2014 IL App (2d) 130714-U
No. 2-13-0714
Order filed January 29, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Lake County.
Plaintiff-Appellee,	)	
v.	)	No. 07-CF-2510
JOSE A. SEPULVEDA,	)	Honorable Daniel B. Shanes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Burke and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's summary dismissal of defendant's postconviction petition was affirmed where two ineffective-assistance-of-counsel claims were barred by *res judicata* or forfeited, and the third ineffective-assistance claim had no arguable basis in law.

¶ 2 Following a jury trial, defendant, Jose A. Sepulveda,[1] was convicted of first-degree murder (720 ILCS 5/9-1(a)(2) (West 2006)) and sentenced to 28 years' imprisonment. On direct

[1] Defendant's case in the trial court and on direct appeal was captioned with his name as Jose A. Sepulveda. The postconviction petition caption lists defendant's name as Jose Sepulveda

appeal, this court affirmed defendant's conviction. *People v. Sepulveda*, 2012 IL App (2d) 101305-U. Defendant subsequently filed a petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)), in which he alleged that he was denied the right to effective assistance of counsel and that his due process rights were violated. Defendant now appeals from the trial court's summary dismissal of his postconviction petition. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant's conviction arose from the July 4, 2007, murder of Ricardo Osorio during a fight in the parking lot of a Family Dollar store in Waukegan, Illinois. We discussed the facts in great detail in our disposition on direct appeal. *People v. Sepulveda*, 2012 IL App (2d) 101305-U. For purposes of the current appeal, we provide the following summary. After a heated cell phone conversation between Ernesto Lopez and one of defendant's friends, Eduardo,[2] the parties went to the Family Dollar parking lot late in the evening on the fourth of July. Ernesto's group arrived by car and included Ricardo and Amelia Lopez (Ernesto's wife and Ricardo's cousin). Eduardo walked to the parking lot with Jose Guadarrama, defendant, and defendant's brother, Luis Sepulveda. Defendant picked up a 3 ½ foot tree branch on the way to

---

aka Jose Alvarez. We use the name as it was used in the original case.

[2] As noted by the trial court in its written decision, it is impossible to glean accurately Eduardo's last name from the record. Throughout the fact section of his brief, defendant refers to Eduardo by his first name only; in the argument section, defendant refers to Montano-Ochoa. The record contains Eduardo's affidavit (discussed in detail below). The affidavit contains the signature of "Jose E. Montano," while the typed name under the signature line is "Eduardo Montano-Ochoa." We will refer to Eduardo by his first name.

the parking lot; no one else had a weapon of any kind. Ernesto and Eduardo immediately began fist fighting.

¶ 5 Within five minutes, Luis, Guadarrama, defendant, and Ricardo, were involved in the fray. Luis entered the fist fight to try to break it up. The specific facts regarding Guadarrama's, defendant's, and Ricardo's actions were disputed. However, it was undisputed that Ricardo ended up on the ground, face up, bleeding from his head. He suffered a fractured cheekbone and three breaks to his nose and was pronounced dead at the hospital later that evening.

¶ 6 The State presented an accountability theory of the case—asserting that Guadarrama[3] and defendant had acted together to ensure that their side won the fight. The State argued that Guadarrama and defendant acted in concert to batter Ricardo; Guadarrama used his fists, and defendant used a tree branch. The defense posited that defendant acted in Luis's defense, because he thought that Ricardo was going to hurt his brother, Luis. Defendant testified that he saw Ricardo moving toward Luis to hit or grab Luis. According to defendant, he hit Ricardo on the side of the head with the branch because he thought that Ricardo was going to hurt Luis.

¶ 7 The trial court instructed the jury on first-degree murder, second-degree murder (based on an unreasonable belief that the use of force was justified), accountability, use of force in defense of a person, and use of force by an initial aggressor.[4] The jury found defendant guilty of first-degree murder (strong probability of great bodily harm).

---

[3] Guadarrama was indicted jointly with defendant. He pleaded guilty to second-degree murder. Guadarrama had finished serving his sentence (five years' imprisonment) by the time he testified at defendant's trial.

[4] On direct appeal, we agreed with defendant that the court erred in giving a non-IPI version of this instruction, but we held that the error did not rise to the level of plain error.

