THIRD DIVISION
August 3, 2011

2011 IL App (1st) 093244-U
No. 1-09-3244

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRANDON WYATT, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 00 CR 19161 Honorable John P. Kirby, Judge Presiding.

Justice Murphy delivered the judgment of the court.

Quinn, P.J., and Steele, J., concurred in the judgment.

ORDER

HELD: Where this court affirmed denial of defendant's motion to suppress statements on direct appeal, trial court did not err in dismissing defendant's postconviction petition claiming ineffective assistance of trial counsel and appellate counsel where no new evidence was presented to support his claims.

HELD: Where the mittimus reflects three convictions for murder when the counts were merged and reflects incorrect number of days presentence credit, the mittimus must be corrected to reflect one conviction for murder and the proper number of days' credit for presentence days served, up to, but not including the day that the mittimus was issued pursuant to *People v. Williams*, 239 Ill. 2d 503 (2011).

¶ 1 Following a bench trial, defendant, Brandon Wyatt, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2004)) and attempted armed robbery (720 ILCS 5/8-4(a) (West 2004), 720 ILCS 5/18-2(a) (West 2004)) in connection with the July 17, 1999, fatal shooting of Wilbert Hooten, a Metra train ticket agent and sentenced to consecutive sentences of 36 years' imprisonment for first degree murder and 6 years' imprisonment for the attempted armed robbery conviction. Defendant filed a direct appeal, arguing that the trial court erred in denying his motions to suppress statements and that he was improperly sentenced. This court affirmed his convictions and sentence. *People v. Wyatt*, 1-05-0819 (2008) (unpublished order under Supreme Court Rule 23).

¶ 2 Defendant filed a postconviction petition pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)) (Act), alleging that he was denied effective assistance of appellate and trial counsel relating to counsel's refusal to let defendant testify at the hearing on the motion to suppress. Defendant's petition was summarily dismissed. The trial court found that defendant failed to make a substantial showing or provide any new evidence to support his claim that his constitutional rights were violated.

¶ 3 On appeal, defendant argues that his postconviction petition should advance to the second stage of proceedings because he was deprived of his constitutional right to testify at trial. Defendant contends that trial counsel's refusal to allow him to testify at the motion to suppress violated this right and rendered his assistance ineffective. Defendant also argues that appellate counsel's failure to properly develop this argument on direct appeal constitutes ineffective assistance. Defendant also asserts that, and the State concedes, the mittimus should be corrected to properly reflect a single conviction for first degree murder and the proper amount of

presentence days' credit. For the following reasons, we affirm the dismissal of defendant's postconviction petition and order the mittimus be corrected.

¶ 4 I. BACKGROUND

¶ 5 The facts of this case are more fully recited in the Rule 23 order for defendant's direct appeal. *Wyatt*, slip op. at 2-6. We limit our discussion of the facts here to those pertinent to defendant's postconviction petition. Prior to trial, defendant filed several motions including motions to suppress his oral and videotaped statements to the police. Defendant claimed that his statement was involuntary because he was a juvenile, did not knowingly waive his *Miranda* rights, was deprived of sleep and bathroom privileges to wear him down, and was not granted the right to confer with counsel or any concerned adult prior to his coerced statement.

¶ 6 Defendant did not testify and trial counsel did not present any evidence at the hearing on the motions to suppress. However, the State presented the testimony of several witnesses before the trial court and the trial court denied defendant's motions. The court found that the details provided by the police corroborated co-defendant Jason Dace's statement implicating defendant and probable cause existed for defendant's arrest. The trial court rejected defendant's assertions that the videotaped confession was clearly an act and defendant merely regurgitated a script created by the police. Furthermore, the trial court found that the State showed that defendant was properly administered his rights and that he knowingly waived them and gave his statement under his free will.

¶ 7 Following a bench trial, defendant was found guilty of first degree murder and attempted armed robbery. On direct appeal, defendant argued, *inter alia*, that the trial court erred in denying his motions to suppress his oral and videotaped statements. Despite finding that

defendant waived this argument for failing to raise it in his posttrial motion and the evidence was not so closely balanced to support plain error review, this court reviewed defendant's contention that his confession was not voluntary. This court rejected defendant's argument, relying on the trial court's credibility determinations of witnesses and the evidence before it in determining that defendant willingly and voluntarily gave his confession. This court further noted that defense counsel presented no evidence that defendant was mistreated or argument as to what additional information would be presented on remand to overcome the trial court's findings.

