

No. 1-09-1013

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Cook County, Illinois.
Plaintiff-Appellee,)	
)	
v.	_____)	No. 04 CR 17227
)	
RAUL TIJERINA,)	Honorable Stanley J. Sacks,
)	Judge Presiding.
Defendant-Appellant.)	

JUSTICE MURPHY delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

ORDER

HELD: Where the record reflects that trial counsel included an assertion that defendant's statements should be suppressed for being taken after he invoked his right to counsel before informing the court that the count was stricken upon defendant's request with defendant present in court, the trial court properly dismissed defendant's postconviction petition claiming ineffective assistance of counsel as frivolous and patently without merit.

Following a jury trial, defendant, Raul Tijerina, was convicted of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) and intentional homicide of an unborn child (720 ILCS 5/9-1.2(a)(1) (West 2004)) for the July 9, 2000, death of Sonya Garcia, a 14 year-old girl who was approximately 8 months pregnant and residing with defendant. Defendant was sentenced to

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consecutive terms of 60 and 40 years' imprisonment, respectively, for these convictions. On direct appeal this court affirmed defendant's convictions and sentence. *People v. Tijerina*, 229 Ill. App. 3d 654 (2008).

On January 23, 2009, defendant filed the instant *pro se* postconviction petition pursuant to the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2006). Defendant asserted that he suffered ineffective assistance of counsel for trial counsel's failure to move to suppress his statements he allegedly made after invoking his right to counsel. Defendant also claimed that appellate counsel failed to raise a claim of ineffective assistance of counsel for trial counsel's alleged failure to question witnesses thoroughly. On appeal, defendant argues that the trial court erred in dismissing his petition as frivolous and patently without merit because he stated the gist of a constitutional issue. For the following reasons, we affirm the holding of the trial court.

I. BACKGROUND

Prior to trial, counsel for defendant filed a motion to suppress statements asserting seven grounds to support his claim that his statements and confession should be suppressed. Included among defendant's claims was that his statement confessing his guilt resulted from interrogation and questioning after he had elected to remain silent and elected to consult with an attorney. When defense counsel presented argument to the court, she noted that all but one count was stricken from the motion and stated "like I said, the only issue, and ethically I'm only allowed to bring up those issues my client brings up, deal specifically with hitting in the face" - - the count alleging his confession resulted from physical coercion.

The State presented the testimony of Detective Richard Milz of the Chicago police

department. Milz testified that in June 2004 he was working in the cold case squad when he traveled to Carrizo Springs, Texas, and arrested defendant. Defendant was transported to the Dimmit County Courthouse. Milz testified that defendant was advised of his *Miranda* rights before defendant made an inculpatory statement. Defendant was again advised of his rights by the assistant State's Attorney, who also informed defendant that he was not defendant's attorney. Defendant was again advised of his *Miranda* rights before giving a second videotaped statement. Milz further testified that he never struck defendant. The trial court denied the motion.

At trial, Teresa Morgan testified that in July 2000, she resided in the first-floor-rear apartment at 4716 South Troop Street. Defendant and the victim had moved into the second-floor-front apartment of the building sometime in the spring of 2000. Defendant's sister, Deana Tijerina, lived in the first-floor-front apartment. Morgan assumed that the victim was defendant's girlfriend as she had seen them holding hands and kissing at different times.

At approximately 1 a.m. on July 9, 2000, Morgan and her boyfriend were watching television in her apartment when she heard a female voice hollering "stop hitting me." Morgan went to the front of the building because the woman continued hollering. Morgan heard the woman still hollering and a man speaking in Spanish from the second-floor-front apartment and recognized the voices as defendant's and the victim's. Morgan understood some Spanish and heard defendant hollering "bitch" and "whore." Morgan also heard the sound of someone being hit. After about 10 minutes, Morgan went to the corner to call the police on the pay phone because she did not have phone service in her apartment.

