS 5/122-2 (West 2012)). The failure to attach supporting documentation or explain their absence is fatal to defendant's petition. *Delton*, 227 Ill. 2d at 255 (citing *People v. Collins*, 202 Ill. 2d 59, 66 (2002)).

¶ 27 In light of the foregoing, we find that the circuit court did not err in summarily dismissing defendant's *pro se* post-conviction petition as frivolous and patently without merit, and affirm the order of the circuit court of Cook County.

¶ 28 Affirmed.