¶ 8 On direct appeal, defendant argued that he received ineffective assistance of counsel, the trial court erred in giving certain jury instructions, he was prejudiced by prosecutorial misconduct, and the trial court erred in calculating his credit for time spent in custody. We affirmed defendant's conviction and remanded with directions to amend the sentencing order to reflect accurately defendant's credit for time served. *Sepulveda*, 2012 IL App (2d) 101305-U. Thereafter, defendant filed a petition for leave to appeal in the supreme court, which the court denied. Defendant subsequently filed a postconviction petition. He timely appeals from the trial court's summary dismissal of his postconviction petition.

II. ANALYSIS

¶ 9 The Act provides a method by which a criminal defendant may assert that his or her conviction was the result of "a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." 725 ILCS 5/122-1(a)(1) (West 2012); *People v. Tate*, 2012 IL 112214, ¶ 8. In cases not involving the death penalty, the Act establishes three stages to the proceedings. *Tate*, 2012 IL 112214, ¶ 9. This appeal concerns the dismissal of a petition at the first stage. At the first stage, the trial court must independently review the petition and may summarily dismiss it if it "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012); *Tate*, 2012 IL 112214, ¶ 9. A petition is frivolous or patently without merit only if it has "no arguable basis either in law or in fact." *Tate*, 2012 IL 112214, ¶ 9. Our review of the trial court's first-stage dismissal of a postconviction conviction is *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 10 Defendant raised four claims in his postconviction petition—three claims of ineffective assistance of counsel and one claim of denial of due process. In the due process claim, defendant

---

Sepulveda, 2012 IL App (2d) 101305-U, ¶¶ 62-69.

asserted that the State "withheld evidence regarding the investigating detective *** which if properly revealed would have inured to [defendant's] benefit on the admissibility and validity of [defendant's] in-custody statements" to the detective. On appeal, defendant makes no argument whatsoever about his due process claim. Accordingly, he has forfeited this claim. *People v. Evans*, 405 Ill. App. 3d 1005, 1007 (2010) (citing Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived * * *.")).

¶ 11 Turning to defendant's three ineffective-assistance-of-counsel claims, we initially examine them in light of defendant's arguments on direct appeal. A postconviction action is a collateral attack on the trial court proceedings; it is not an appeal from the judgment of conviction. *Tate*, 2012 IL 112214, ¶ 8. Therefore, issues that were raised and decided on direct appeal are barred by *res judicata*. *Tate*, 2012 IL 112214, ¶ 8. Similarly, issues that were not raised on direct appeal, but could have been, are forfeited. *Tate*, 2012 IL 112214, ¶ 8. The doctrines of *res judicata* and forfeiture are proper bases for first-stage dismissals. *People v. Blair*, 215 Ill. 2d 427, 443 (2005).

¶ 12 Defendant asserted in his postconviction petition that his trial counsel was ineffective for failing to file a motion to suppress his statements to police "based on his inability to understand and communicate in English, his lack of education, and his impaired mental faculty." Defendant acknowledged in his postconviction petition that, on direct appeal, he raised the issue of trial counsel's ineffectiveness for failure to file a motion to suppress challenging defendant's statements to police "as being rendered in breach of promises of leniency." However, he urged that he was not barred from raising "the broader question of whether a motion to suppress would have been successful based on the broader allegation that defendant's statements were involuntary." Defendant's argument misses the mark.

¶ 13 To the extent that defendant's direct appeal included a claim of ineffective assistance for trial counsel's failure to file a motion to suppress, the doctrine of *res judicata* bars him from raising it again in his postconviction petition. *Tate*, 2012 IL 112214, ¶ 8. To the extent that defendant's postconviction petition offered a new basis upon which to file a motion to suppress, his argument is forfeited, because it could have been raised on direct appeal.[5] In his postconviction petition, defendant referred to the presentence report and contended that the voluntariness of his statements could have been challenged based on his intelligence, education, and mental capacity. Given that the presentence report was included in the record on direct appeal, defendant could have raised this argument on direct appeal. Because he did not, the contention is forfeited in the postconviction proceedings. *Tate*, 2012 IL 112214, ¶ 8.

¶ 14 Defendant's second postconviction ineffective-assistance claim alleged that trial counsel was ineffective for failing to file a motion to quash arrest and suppress his statements to police on the basis that his extraterritorial arrest in Wisconsin was illegal. Neither in his postconviction petition nor on appeal does defendant offer any reason why this argument could not have been raised on direct appeal. The record on direct appeal contains an application for requisition for arrest and rendition of defendant as a fugitive, which is file stamped July 30, 2007. The August 1, 2007, report of proceedings reflects that an assistant State's attorney informed the court that defendant was in custody in Wisconsin and that they were "working on extradition."