Five police officers arrived on the scene shortly thereafter. When the police knocked on defendant's door, Morgan heard defendant ask what the police wanted. The policeman told defendant to open the door and defendant told the police to "get the f--- away from his door."

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The police then left and Morgan did not hear any more noise from defendant's apartment that night. A few hours later, Morgan was awakened by a knock on her door from homicide detectives who informed her that the victim was dead. Morgan admitted to being on probation for a 2003 felony conviction for possession of a controlled substance, but denied being under arrest when she testified before the grand jury.

Officer Chris Hackett of the Chicago police department was dispatched to defendant's apartment at about 1:20 a.m. on July 9, 2000. Hackett, his partner and a sergeant went inside and Hackett knocked on the door to defendant's apartment. Hackett heard movement inside, but no response and knocked again, announcing his agency and requesting that the occupant open the door. A man came to the door and said that he would not open the "f----g" door. The door was locked and Hackett heard no other voices, crying sounds or indications of a disturbance. The policemen were not advised to enter the residence, so they cleared the job and left the scene at 1:28 a.m. Hackett returned to defendant's residence after a second 911 call was received around 5 a.m. that same morning.

Defendant's sister, Deana, testified that defendant had lived with the victim for a couple months before July 9, 2000. Prior to that, defendant had lived with the victim's mother. Deana testified that their family looked out for defendant because he was not bright and that he could not read or write. She stated that the victim smoked marijuana and that she advised defendant to kick her out, stating that the victim was trouble. Defendant responded to Deana that the victim was like a daughter to him and he did not kick her out of the apartment. Despite this, Deana said defendant and the victim were lovers.

Deana returned home at about 1:30 a.m. on July 9, 2000, and did not see any police or any sign of a disturbance. Later that morning, defendant awoke Deana saying that something was

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wrong with the victim. Defendant admitted that he had smacked and shaken the victim because she was acting strange and to find out who gave her drugs. Defendant said that the victim was “acting crazy” and had fought back.

Deana went upstairs to defendant’s apartment and found the victim on the bed. Deana described the victim as purple and her face was both purple and swollen, though she did not see any blood. Deana stated that they had to call the police and went down the block to the pay phone with defendant to call 911. After dialing 911, Deana turned around and defendant had disappeared, despite the fact he was not wearing any shoes. Deana did not hear from or see defendant until he was arrested in 2004.

Deana testified on cross-examination that defendant and the victim were not lovers. She only said that they were lovers because the State wanted her to say that they were. Deana had signed a statement and testified to the grand jury that they were lovers and was told that she would be charged with perjury if she changed her testimony. On redirect, Deana stated that she was not changing her testimony and again stated that defendant and the victim were lovers. The trial court denied defendant’s motion for a mistrial based on the introduction of evidence of defendant’s relationship with the victim and the State’s representation, it would not introduce other crimes into evidence.

Detective Anthony Padilla was assigned to investigate the victim’s death at 5:45 a.m. on July 9, 2000. Padilla arrived at the scene of the crime and found the victim lying on the bed. The victim appeared to be dead with multiple abrasions on her face, her eyes swollen shut, and blood on her mouth, nose, legs, and clothing. Padilla moved the victim’s body to check for other injuries. Padilla also observed blood on the wall of the living room, on the hallway, on a cooler near the bedroom and on the blades of a fan. Three blood swabs taken from these areas were

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each identified as the victim's blood. Though she appeared to have been beaten, the victim's death was initially classified as a noncriminal matter.

The incident was eventually assigned to the cold case squad. In May 2004, Detective Milz learned that defendant was living in Carrizo Springs, Texas, and he obtained a warrant for defendant's arrest. Milz traveled to Texas with Padilla, two other police officers and Assistant State's Attorney Lou Longhitano. With assistance from Texas Rangers, the officers located defendant and followed him to his home, eventually finding him hiding in the garage. Defendant was arrested and taken to a jury room in the Dimmit County Courthouse, advised of his rights and questioned.

