

2014 IL App (1st) 132146-U
No. 1-13-2146
Order Filed September 19, 2014

SIXTH DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County
Plaintiff-Appellee,)	
)	No. 03 CR 4731
v.)	
)	
GABRIEL LOPEZ,)	
)	Honorable
Defendant-Appellant.)	Stanley J. Sacks,
)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court's summary dismissal of the defendant's postconviction petition was affirmed. The defendant failed to establish an arguable basis in law that appellate counsel was ineffective.

¶ 2 The defendant, Gabriel Lopez, appeals from an order of the circuit court of Cook County dismissing his postconviction petition at the first stage of postconviction proceedings. The defendant contends that he set forth an arguable basis in law and fact for his claim that he was denied the effective assistance of appellate counsel. We disagree and affirm the order of the circuit court.

¶ 3 **BACKGROUND**

¶ 4 Following a jury trial, the defendant was convicted of the first degree murder of Pablo Arroyo (the victim) and sentenced to 38 years' imprisonment. The evidence presented at trial against the defendant included two inculpatory statements he gave. The defendant gave the first statement to police admitting that he acted as a lookout for the individual who shot the victim. He gave the second statement to an assistant State's Attorney admitting that he was the shooter. In addition, at the time of his arrest, the defendant was in possession of the murder weapon. The defendant presented an alibi defense. The jury found the defendant guilty of the victim's murder but found he had not personally discharged the weapon.

¶ 5 On direct appeal, this court affirmed the defendant's conviction and sentence. See *People v. Lopez*, No. 1-06-0906, (2010) (unpublished order under Supreme Court Rule 23). The sole issue on appeal was "whether the trial court erred when it granted the State's motion *in limine* to bar evidence that the victim had drugs on his person and in the vicinity of his body when his body was discovered by police." *Lopez*, order at 1. This court found no abuse of discretion in the granting of the motion *in limine*. We determined that the evidence against the defendant, *i.e.* he was found in possession of the murder weapon and gave an inculpatory

statement to the police, was substantial and, had the barred evidence been admitted, it would not have contradicted the evidence against the defendant. *Lopez*, order at 14. We further determined that the evidence at trial was sufficient to overcome the defendant's alibi defense and to prove that the defendant was the shooter beyond a reasonable doubt. *Lopez*, order at 15.

¶ 6 Subsequently, the defendant filed a petition pursuant to the Post-Conviction Act (the Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). In his petition, the defendant raised multiple claims, *inter alia*, that he was denied the effective assistance of both defense and appellate counsel. The defendant alleged that he was denied his constitutional right to present a complete defense because the trial court sustained many of the State's objections during the cross-examination of assistant State's Attorney Barbara Plitz (ASA Plitz). Defense counsel objected at trial to the court's sustaining of the State's objections, but he failed to allege the error in the defendant's posttrial motion. On direct appeal, appellate counsel failed to raise defense counsel's ineffectiveness and did not seek plain-error review. See Illinois Supreme Court Rule 615(a) (eff. Aug. 27, 1999). The circuit court dismissed the defendant's postconviction petition as frivolous and patently without merit.

¶ 7 Pursuant to a supervisory order from the supreme court, the defendant was granted leave to file a late notice of appeal.

¶ 8 ANALYSIS

¶ 9 I. Standard of Review

¶ 10 The summary dismissal of a postconviction petition is reviewed de novo. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

¶ 11 II. Discussion

¶ 12 In order to qualify for relief under the Act, the defendant must demonstrate the violation of a constitutional right. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 8. A petition that is frivolous and patently without merit is subject to summary dismissal. *Cole*, 2012 IL App (1st) 102499, ¶ 8. In determining whether a postconviction petition is frivolous and without merit, the question before the court is whether the petition has no arguable basis in law or in fact, meaning whether it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 17. "Essential to a postconviction claim of ineffectiveness of appellate counsel on direct appeal is proof of error of constitutional dimensions during the course of the trial, which counsel on direct appeal failed to raise." *Cole*, 2012 IL App (1st) 102499, ¶ 18.