[5] In any event, regardless of the alleged basis for a motion to suppress, we held on direct appeal that, because there was overwhelming evidence of defendant's guilt, even without the objected-to testimony, defendant's ineffective-assistance argument failed because he did not show prejudice. *Sepulveda*, 2012 IL App (2d) 101305-U, ¶ 50.

Accordingly, defendant could have raised this claim on direct appeal. Because he did not, it is forfeited. *Tate*, 2012 IL 112214, ¶ 8.

¶ 15 Defendant's third and final postconviction ineffective-assistance claim alleged that counsel was ineffective for failing to interview Eduardo and call him to testify. We agree with defendant that this claim was not forfeited, because it is based on matters outside the record. See *Tate*, 2012 IL 112214, ¶¶ 14-15. Attached to defendant's postconviction petition was Eduardo's affidavit in which he averred the following. Eduardo went to the Family Dollar parking lot on the evening of July 4, 2007, to meet Viridiana Lopez, pursuant to their telephone conversation.[6] Eduardo went to the parking lot with Jose Guadarrama and Luis Sepulveda. Upon arrival, Eduardo and his companions were met by Viridiana and her girlfriend, and two males, both of whom were holding baseball bats. One of the males started to fight with Eduardo. The male ended up on top of Eduardo. When Guadarrama tried to pull the first male off of Eduardo, the second male hit Guadarrama. Eduardo did not see defendant "hit anyone with anything." Eduardo was never interviewed by defendant's lawyer.

¶ 16 Under the familiar, two-prong test of *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on a claim of ineffective assistance of counsel, "a defendant must show that (1) his counsel's performance was deficient in that it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defendant in that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceeding would have been different." *People v. Houston*, 226 Ill.2d 135, 144 (2007). However, at the first stage of

[6] The heated cell phone conversation to which we referred above began as a conversation between Viridiana (Amelia's 15-year-old sister) and Eduardo. Ernesto took the phone from Viridiana when Eduardo kept calling Viridiana back after she would hang up on him.

postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed "if (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness and (ii) it is *arguable* that the defendant was prejudiced." (Emphases in original.) *Tate*, 2012 IL 112214, ¶ 19 (quoting *People v. Hodges*, 234 Ill.2d 1, 17 (2009)).

¶ 17 In his brief on appeal, defendant fails to develop any argument as to how his ineffective-assistance-of-counsel claim had an arguable basis in law or fact. He conclusorily states that Eduardo's testimony would have corroborated defendant's testimony. However, he fails to explain how that is so. Accordingly, defendant has forfeited this argument. *Lozman v. Putnam*, 379 Ill. App. 3d 807, 826 (2008) ("[A] party waives a point by failing to argue it.").

¶ 18 Forfeiture aside, we briefly note that defendant's claim has no arguable basis in law. The relevant inquiry is whether Eduardo's testimony (had he been called and had he testified consistently with his affidavit) would have supported the defense theory at trial. See *Hodges*, 234 Ill. 2d at 19. As discussed above, the defense theory at trial, consistent with defendant's own testimony, was that defendant hit Ricardo to defend his brother, Luis. In his affidavit, Eduardo mentioned only Luis' presence in the parking lot; he made no mention of Luis being involved in the fight or being in any danger. Thus, Eduardo's testimony would have had no bearing on the defense theory that defendant was justified in using force to defend Luis. Even taking as true Eduardo's averment that Ernesto and Ricardo (the only "two males" in Ricardo's group) were armed, since defendant himself testified that he was the only person armed, Eduardo's testimony would have had no relevance to defendant's belief that the use of force was necessary. Moreover, Eduardo did not aver that either Ernesto or Ricardo used a baseball bat to strike anyone. Nor did Eduardo aver that Ernesto or Ricardo did anything to defendant. Thus, notwithstanding defendant's assertion to the contrary in his postconviction petition, Eduardo's

testimony would not have supported defendant's request for a jury instruction on self defense. Given the record in the case and Eduardo's affidavit, it is not arguable that defendant was prejudiced by trial counsel's failure to call Eduardo to testify. Accordingly, defendant's postconviction ineffective-assistance claim lacks merit.

¶ 19 III. CONCLUSION

¶ 20 For the reasons stated, the judgment of the circuit court of Lake County is affirmed.

¶ 21 Affirmed.