2016 IL App (5th) 140029-U

NO. 5-14-0029

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 09-CF-1497
	)	
KYLE STARKS,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Goldenhersh and Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of the defendant's postconviction petition is affirmed on the basis of forfeiture, where the claims raised on appeal by the defendant's appellate postconviction counsel were not contained in the defendant's petition, and the defendant's claims in his postconviction petition were not raised on appeal.

¶ 2 The defendant, Kyle Starks, appeals the first-stage dismissal of his petition for postconviction relief filed pursuant to section 122-1 of the Post-Conviction Hearing Act (the Act) (725 ILCS 5/122-1 (West 2012)). On December 29, 2009, the defendant was arrested as a suspect in the murder of his girlfriend, Tyra Whittaker. The defendant was interviewed at the Cahokia police department, where he eventually waived his *Miranda*

rights and confessed to the crime. The defendant filed a motion to suppress his recorded statement to police, but the trial court found that the statement was voluntary and denied his motion. At trial, the defense admitted that the defendant killed Whittaker, and asserted the affirmative defense of insanity.

¶ 3 The defense's expert witness was Dr. John Rabun, the forensic psychiatrist who evaluated the defendant on the issue of sanity. At trial, Dr. Rabun testified that because the defendant did not disclose all of his thoughts and actions during the mental health evaluation, Dr. Rabun was unable to make a finding that the defendant was legally insane at the time of the event, but the issue was left open as an improbable possibility. Dr. Rabun agreed that he had asked the defendant during the interview whether he knew that killing the victim was wrong, and that the defendant replied "yes, I guess. I just blanked out." Based on the information available, Dr. Rabun testified that he believed the defendant to be guilty but mentally ill.

¶ 4 A jury found the defendant guilty but mentally ill of first-degree murder on April 27, 2011. On June 2, 2011, he was sentenced to 32 years' imprisonment. On appeal, the defendant's appellate counsel raised two issues: that his confession was involuntary because he was particularly susceptible to coercion based upon his known mental illness and emotional state, and that his sentence was excessive. The defendant's conviction and sentence were affirmed by this court on April 17, 2013. *People v. Starks*, 2013 IL App (5th) 110265-U. On October 3, 2013, the defendant filed the postconviction petition that is the subject of this appeal.

¶ 5 In his *pro se* petition, the defendant maintained that his confession to the police was involuntary and that he lacked the mental capacity to be found guilty of the crime. He asserted that his trial lawyer "left out important information" that would have resulted in a different outcome at trial, explaining that his counsel could have made "a better and more consistent argument about what was going on with me that night" to the jury. He asserted that his trial counsel "failed to acknowledge that I didn't know the difference between right and wrong that night" and that counsel's failure to present mitigating evidence constituted ineffective assistance of counsel.

¶ 6 The defendant next referenced his interview with Dr. Rabun in which he was asked if he knew at the time of the murder that killing was wrong. The defendant noted that he stated "yes, I guess" in response to this question, because "I didn't really know that night. Not knowing shows that I was lacking substantial capacity to appreciate the criminality of the conduct." The defendant asserted that his trial lawyer should have clearly stated the law and his answer to Dr. Rabun's question to the jury, as it was his counsel's responsibility to present his answer to the jury in a way that would benefit him. The defendant concluded that he believed that if his trial lawyer had better presented the evidence and explicitly acknowledged the question that was asked by Dr. Rabun to determine whether the defendant knew the difference between right and wrong, then "the jury would of had a better understanding where my mind was."

¶ 7 The defendant supported his petition by attaching the portions of the trial transcript in which Dr. Rabun testified that determining whether a defendant is legally insane is couched in whether the defendant knows right from wrong, and that in response

to this line of questioning, the defendant told Dr. Rabun "yes, I guess. I just blanked out." The defendant also attached the portion of the transcript of the State's closing argument in which the State said a person is insane if he lacks substantial capacity to appreciate the criminality of his conduct, that is, if he does not know the difference between right and wrong.

¶ 8 The defendant also noted in his petition that appellate counsel did not include this information in his opening brief on direct appeal, but after contacting his counsel, the information was included in the reply brief. The defendant attached a portion of the direct appeal's reply brief to his petition, in which appellate counsel emphasized that "yes, *I guess*" demonstrates not that the defendant knew that his actions were wrong at the time, but rather the defendant's knowledge in retrospect.

¶ 9 On October 7, 2013, the trial court summarily dismissed the defendant's petition, finding that "no gist of a constitutional claim is raised and specifically that no allegation of incompetence of counsel rises to the level that suggests the outcome of the case would have been different but for the actions of defense counsel." The defendant appeals.

¶ 10 Our review of the circuit court's dismissal of a postconviction petition is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). The Act provides a three-stage process for the adjudication of postconviction petitions in noncapital cases. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Postconviction proceedings are commenced by the filing of a petition, which clearly sets forth the respects in which petitioner's constitutional rights were violated. 725 ILCS 5/122-2 (West 2012). At the first stage, the trial court independently reviews and assesses the defendant's petition within 90 days of its filing,

and if the court determines that the petition is "frivolous" or "patently without merit," the court can summarily dismiss it. 725 ILCS 5/122-2.1(a)(2) (West 2012); *Edwards*, 197 Ill. 2d at 244. A petition is frivolous or patently without merit where it has no arguable basis in either fact or law. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 35. To survive a summary dismissal, the postconviction petition, which is taken as true and is liberally construed, must allege the "gist" of a constitutional claim, which is a low threshold. *People v. Reyes*, 369 Ill. App. 3d 1, 12 (2006). The postconviction petition need only present a limited amount of detail. *Id.* However, the low threshold at the first stage of the postconviction proceedings does not mean that a petitioner is excused from providing any factual detail surrounding the alleged constitutional violation. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