Milz testified that when defendant was asked if he knew why they were there, defendant put his head down and indicated that he knew. Defendant told the officers that the victim was his girlfriend and she was eight months pregnant with his baby when she died. Defendant stated that on July 9, 2000, he woke up from a nap to find the victim glassy-eyed and he thought she might be using drugs. When the victim denied taking any drugs, defendant slapped her 13 to 15 times across the face. The victim still maintained that she did not take any drugs and defendant stated that he went back to sleep and when he woke up, the victim was dead on the floor.

Milz told defendant that they did not believe defendant and they had information from the medical examiner, including a list of the injuries suffered by the victim. Defendant lowered his head, began to cry and admitted that he was not telling the whole truth. He admitted to also hitting the victim with a closed fist a couple times, causing her lip to swell and bleed, and biting her on her back and shoulder two to three times. Defendant then admitted to choking the victim for three or four minutes until she fell off the bed crying and gasping for air. The victim

continued to deny using any drugs and defendant went back to sleep.

When defendant awoke, he said that she was dead on the floor and he picked her up, put some clothes on her and went to tell Deana what had happened. Defendant admitted that he fled while his sister called 911 because he was scared and did not want to be around when the police arrived. Defendant stayed at a hotel for a couple days and then took a bus to Texas.

Defendant was informed that Longhitano was a prosecutor and not his attorney. Defendant stated that he understood and agreed to give a videotaped statement to Longhitano. However, the microphone did not work and Longhitano and the detectives had to return to Texas to take a second statement 13 days later. Defendant agreed to give a second videotaped statement that was largely consistent with the first statement. This time, however, Longhitano noticed defendant's top front teeth were missing. Defendant did not say that he lost his teeth during the incident with the victim but, rather, that they were already missing at the time of the incident. Defendant was brought to Chicago, arrested, and charged with murder.

Dr. Adrienne Segovia, the medical examiner on this case, testified that she performed an autopsy on the victim's body. Segovia stated that the victim was 5 feet 3 inches tall, weighed 171 pounds and presented with numerous injuries. Segovia identified 26 external injuries on the victim including bruises, cuts, and scrapes on her face, forehead and arms, and two bite marks on her arms. In addition, she identified 11 internal injuries, including bleeding into her eyes, three tongue bites, bleeding under the scalp, over the brain and under the skull, and hemorrhages inside the back of her neck. One of the injuries was inflicted after death by someone either moving the body or attempting to resuscitate her and one was a prior injury that had scabbed over. Segovia stated that toxicology screens for alcohol, opiates and benzoylcocaine were negative. In

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addition, within the victim's uterus was a 4.4-pound, 7- or 8-month-old fetus that was normal, but died due to lack of oxygen.

Segovia opined that the victim died as a result of strangulation and multiple blunt force trauma from the lacerations, abrasions, bruises and subdural hemorrhaging. Segovia admitted that the eye hemorrhaging may be found in cases of obesity, heart failure or when cardiopulmonary resuscitation (C.P.R.) is administered. Though not conclusive proof, Segovia opined the injuries indicated that the victim's death was due to lack of oxygen.

Defendant testified on his own behalf. Defendant testified that he was born in Chicago. Defendant testified that he does not speak Spanish and cannot read or write English. Defendant dated the victim's mother and lived with her, but she left one day and never returned. He decided to take in the victim because she had nowhere to go. Defendant denied being the victim's lover and stated the unborn child was not his.

On July 9, 2000, defendant was sleeping and when he awoke, the victim was glassy-eyed, staring at static on the television. Defendant testified that he slapped her because she was pale and unresponsive to his questions. Defendant believed that slapping her would "brighten her up." However, the victim got "hyper" and head-butted defendant twice, he grabbed her, but she head-butted him again, knocking out his teeth, and hit him in the groin. Defendant testified that he got mad and then bit the victim. Defendant stated that his face was puffy from being head-butted, but noted that he did not tell Deana that his teeth had been knocked out, he did not recover the lost teeth, and he did not know where the teeth went.

