

NOTICE
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2012 IL App (4th) 110771-U

NO. 4-11-0771

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
October 26, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Livingston County
GERMAINE A. ELCOCK,)	No. 08CF290
Defendant-Appellant.)	
)	Honorable
)	Jennifer H. Bauknecht,
)	Judge Presiding.

JUSTICE COOK delivered the judgment of the court.
Justices Steigmann and Pope concurred in the judgment.

ORDER

¶ 1 *Held:* The office of the State Appellate Defender's motion to withdraw as counsel on appeal is granted and the trial court's judgments are affirmed as defendant can raise no meritorious issues in this appeal.

¶ 2 This appeal comes to us on the motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal on the ground that no meritorious issues can be raised in this case. For the reasons that follow, we agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant, Germaine A. Elcock, is a prisoner at Dwight Correctional Center. In this case, the State charged defendant with the August 2008 aggravated battery of a corrections officer, Lieutenant Lance Whitecotton, alleging she kicked him in the groin. In June 2009, defendant voluntarily waived her right to a jury trial.

¶ 5 In August 2009, the trial court held a bench trial. Lieutenant Whitecotton testified that he restrained defendant following an altercation between her and another inmate. After taking defendant for a medical examination, Lieutenant Whitecotton attempted to place defendant in a van. Defendant pushed back against him, striking his shoulder and face. Lieutenant Whitecotton successfully placed defendant in the van, but as he was closing the doors, defendant kicked him in the groin. Lieutenant Whitecotton testified that he was later examined at "the health care unit."

¶ 6 Corrections officer Jay Roth testified that he observed defendant kick Lieutenant Whitecotton after he placed her in the van. Lieutenant Annabelle Motteler testified that she observed that after the incident Lieutenant Whitecotton was in apparent pain, "doubled over holding himself."

¶ 7 Major Ernest Jefferson, defendant, and nurses Deborah Justice and Paul Quehl testified for the defense. Major Jefferson testified that he met Lieutenant Whitecotton at the medical unit but did not observe any injuries.

¶ 8 Defendant testified that Lieutenant Whitecotton pushed her three times while attempting to place her in the van, after which she began to scream for help. She testified that Officer Roth and Lieutenant Whitecotton grabbed her arms and "slammed [her] into the van." Defendant further stated that after she was placed in the van Lieutenant Whitecotton placed his hand over her mouth and placed his mouth on her breast. She testified that Officer Roth "started beating *** the lower part of [her] body." Defendant denied kicking Lieutenant Whitecotton.

¶ 9 Justice testified that she examined defendant around 10:10 p.m. on the day of the incident and observed "an abrasion on her arm and some bruises." Quehl testified that he

examined defendant around 8:30 p.m. and observed a "little redness [on the back] of [her] neck" but no scratches or cuts.

¶ 10 The trial court found defendant guilty. In May 2010, the court sentenced her to three years in prison. In June 2011, defendant voluntarily dismissed her direct appeal.

¶ 11 In March 2011, defendant filed a *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 to 122-8 (West 2010)). Defendant alleged three errors that she claimed led to her conviction. First, she claimed that she received ineffective assistance of counsel because her attorney failed to move for a change of venue. Defendant based this claim on her suspicion that the jury pool in Livingston County would "probably be filled with either correctional officers or family and friends of correctional officers" and that she could not receive a fair trial in a county with only a 5% African-American population. Second, she claimed that a corrections officer asked her whether she kicked Lieutenant Whitecotton in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Third, she alleged that Lieutenant Whitecotton committed perjury when he testified that he was examined by a nurse after the incident, where there was no medical report documenting the examination, and when he testified that defendant struck him in the face and shoulder when he tried to place her in the van, where his incident report stated he had been struck in the chest.

¶ 12 In June 2011, the trial court summarily dismissed defendant's postconviction petition, finding it frivolous and patently without merit. In August 2011, defendant filed her notice of appeal. The court appointed OSAD as defendant's counsel on appeal. In November 2011, this court granted leave to file a late notice of appeal.

¶ 13 In July 2012, OSAD moved to withdraw, attaching to its motion a brief in

conformity with the requirements of *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The record shows service of the motion on defendant. On its own motion, this court granted defendant leave to file additional points and authorities by August 30, 2012, but defendant has not done so. After examining the record and executing our duties in accordance with *Finley*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 14

II. ANALYSIS

¶ 15 OSAD argues this appeal presents no meritorious claim upon which defendant could realistically expect to obtain relief as the trial court properly dismissed defendant's postconviction petition. We agree.

¶ 16 The Post-Conviction Hearing Act provides a procedure for correcting substantial constitutional violations that resulted in the defendant's conviction. 725 ILCS 5/122-1(a)(1) (West 2010). At the first stage of postconviction proceedings, the trial court must *sua sponte* summarily dismiss a postconviction petition within 90 days of its filing if the court finds it is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010). A defendant's postconviction petition is frivolous or patently without merit if all of its allegations, taken as true and liberally construed in the defendant's favor, fail to state the "gist of a constitutional claim." (Internal quotation marks omitted.) *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001).

¶ 17 A postconviction petition's nonfactual and nonspecific assertions amounting to mere conclusions are insufficient to survive first-stage dismissal. *People v. Coleman*, 183 Ill. 2d 366, 381, 701 N.E.2d 1063, 1072 (1998). A petition's allegations should be supported with affidavits, records, or other evidence. 725 ILCS 5/122-2 (West 2010).

¶ 18 OSAD presents four potential issues that it claims would not support reversal if argued before this court. First, OSAD asserts that defendant could not reasonably argue that her ineffective-assistance claim stated the gist of a constitutional violation. We agree. A defendant receives ineffective assistance amounting to a constitutional violation when counsel's objectively deficient performance prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To make out a claim for ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 687-88, 694.