¶ 11 As noted above, the trial court found no gist of a constitutional claim in the defendant's *pro se* petition. On appeal, the defendant's appellate postconviction counsel (OSAD) argues that the defendant presented the gist of a constitutional claim that he was denied the effective assistance of both trial counsel and appellate counsel. Citing the defendant's assertion in his petition that his confession was involuntary and that his trial lawyer "left out important information" that would have led to a different outcome at trial, OSAD argues that trial counsel was ineffective where it presented no evidence at the hearing on the motion to suppress other than the defendant's taped statement; specifically, evidence that would have helped explain the defendant's "true emotional state" such as the evidence given by the employees of the St. Clair County jail who testified at his trial that the defendant was placed in a suicide prevention room after he

was booked into jail, and that he had a seizure. OSAD asserts that because the defendant's trial lawyer did not present mitigating information that would have been relevant to the trial court for evaluating his motion to suppress, the defendant's trial counsel's representation was deficient. OSAD also asserts that the defendant received ineffective assistance of appellate counsel, who failed to include this in his challenge to the denial of the motion to suppress. OSAD requests that the trial court's summary dismissal be reversed and remanded.

¶ 12 The State responds that dismissal was proper because the defendant's claims of ineffective assistance of counsel are forfeited, as the claims raised in this appeal do not appear in the defendant's postconviction petition. OSAD responds that the defendant's "neither organized nor coherent" petition struggled to convey his complaints of trial and appellate counsel's representation, and that it is a well-established principle that *pro se* postconviction petitions are to be construed liberally at the first stage. *People v. Hommerson*, 2014 IL 115638, ¶ 7. However, we find the State's argument well taken.

¶ 13 Each postconviction issue must appear in the petition. 725 ILCS 5/122-2 (West 2012) ("The petition shall *** clearly set forth the respects in which petitioner's constitutional rights were violated."); *People v. Jones*, 211 Ill. 2d 140, 148 (2004) ("any issues to be reviewed must be presented in the petition filed in the circuit court"). Therefore, a defendant may not raise an issue for the first time on review. *Id*.

¶ 14 While OSAD correctly states that a *pro se* postconviction petition is to be construed liberally at the first stage, the fact remains that no assertion in the defendant's petition, unless lifted out of its context, results in the constitutional arguments he raises

on appeal. Our supreme court has stressed that the appellate courts are not free to excuse an appellate waiver caused by the failure of a defendant to include issues in his postconviction petition. See *People v. Jones*, 213 Ill. 2d 498, 508 (2004). While OSAD's attempt to provide the defendant with potentially stronger constitutional arguments is laudable, we simply may not consider them on appeal if no semblance of that argument was presented in the postconviction petition that was reviewed by the trial court. See *id.* at 504-05 (stating that raising a newly discovered error on appeal conflicts with the nature of appellate review and the strictures of the Act).

¶ 15 In his *pro se* petition, the defendant essentially argued he presented an ineffective-assistance-of-counsel claim where it was not enough for trial counsel to have said in closing argument that the defendant was unable to appreciate the criminality of his conduct; counsel also needed to tell the jury his answer to Dr. Rabun's question. He follows this by mentioning his appellate counsel, though he does not clearly assert any error against said counsel. On appeal, however, it is argued that his counsel was ineffective at the suppression hearing for failing to present evidence of his mental health assessments and medical treatment, as reported in the days and weeks after his confession, and his appellate counsel was similarly ineffective for its failure to challenge this. Even a liberal reading of the defendant's *pro se* claims does not give rise to the claims we have been presented with on appeal. See, *e.g.*, *People v. Mars*, 2012 IL App (2d) 110695, ¶¶ 31, 33 (wherein the appellate court concluded that the defendant's petition was clearly addressing his trial counsel's failure to bring an allegedly faulty indictment to the court's attention, and no matter how liberally it construed the petition's

allegation as to "defense counsel," it could not conclude that the defendant intended to raise a claim relating to appellate counsel's failure on appeal to raise the issue of compulsory joinder and violation of his right to a speedy trial); *People v. Petrenko*, 237 Ill. 2d 490, 497-98 (2010) (where both the defendant's *pro se* petition and his argument on appeal mention the age of the mail that was found in the defendant's trash in arguing that his trial counsel was ineffective for failing to contest the validity of a search warrant, the defendant was prohibited from raising a legal issue on appeal related to this set of facts that was not raised in his *pro se* petition).

¶ 16 Ultimately, the defendant's claims in the *pro se* petition as compared to his claims on appeal are based on different stages of the trial, different legal theories, and different evidence. Our purpose is to review, *de novo*, whether the defendant presented the circuit court with the gist of a constitutional claim, not whether OSAD presented us with one. This court was not presented with argument based on the claims that the defendant raised in his petition. We may not consider the claims raised by OSAD that were not contained in the defendant's petition, and because it is not raised on appeal, the defendant has forfeited any argument that the claim actually contained in his petition presents the gist of a constitutional claim. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006) (stating that claims not raised on appeal are forfeited). For this reason, we must affirm the trial court's summary dismissal of the defendant's postconviction petition; however, we remind the defendant that he is free to pursue any defaulted claims he believes to be of merit by filing a successive postconviction petition in the circuit court in accordance with the "cause and prejudice" guidelines. See *id.*

¶ 17 Affirmed.