2020 IL App (2d) 170774-U
No. 2-17-0774
Order filed April 28, 2020

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Du Page County.
Respondent-Appellee,	)	
	)	
v.	)	No. 11-CF-1739
	)	
ALFREDO GARCIA,	)	Honorable
	)	Robert A. Miller,
Petitioner-Appellant.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Justices Schostok and Bridges concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court erred in dismissing petitioner's postconviction petition during first-stage proceedings where petitioner stated an arguable claim that his trial attorney was ineffective for failing to investigate and move to suppress his confession.

¶ 2 I. INTRODUCTION

¶ 3 Petitioner, Alfredo Garcia, was convicted of delivery of a controlled substance and possession of a controlled substance with intent to deliver (see 720 ILCS 570/401(a)(2)(D) (West 2010)) and sentenced to two concurrent terms of 16 years' imprisonment. Petitioner's convictions were affirmed on direct appeal. See *People v. Garcia*, 2014 IL App (2d) 121373-U. Subsequently petitioner filed a *pro se* postconviction petition. See 725 ILCS 5/122-1 *et seq.* (West 2016), which

the trial court dismissed a frivolous and patently without merit. For the reasons that follow, we reverse and remand.

¶ 4 II. BACKGROUND

¶ 5 The underlying facts of this case are set forth in detail in our disposition on direct review. See *Garcia*, 2014 IL App (2d) 121373-U. We need not restate them here.

¶ 6 Following the jury's verdict in the underlying case, petitioner filed a *pro se* motion for a new trial. In it, he alleged, *inter alia*, that his attorney was ineffective for failing to consult with him prior to the trial. The trial court held a hearing in accordance with *People v. Krankel*, 102 Ill. 2d 181 (1984). Petitioner testified that his attorney never came to the jail to speak with him. Defense counsel stated that he and petitioner had "a little bit of a language problem." Counsel stated that he thought the defense would be "pretty straightforward" and that he had discussed trial strategy with petitioner. When asked what he needed to speak with counsel about, petitioner simply reiterated that counsel never came to speak with him. He then stated that counsel never told him that his codefendants were going to testify against him and that if he knew this, he would have accepted one of the State's offers. Petitioner explained that though he was present at a hearing where the subject of his codefendants testifying was at issue, this occurred shortly before trial, and petitioner thought he could no longer change his mind about going to trial. The trial court found that defense counsel was not ineffective. Petitioner, by counsel, then filed an amended motion for a new trial, which was also denied, and the judgment was affirmed on direct appeal. See *People v. Garcia*, 2014 IL App (2d) 121373-U.

¶ 7 On June 13, 2017, petitioner filed the petition at issue in this appeal. In it, he raised a number of issues; however, on appeal, he presses only one—whether his trial attorney was ineffective for failing to investigate the voluntariness of his confession and not filing a motion to

suppress it. Essentially, petitioner argued that his attorney failed to adequately consult with him. If he had, he would have learned that petitioner had not been *Mirandized* prior to his confession and could have moved to suppress on this basis. Petitioner submitted an affidavit in support of his petition, alleging (1) he was questioned by the police without being read his *Miranda* rights; (2) he denied being involved in a drug transaction; (3) an officer told him one of his alleged coconspirators said petitioner was involved; (4) an officer put handcuffs on petitioner and made verbal threats; and (5) petitioner then agreed to write and sign a confession. He further alleged that he was then read his rights and he gave a verbal statement. The trial court dismissed the postconviction petition as frivolous and patently without merit.

¶ 8 III. ANALYSIS

¶ 9 Because this case comes to us following a first-stage dismissal of a postconviction petition, our review is *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). At this stage, a petitioner need only present a limited amount of detail and is not required to include legal argument or citation to legal authority. *Id*. A petitioner is only required to set forth the gist of a constitutional claim in order for the petition to proceed. *Id*. That is, the petitioner must present an arguable claim of error. *Id*. In the context of a claim of ineffective assistance of counsel, a summary dismissal of a petition is improper if "(i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the [petitioner] was prejudiced." *People v. Hodges*, 234 Ill. 2d 1, 17 (2009). The latter is satisfied if it is arguable that a reasonable probability exists that the proceeding would have come to a different result, but for counsel's unprofessional error. *People v. Rojas*, 359 Ill. App. 3d 392, 405 (2005). Generally, matters of trial strategy cannot form the basis of an ineffectiveness claim. *People v. Manning*, 241 Ill. 2d 319, 327 (2011).