¶ 19 Here, defendant could not have been prejudiced by counsel's failure to move for a change of venue due to the perceived unfavorable composition of the jury pool because defendant voluntarily waived her right to a jury trial. Regardless of the presence of biased potential jurors in Livingston County, defendant's bench trial avoided any prevalent biases based on the familiarity of corrections employees to the county's residents or the scarcity of members of defendant's own race in the county. Notably, defendant did not assert in her postconviction petition that the perceived bias affected her decision to waive her right to a jury trial. Thus, the connection between the perceived bias and her conviction is too tenuous to support her claim.

¶ 20 Moreover, defendant could not reasonably argue that a motion to change venue would have likely been granted. Change of venue is appropriate if "there exists in the county in which the charge is pending such prejudice against [the defendant] on the part of the inhabitants that he cannot receive a fair trial in such county." 725 ILCS 5/114-6(a) (West 2010). A defendant must show "reasonable grounds to believe that the prejudice alleged actually exists and

that by reason of the prejudice there is a reasonable apprehension that the accused cannot receive a fair and impartial trial." (Internal quotation marks omitted.) *People v. Gendron*, 41 Ill. 2d 351, 354, 243 N.E.2d 208, 211 (1968).

¶ 21 Defendant lacks support for her conclusory allegations that Livingston County residents are so biased against prisoners that no prisoner can receive a fair trial, or that Livingston County's small African-American population affected the possibility that a black defendant could receive a fair trial there. See *People v. Mack*, 107 Ill. App. 3d 164, 175, 437 N.E.2d 396, 405 (1982) ("We are aware of no right that defendants had to a trial in a county having a large number of people of the same race as defendants."). Had defense counsel chosen to move for a change of venue, the trial court would not have erred in denying it; the court could have reasonably, instead, relied on the *voir dire* process to exclude any prejudiced individuals from defendant's jury.

¶ 22 Moreover, even if defendant's motion for change of venue were granted, defendant has not alleged that the result of her prosecution would have been different. An unbiased jury in another county presented with the evidence of guilt that was shown at defendant's bench trial could very plausibly have found defendant guilty. Because defendant could not show that she was prejudiced by counsel's alleged deficient performance, defendant failed to state the gist of an ineffective-assistance claim.

¶ 23 Second, OSAD argues that defendant could not reasonably argue that her *Miranda* claim presented the gist of a constitutional violation. We agree. Defendant alleged in her postconviction petition that Lieutenant Motteler asked defendant "what happened that night and whether defendant really did kick Lt. Lance Whitecotton in the genitals." Defendant further

alleged that the questioning constituted custodial interrogation prohibited by *Miranda*. Regardless of whether the questioning was custodial interrogation, however, the State presented no evidence at defendant's trial of any statements defendant made. Since exclusion of the defendant's statements is usually the method for curing any improper custodial interrogation not preceded by the defendant's knowing and voluntary waiver of rights after being warned pursuant to *Miranda*, and no statements were admitted in this case, defendant could not reasonably argue on appeal that her postconviction *Miranda* claim should have survived summary dismissal. See *Oregon v. Elstad*, 470 U.S. 298, 306-07 (1985) (discussing the exclusionary rule as applied to violations of the fifth amendment (U.S. Const., amend. V) and *Miranda*).

¶ 24 Third, OSAD asserts that defendant could not reasonably argue that her due-process claim based on Lieutenant Whitecotton's alleged perjury stated the gist of a constitutional deprivation. We agree. In general, "a criminal conviction obtained through the knowing use of false testimony constitutes a violation of due process." *People v. Brown*, 169 Ill. 2d 94, 103, 660 N.E.2d 964, 968 (1995). However, even assuming that the State knowingly used false testimony, any error here was harmless. See *People v. Jimerson*, 166 Ill. 2d 211, 228, 652 N.E.2d 278, 286 (1995) (holding that harmless error applies to allegations of improper use of perjured testimony). The disputed testimony had no effect on defendant's conviction because it did not concern an element of the crime, and the essential allegations were substantiated by evidence defendant has not challenged. Defendant alleged in her postconviction petition that Lieutenant Whitecotton lied when he misidentified the area of his body where defendant struck him during the struggle to get defendant into the van and when he claimed that he was examined after the incident. However, the aggravated battery charged in the indictment was defendant's kicking Lieutenant

Whitecotton in the groin after she had been placed in the van. That aggravated battery was adequately supported without reference to the allegedly false testimony, which was inessential to the State's case. Because any error would have been harmless, defendant could not colorably argue on appeal that the trial court erred in dismissing this claim.

¶ 25 Fourth, OSAD asserts that defendant could not reasonably argue that the trial court employed an erroneous procedure in disposing of defendant's postconviction petition. OSAD notes that the court properly dismissed the petition within 90 days of its filing as the petition was filed on March 23, 2011, and the court dismissed it in a written order dated June 10, 2011. See 725 ILCS 5/122-2.1(a)(2) (West 2010). Further, OSAD notes that defendant was timely served with the required notice of adverse judgment on June 13, 2011. See Ill. S. Ct. R. 651(b) (eff. Dec. 1, 1984). Accordingly, we agree with OSAD that defendant could not reasonably argue on appeal that the court procedurally erred in dismissing her *pro se* postconviction petition.

¶ 26 III. CONCLUSION

¶ 27 For the foregoing reasons, we conclude no meritorious issues can be raised on appeal in this case and, accordingly, we grant OSAD's motion to withdraw and affirm the trial court's judgments.

¶ 28 Affirmed.