¶ 8 In his postconviction petition, defendant presented two issues for review: (1) that he suffered from ineffective assistance of appellate counsel; and (2) ineffective assistance of trial counsel. Both claims related to the alleged deprivation of his right to testify. Defendant alleged that he communicated his desire to testify at the hearing on the motions to suppress but that trial counsel refused his request. Defendant claimed, and trial counsel's affidavit supported this claim, that counsel refused because defendant's youthfulness and inexperience with the criminal justice system could negatively impact any future appeal.

¶ 9 In a written order, the trial court summarily dismissed the petition as frivolous and patently without merit. The court found that defendant waived these claims for failing to raise them on direct appeal, nevertheless it reviewed each claim. With respect to defendant's claim of ineffective assistance of trial counsel, the trial court noted that on direct appeal, this court had opined that the denial of defendant's motion to suppress was not against the weight of the evidence and defendant's claim of ineffective assistance of trial counsel was barred by *res judicata.*

¶ 10 For defendant's claim of ineffective assistance of appellate counsel, the trial court again

pointed to the *Wyatt* order. It noted that this court did not find counsel's argument that trial counsel failed to present any evidence in support of the motion persuasive. The trial court found that defendant again failed to present any new facts, evidence or information to support the claim that the outcome would have been different had defendant testified. Based on the findings of the trial court at the pretrial hearing and bench trial, and this court before it that there was sufficient credible evidence that the confession was voluntary, the petition failed and was dismissed. This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 A. Dismissal of Postconviction Petition

¶ 13 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 such evidence is not attached. 725 ILCS 5/122-2 (West 2008). At the first stage of postconviction proceedings, 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, 13 (2009). Within 90 days of the filing of a postconviction petition, the circuit court must independently review the petition and determine whether it "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008).

¶ 14 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. *Id.* at 16-17. 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 2008). The instant matter was dismissed at the first stage of proceedings as frivolous and patently without merit.

¶ 15 The Act is not an avenue for a defendant to simply rephrase an issue previously addressed on direct appeal. *People v. Simpson*, 204 Ill. 2d 536, 559 (2001). To be successful in his petition, a defendant must demonstrate his rights were substantially deprived in the proceedings against him and that his challenge has not been raised and could not have been adjudicated earlier. Issues that could have been raised on direct appeal or in prior proceedings, but were not, are procedurally defaulted. Previously decided issues are barred by the doctrine of *res judicata*. *People v. Whitfield*, 217 Ill. 2d 177, 183 (2005).

¶ 16 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). We review the trial court's judgment, not the reasons cited, and we may affirm 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).

¶ 17 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 (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." *Id.* at 694; *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. *Id.* at 689. If the second prong cannot be satisfied, a reviewing court need not consider the first prong. *Id.* at 697.

¶ 18 Defendant states that his claim arose from this court's comment in the disposition of his direct appeal that his claim failed in part due to the failure of counsel to argue what additional information would be produced on remand or whether that information would overcome the trial court's decision. Defendant points to appellate counsel's having "only whimsically and passively mentioned the trial counsel's failure to call witnesses and offer evidence beyond the petitioner's motion, which was declared an 'affirmed statement' of the petitioner." Defendant argues that he was deprived of his sixth amendment right to testify by trial counsel and suffered ineffective assistance of counsel due to this and appellate counsel's failure to properly present this constitutional claim.

¶ 19 Defendant argues that trial counsel's tactical decision to file a motion to suppress opened up the absolute necessity to have defendant testify. Despite this, and defendant's request to testify, trial counsel refused to allow him to testify. He argues that this court has continually reversed first stage dismissals of postconviction petitions where trial court counsel refused to allow the defendant to testify at trial. *People v. Brown*, 336 Ill. App. 3d 711 (2002); *People v. Piper*, 272 Ill. App. 3d 843 (1995); *People v. Dredge*, 148 Ill. App. 3d 911 (1986); and *People v. Wilson*, 146 Ill. App. 3d 567 (1986). Defendant concludes that this can only be interpreted as ineffective assistance of counsel because defendant and only defendant could provide testimony

and evidence in support of the claim that his statement was involuntary and should be suppressed.