¶ 10 Further, matters that were raised on direct review are barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal, but were not, are forfeited. *People v. English*, 2013 IL 112890, ¶ 22. Here, the State asserts that petitioner could have raised this issue on direct appeal. Petitioner counters that this claim relies on matters *dehors* the record. We agree with petitioner. While the State is correct that petitioner raised counsel's effectiveness in his motion for a new trial—which led to a *Krankel* hearing—the instant claim is different. While both claims addressed counsel's alleged ineffectiveness, the current one does so based on counsel's failure to file a motion to suppress his confession. Facts pertinent to this argument are contained in petitioner's affidavit rather than the record. See *People v. Tate*, 2012 IL 112214, ¶ 15 ("In the case at bar, none of the four witnesses were called to testify. As a result of counsel's allegedly deficient representation, the contents of their affidavits could not have been included in the record. In this situation, forfeiture does not preclude [the defendant's] claims that counsel was ineffective for failing to call these witnesses, even though they were not included in [the defendant's] posttrial motion."). Accordingly, we hold that this claim is not barred.

¶ 11 Turning to petitioner's argument, he asserts that his motion and affidavit make an arguable case that he did not sign his *Miranda* waiver until after he made his written confession. The State contends, and the trial court found, that this is positively rebutted by the record. Specifically, as the trial court noted, a police officer testified that when petitioner was first placed in an interrogation room, he was read his rights and that the officer (as a witness) and petitioner signed the form at 12:15 p.m. On the top of the form on which petitioner wrote his statement, it indicates that it was written at 12:55 p.m. The trial court concluded that this positively rebutted petitioner's claim that he was not *Mirandized* prior to making his written statement. Petitioner now contends

that the times written on these documents were the result of the same coercive process that produced his written statement

¶ 12 Construing the petition liberally as we must (see *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)) and in light of the threshold standard a petition must meet during first-stage proceedings (*Brown*, 236 Ill. 2d at 184), we conclude that petitioner has raised an arguable constitutional issue. The record indicates that outside of when he was initially hired, trial counsel did not consult with petitioner. Further, had he done so, he arguably would have uncovered this issue. Counsel has a duty to make a reasonable investigation of a case. *People v. Domagala*, 2013 IL 113688, ¶ 38 (citing *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). Further, petitioner has averred that he was handcuffed and verbally threatened and this led him to confess. This raises a question as to whether the confession was voluntary. See *People v. Richardson*, 234 Ill. 2d 253-54 (2009). Moreover, the petition sets forth an arguable claim that petitioner had not been *Mirandized* prior to the time he made his written statement. The trial court found that a notation on the statement itself indicates that it was made at 12:55, and other evidence indicated that petitioner was given the *Miranda* warnings at 12:15. However, the notation the trial court relied on in finding that the record rebutted petitioner's claim is handwritten on the very same documents as the allegedly coerced confession. Thus, as petitioner suggests, it is arguable that the notation was not accurate, since it was part of the allegedly coerced confession. See *People v. Zynda*, 53 Ill. App. 3d 794, 800-802 (1977) (evaluating issue of whether consent form signed by the defendant was a product of police coercion as a question of fact.).

¶ 13 The State also contends that petitioner cannot establish prejudice as required to support an ineffectiveness claim. It asserts that given the overwhelming evidence against petitioner, he cannot establish a reasonable probability that the result of the trial would have been different had his

confession been suppressed. The State notes our finding on direct review that the evidence in this case was not closely balanced (for the purposes of the plain-error doctrine). See *Garcia*, 2014 IL App (2d) 121373-U, ¶ 35. However, petitioner counters that his confession was arguably the most important item of evidence against him. Petitioner asserts that the only other evidence linking him to the drug transaction was the testimony of alleged co-defendants. Such testimony is regarded as suspect. Indeed, the jury was instructed in accordance with Illinois Pattern Jury Instruction, Criminal, No. 3.17 (4th ed. 2000), which states: "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." We agree with petitioner. Given the nature of the other evidence against petitioner, it is at least arguable that his confession was of sufficient import that its suppression would have affected the outcome of the trial. See *People v. Clay*, 349 Ill. App. 3d 24, 30 (2004) (quoting *People v. St. Pierre*, 122 Ill. 2d 95, 114 (1988) ("Because confessions frequently constitute the most persuasive evidence against a defendant, 'the admission of an unlawfully obtained confession rarely is harmless error.' ")).

¶ 14 IV. CONCLUSION

¶ 15 In light of the foregoing, the decision of the circuit court of Du Page County dismissing petitioner's postconviction petition is reversed. This cause is remanded for further proceedings.

¶ 16 Reversed and remanded.