Defendant testified that at this time, the police came to the door. Defendant stated that there was no yelling or screaming. When the police arrived, the victim was sitting on the couch

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and he told her she could open the door if she wanted. Defendant denied refusing to open the door for the police. After the police left, defendant went to his friend's house. However, his friend was not home, so he went back to the apartment. When he returned, the victim was in the bedroom and would not get up. Defendant testified that the victim was wearing a T-shirt and shorts and that he did not try to change or dress her.

The trial court refused to give instructions for involuntary manslaughter or second degree murder by provocation. The trial court instructed the jury on second degree murder by unreasonable belief in self-defense. The jury found defendant guilty of first degree murder and intentional homicide of an unborn child. Defendant was sentenced to consecutive terms of 60 and 40 years' imprisonment, respectively, for these convictions. This court affirmed defendant's conviction and sentence on appeal.

Defendant filed the instant *pro se* petition asserting that he suffered ineffective assistance of trial counsel for her failure to move to suppress his statement to the police. Defendant alleged that he invoked his right to counsel, but was not provided counsel before making his statement. Defendant also claimed that he suffered ineffective assistance of counsel on direct appeal for failing to raise the issue of ineffective assistance of trial counsel. Defendant attached an affidavit by which he averred that he could not read or write English and had his affidavit read to him.

Defendant stated that when he was placed under arrest in his garage in Carrizo Springs, Texas, he told the assistant State's Attorney and police officers that he wanted an attorney. In response, he was told that he would get an attorney in Chicago. He claimed that he again asked for an attorney at the police station, but was told he had to give a statement first. After two weeks in custody, defendant was told there was something on the videotape of his first

confession that should not have been and he had to give a videotaped statement again. Defendant was told he would be able to go home when he got to Chicago. When he returned to Chicago, defendant was given an attorney and he “told him that I had asked for an attorney in Texas, but they wouldn’t let me have one until I got back to [C]hicago.”

In an eight-page written order, the trial court dismissed defendant’s petition as frivolous and patently without merit. The court found that the record contradicted defendant’s claim as trial counsel filed a motion to suppress defendant’s statement that was denied. Next, the trial court found that defendant waived the argument that his statement should be suppressed because he requested an attorney as he did not raise the issue on direct appeal and his claim was based entirely on the record. The trial court added that testimony at the hearing on defendant’s motion to suppress established that he was advised of his rights at least three times - - when he was arrested, before the first videotaped statement when the microphone did not work, and before the second videotaped statement - - and he never requested counsel. Finally, the trial court found defendant’s issue with trial counsel’s questioning of witnesses was a matter of trial strategy and would not constitute ineffective assistance.

II. ANALYSIS

Under the Act, a defendant may file a petition that clearly identifies alleged constitutional violations. Supporting affidavits, records or other evidence shall be attached to the petition, or the defendant must explain why the evidence is not attached. 725 ILCS 5/122-2 (West 2006). At the first stage of postconviction proceedings, the trial court undertakes a facial review of the petition to determine if it is frivolous or patently without merit. If the court determines that the petition is either frivolous or patently without merit, the court must dismiss the petition in a

written order. 725 ILCS 5/122-2.1(a)(2) (West 2006). If the petition survives to proceed to stage two, section 122-4 of the Act (725 ILCS 5/122-4 (West 2006)) provides for counsel to be provided for an indigent defendant, who may file an amended petition. *People v. Bocclair*, 202 Ill. 2d 89, 100 (2002). The instant matter was dismissed at the first stage when the trial court determined that defendant's claims were not supported by the record and were frivolous and without merit.