¶ 13 The *Strickland* standard governs claims of ineffective assistance of both trial and appellate counsel. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11; *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must show that (1) counsel's performance was deficient, and (2) absent counsel's errors there was a reasonable probability the appeal would have been successful. *McGhee*, 2012 IL App (1st) 093404, ¶ 11. Both prongs of the *Strickland* test must be satisfied, or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 14 At the center of the defendant's argument is whether the trial court abused its discretion in sustaining the State's objections to questions posed to ASA Plitz by the defendant on cross-examination. The State maintains that appellate counsel did not render ineffective assistance since appellate counsel could not raise an unpreserved error on appeal. The defendant responds that constitutional errors may be raised on appeal even if they were not set forth in a posttrial motion. See *People v. Cregan*, 2014 IL 113600. In *Cregan*, our supreme court

observed that "[i]f a defendant were precluded from raising a constitutional issue previously raised at trial on direct appeal, merely because he failed to raise it in a posttrial motion, the defendant could simply allege the issue in a later postconviction petition." *Cregan*, 2014 IL 113600, ¶ 18.

¶ 15 The defendant maintains that the trial court's restriction of his cross-examination of ASA Plitz denied him his constitutional right to present a complete defense. See *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 43 ("A criminal defendant is constitutionally guaranteed a meaningful opportunity to present a complete defense"). Therefore, appellate counsel was not precluded from raising the error on appeal. In the alternative, appellate counsel could have but did not request the appellate court to review for plain error. Whether we review for a constitutional violation or plain error, we first consider if error occurred. See *People v. Herron*, 215 Ill. 2d 167, 187 (2005).

¶ 16 At the defendant's trial, ASA Plitz testified on direct examination as follows. She met with the defendant at 6 a.m. on February 5, 2003, at Area 4 police headquarters. She introduced herself to the defendant and advised him that she was not his attorney. ASA Plitz advised the defendant of his *Miranda* rights. The defendant stated that he understood his rights and agreed to speak with her. During their conversation, which lasted 20 minutes, the defendant admitted he shot the victim. The defendant declined to have his statement videotaped and chose to memorialize it with a handwritten statement. At that point, ASA Plitz explained that she asked Detective Jerome, who was present, to leave the room to allow her to speak to the defendant in private. She questioned the defendant as to his treatment by police, whether he had been given a meal and been allowed to use the restroom. The defendant responded that he had no complaints about his treatment.

¶ 17 ASA Plitz, Detective Jerome and the defendant then moved into a larger room. ASA Plitz wrote out a summary of the defendant's statement and had the defendant read the first paragraph to make sure he could read her writing. She then read the entire statement to him. After each page was read, the page was signed by the defendant, ASA Plitz and Detective Jerome. The defendant spoke English and showed no difficulty understanding the English language. A picture was taken of the defendant demonstrating a gang sign with his hands and another demonstrating the gang sign the victim made in response.

¶ 18 On cross-examination, ASA Plitz acknowledged that she had never met the defendant prior to her interview with him. Defense counsel then questioned ASA Plitz as follows:

"Q. And in 20 minutes you expected this kid to trust you, to tell you whether or not - - how he was treated in the police station; is that correct?

MR. MURPHY [Assistant State's Attorney]: Objection.

THE COURT: Sustained.

BY MR. LYKE [Defense counsel]:

Q. In 20 minutes, in that same room that he - - let me ask you this: Did they tell you how long they kept him in the room before you went in and talked to him?

MR. MURPHY: Objection.

THE COURT: Sustained.

BY MR. LYKE:

Q. Did you learn in your investigation how long he had been kept in the room?

MR. MURPHY: Objection.

THE COURT: Sustained.

BY MR. LYKE:

Q. Was that important to you to know how long a suspect has been kept isolated?

MR. MURPHY: Objection.

THE COURT: Sustained.

* * *

BY MR. LYKE:

Q. Well, let me get this - - you never met my client before, but you walk into the room and 20 minutes later he tells you things that get him charged with murder.

True?

MR. MURPHY: Objection.

THE COURT: Sustained."