¶ 20 Defendant claims that it necessarily follows that he suffered ineffective assistance of appellate counsel due to counsel's failure to properly develop the argument that trial counsel failed to call witnesses or offer any evidence in support of the motions. Defendant concludes that his affidavit and the affidavit of trial counsel support his claim that he wanted to testify, but he was not allowed to at the hearing. Accordingly, he argues that the dismissal of his petition must be vacated and further proceedings be held pursuant to the Act to properly examine his claims.

¶ 21 The State responds that defendant has mistakenly applied case law concerning the right of a defendant to testify at trial with testifying at a hearing on a motion to suppress. It allows that the cases cited by defendant all stand for the proposition that first-stage dismissal is improper when a defendant wants to testify at trial but counsel does not allow him to testify, but asserts that no case law exists for the proposition that defendant advances. The State adds that not only did defendant fail to object at trial to counsel's alleged refusal to allow him to testify, the State requested and the court agreed to consider defendant's motion a sworn statement. Therefore, it argues that defendant's claim of ineffective assistance of trial counsel was properly considered waived by the trial court.

¶ 22 For the claim of ineffective assistance of appellate counsel, the State argues that defendant again failed to provide any evidence about what he would have testified to and how his testimony would have led to a different result for his motion or trial. The State argues that

the affidavits provided by defendant and trial counsel contain only the same vague and conclusory statements that were part and parcel of defendant's motions to suppress. Trial counsel averred that defendant was not allowed to testify based on the belief that his young age and lack of familiarity with the criminal justice system could hinder any possible future appeal. Defendant generally claimed that he did not testify based on assurances of leniency and coercion by the police and assistant State's Attorney. Defendant claimed that, had he been allowed to testify, he would have clarified his emotional state while in custody, his lack of experience with the criminal justice system and the promises made by his interrogators, while also providing more specificity about the amount of time, sleep and bathroom breaks he was afforded while in custody. The State argues that not only was this information before the trial court, defendant's videotaped confession directly rebuts defendant's allegation that he was not treated properly or was coerced to confess.

¶ 23 We agree with the State that the trial court dit not err in concluding that defendant's postconviction petition was insufficient to demonstrate the gist of a constitutional issue of ineffective assistance of counsel. As addressed by the State, much of what defendant advances in his petition was considered originally by the trial court and this court. Defendant's claim on direct appeal that the trial court erred in denying his motion to suppress was rejected based on the testimony provided by the State at the hearing on the motion and the lack of any evidence to counter the State's presentation.

¶ 24 The affidavits in support of his postconviction petition do not provide this evidence. As the trial court concluded, there is nothing of record to indicate that the proceedings would have

changed if defendant would have testified or that appellate counsel would have presented this argument. Defendant's allegation that counsel's argument did not advance beyond whimsy or passivity is not supported by his petition and his allegation of ineffective assistance of counsel was properly dismissed by the trial court.

¶ 25 B. Correction of the Mittimus

¶ 26 Defendant also argues that the mittimus must be corrected to properly reflect a single conviction for murder and 1,719 days credit for pre-sentence time served. While defendant concedes, and the State notes, that the mittimus indicates that the second and third murder counts merged into count one and defendant only received a sentence on that count, the State has no objection to amending the mittimus to reflect only one conviction for first degree murder. However, the State contends that defendant has miscalculated the proper amount of presentence credit and the mittimus should be corrected to reflect 1,718 days' credit. We agree with the State.

¶ 27 In his calculation, defendant has included the date the mittimus issued. As the State argues, our supreme court recently settled the issue of when a sentence starts in *Williams*. Pursuant to *Williams*, defendant's sentence began when the mittimus was issued on March 24, 2005, and that date is not to be included in the calculation of presentence credit for time served. *Williams*, 239 Ill. 2d at 510. Accordingly, pursuant to Illinois Supreme Court Rule 615(b), the mittimus is to be corrected to indicate the proper presentence credit of 1,718 days.

¶ 28 III. CONCLUSION

¶ 29 For the foregoing reasons, we affirm the decision of the trial court. The mittimus shall be corrected to reflect one first degree murder conviction and the proper pre-sentence credit of 1,718 days credit for time served.

¶ 30 Affirmed, mittimus corrected.