Our supreme court has recognized a low threshold for a *pro se* petitioner at the first stage of postconviction proceedings. To withstand dismissal, a *pro se* defendant must merely allege enough facts, with supporting affidavits, records or other evidence, to support the "gist" of a constitutional claim. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). To be dismissed as frivolous or patently without merit pursuant to the Act, the petition must have no arguable basis either in law or in fact, which means it is based on an indisputably meritless legal theory or a fanciful factual allegation. This means the legal theory is completely contradicted by the record or the factual allegations are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17.

Appellate review of a trial court's dismissal of a postconviction petition without an evidentiary hearing is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 380-89 (1998). The trial court's judgment is considered, not the reasons cited, and that judgment may be affirmed on any basis supported by the record if the judgment is correct. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003). At this stage, factual disputes not rebutted by the record must be resolved in an evidentiary hearing. *People v. Whitfield*, 217 Ill. 2d 177, 200 (2005).

A claim of ineffective assistance of counsel is reviewed under the standard announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 694, 80 L. Ed. 2d

674, 698, 104 S. Ct. 2052, 2068 (1984). Under *Strickland*, to determine whether there has been a violation of the defendant's sixth amendment right to effective assistance of counsel, the defendant must show: (1) that his counsel's "representation fell below an objective standard of reasonableness;" and (2) that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 80 L. Ed .2d at 698, 104 S. Ct. at 2068; *People v. Shatner*, 174 Ill. 2d 133, 144 (1996). A strong presumption exists that counsel's conduct fell within the range of reasonable professional conduct. *Strickland*, 466 U.S. at 689, 80 L. Ed .2d at 694, 104 S. Ct. at 2065. If the second prong cannot be satisfied, a reviewing court need not consider the first prong. *Strickland*, 466 U.S. at 697, 80 L. Ed. 2d at 699, 104 S. Ct. at 2069.

Defendant argues that his petition should have survived the initial stage under the Act because he stated the gist of a constitutional claim of ineffective assistance of counsel. Defendant concedes that defense counsel initially included a claim in the motion to suppress that his statement was taken in violation of his fifth amendment right to counsel. However, he argues that the record is unclear exactly what counsel meant when she stated that claim was withdrawn. Defendant argues that it is clear by defendant's affidavit that he requested an attorney and was not provided one until he returned to Chicago and this is sufficient to support the gist of a constitutional claim and withstand dismissal .

Defendant argues that the cases cited by the State involve direct appeals and the requirements to support a complete claim for ineffective assistance of counsel and not the simple gist of a claim required to withstand dismissal here. *People v. Reed*, 298 Ill. App. 3d 285 (1998); *People v. Mabry*, 398 Ill. App. 3d 745 (2010). We agree with defendant that a postconviction

petition at this stage, particularly a *pro se* petition, need not satisfy all elements of a claim, but only the gist of a constitutional claim is required. However, we also agree with the State that the trial court properly concluded that defendant's claim is clearly refuted by the record and his postconviction petition was correctly dismissed as frivolous and patently without merit.

While our supreme court provides a high bar for dismissal of postconviction petitions in cases such as *Hodges*, it still allows that dismissal is proper where a defendant's claims are contradicted by the record. As cited by the trial court, defense counsel filed a motion to suppress defendant's statements to the police that included numerous claims, including defendant's current claim that he gave his statement confessing to the murder after he invoked his right to counsel. This claim was stricken in open court, with defendant present. Defense counsel explained to the trial court that she could only ethically proceed on issues that defendant presented. While she did not specifically say that defendant did not support the instant allegation, we do not find it as confusing a matter as defendant. Furthermore, testimony from the State during the motion hearing and at trial indicated that defendant was informed of his *Miranda* rights the three times he was questioned and gave his statement to the police and that he gave his statement on his own free will. Accordingly, the trial court properly found that the record firmly contradicts defendant's claim that he suffered ineffective assistance of counsel.

III. CONCLUSION

For the foregoing reasons, we affirm the decision of the trial court.

Affirmed.