¶ 19

According to the statement the defendant gave to ASA Plitz, he picked up the murder weapon from an alley where he knew it would be hidden. ASA Plitz testified that the defendant did not tell her the location of the alley and that she did not recall asking him the location of the alley. The cross-examination continued as follows:

"Q. Well, if you had asked him, you would have included in this statement if he told you what alley he got this gun from; wouldn't you?

MR. MURPHY: Objection.

THE COURT: Sustained.

BY MR. LYKE:

Q. You include important facts and important details that you deem are important to put in a statement; don't you?

MR. MURPHY: Objection.

THE COURT: Sustained.

MR. LYKE: Judge, I think that's a relevant question.

THE COURT: Sustained.

* * *

Q. This gun - - [The defendant] never told you what type of gun it was; did he?

A. I don't recall.

Q. Well, if he would have told you what type of gun, you would have included it in this report; wouldn't you?

MR. MURPHY: Objection.

THE COURT: Sustained."

* * *

BY MR. LYKE:

Q. You also claim that if [the defendant] wanted a lawyer, he could have gotten one. True?

A. Yes.

Q. You didn't bring a lawyer for him with you; did you?

MR. MURPHY: Objection.

THE COURT: Sustained.

MR. LYKE: Sustained?

BY MR. LYKE:

Q. Well, did you introduce [the defendant] to his own lawyer?

MR. MURPHY: Objection.

THE COURT: Sustained."

¶ 20 ASA Plitz was cross-examined about her training in taking statements. She acknowledged that she had not received any training in taking hand-written statements. ASA Plitz described how the defendant read aloud the typed portion of the statement containing the *Miranda* rights and then read aloud the first handwritten paragraph to verify that he could read her handwriting. She acknowledged that she did not give the statement to the defendant to read by himself. ASA Plitz was then questioned as follows:

"Q. Ma'am, you are an Assistant State's Attorney?

A. Yes.

Q. You are aware of the term called false confession; aren't you?

MR. MURPHY: Objection.

THE COURT: Sustained."

¶ 21 Finally, when defense counsel asked if she was aware that the victim was shot four times, ASA Plitz responded that she did not remember how many times the victim was shot, only that he was shot and killed. The cross-examination continued as follows:

"Q. How many times did [the defendant] according to your statement claim that he shot this person?

A. May I refer back to [the handwritten statement]?

Q. By all means.

* * *

A. He told me he shot the guy or the victim three times.

Q. When the physical evidence doesn't match what a person is telling you, doesn't that cause you some concern?

MR. MURPHY: Objection.

THE COURT: Sustained."

¶ 22 At the conclusion of ASA Plitz's testimony and outside the presence of the jury, defense counsel stated to the trial court as follows:

"Judge, I am objecting to the Court sustaining most of my questions with respect to this State's Attorney's training. The objections that were sustained to questions relative - - to the questions relative to false confessions that this person is aware about. I am objecting to the Court not allowing me to ask her whether or not she brought a lawyer with her when she tells my client allegedly that if he wants a lawyer, one will be provided for him. I am objecting to all of that."

¶ 23 The defendant contends that the trial court's sustaining of the State's objections denied him the right to present a complete defense. We disagree.

¶ 24 "Rulings concerning the scope of cross-examination are within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion resulting in manifest prejudice to the defendant." The limitation of cross-examination rests within the sound discretion of the trial court and will not be reversed unless there has been a clear abuse of discretion." *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 56. The trial court will be found to have abused its discretion only where the court's decision is arbitrary or fanciful, or where no reasonable person would adopt the court's view. *People v. Fultz*, 2012 IL App (2d) 101101, ¶ 57.

¶ 25 The defendant correctly notes that general objections such as the ones made by the State and sustained by the trial court go only to the competency, relevancy and materiality of the evidence sought to be introduced. *People v. Ervin*, 342 Ill. 421, 428 (1930). "[E]vidence is

defendant used. The defendant failed to establish that he was prejudiced as a result. ASA Plitz acknowledged that she did not include that information in the handwritten statement because the defendant did not tell her the location of the alley and she did not recall asking him the location or what type of gun he used to kill the victim.

¶ 30 C. Defendant's Right to Counsel During Questioning

¶ 31 Defense counsel's questions to ASA Plitz would have the jury believe that in order to fulfill the defendant's *Miranda* rights, ASA Plitz was required to bring counsel for the defendant with her just in case the defendant decided he needed counsel during questioning. *Miranda* requires only that the questioning cease until counsel can be furnished to the defendant. See *People v. Lira*, 318 Ill. App. 3d 118, 123 (2001) (where a suspect invokes the right to counsel during interrogation, questioning must cease until counsel is made available). Since defense counsel's questions would have misled the jury, the trial court did not abuse its discretion in sustaining the State's objections to those questions.

¶ 32 D. False Confession

¶ 33 The defendant maintains that trial court abused its discretion when it sustained the State's objection to defense counsel's question to ASA Plitz whether she was familiar with the term "false confession." In *People v. Sykes*, 341 Ill. App. 3d 950 (2003), the reviewing court held that limiting the defendant's questions concerning police officers' knowledge of other persons making false confessions was not an abuse of discretion. *Sykes*, 341 Ill. App. 3d at 978-79. The court found that "[t]he information sought by defendant – since other people may have falsely confessed in the past to other crimes, maybe defendant did also -- was wholly irrelevant and would have constituted inadmissible hearsay, and have no probative value." *Sykes*, 341 Ill. App. 3d at 979.

¶ 34 The defendant argues that *Sykes* is distinguishable because defense counsel only asked ASA Plitz if she was familiar with the term. Assuming the question was relevant, the defendant failed to establish prejudice since the trial court then allowed ASA Plitz to answer that as a prosecutor it was her duty to ensure that the statement she took from the defendant was voluntary.

¶ 35 E. Inconsistency Between the Physical Evidence and the Defendant's Statement

¶ 36 Finally, the trial court did not abuse its discretion when it sustained the State's objection to whether the failure of the physical evidence to match the defendant's confession caused concern to ASA Plitz. On cross-examination, ASA Plitz testified that she did not remember how many times the victim was shot and that, prior to speaking with the defendant, she was aware only that the victim had been shot and killed. Since ASA Plitz was unaware of any inconsistency between the physical evidence and the defendant's statement, the question was not relevant.

¶ 37 In light of the wide latitude the trial court exercises in limiting cross-examination, we find that the trial court did not abuse its discretion in sustaining the State's objections to defense counsel's questions to ASA Plitz. The objections were properly sustained on the basis of relevancy and/or the failure of the defendant to establish prejudice. Moreover, our review of the entire cross-examination of ASA Plitz revealed that defense counsel's extensive and thorough questioning adequately conveyed to the jury the facts which the defendant maintained supported his position that his statement was result of coercion. The trial court's rulings on cross-examination of ASA Plitz did not deny the defendant the right to present a complete defense. See *Campbell*, 2012 IL App (1st) 101249, ¶¶ 56-60 (in the absence of

prejudice to the defendant, the trial court's sustaining of the State's objections on cross-examination was not an abuse of discretion).

¶ 38

III. Conclusion

¶ 39

"Appellate counsel is only required to raise meritorious issues on appeal." *McGhee*, 2012 IL App (1st) 093404, ¶ 12. Since the trial court did not abuse its discretion in sustaining the State's objections to defense counsel's cross-examination of ASA Plitz, no error occurred. Appellate counsel's performance was not defective for failing to raise a non-meritorious issue on appeal or for failing to request plain error review; absent error, there can be no plain error. See *People v. Anderson*, 2012 IL App (1st) 103288, ¶ 45.

¶ 40

In the absence of error, appellate counsel's performance was not deficient. Since the defendant cannot establish the deficiency prong of the *Strickland* test, the defendant's claim that he was denied the effective assistance of appellate counsel has no arguable basis in law. We conclude that the circuit court's summary dismissal of the petition as frivolous and patently without merit was correct.

¶ 41

The order of the circuit court is affirmed.

¶ 42

Affirmed.