

2013 IL App (2d) 110756-U
No. 2-11-0756
Order filed April 25, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Kane County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 06-CF-2062
)	
ERNESTO VALLE,)	Honorable
)	M. Karen Simpson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Presiding Justice Burke and Justice Birkett concurred in the judgment.

ORDER

¶ 1 *Held:* Because defendant's claim on appeal was not expressed or implicit in his postconviction petition, the claim was forfeited, and we affirmed the dismissal of the petition.

¶ 2 Defendant, Ernesto Valle, appeals from an order summarily dismissing his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He claims on appeal that his counsel on direct appeal was ineffective for failing to raise a sufficiency-of-the-evidence claim. The difficulty with this claim on appeal is that it was not expressed or implicit in his postconviction petition. Thus, the claim is forfeited, and we affirm the dismissal.

¶ 3

I. BACKGROUND

¶ 4 The facts relating to defendant's trial and direct appeal are adequately outlined in *People v. Valle*, 405 Ill. App. 3d 46 (2010). We summarize briefly. Defendant was arrested as a suspect in the August 12, 2006, shooting death of Jessie Lozano. The police interrogated him at length over the course of the night and day following his arrest. The police used tactics that included several instances of deception and occasional use of a highly aggressive tone. Ultimately, defendant made inculpatory statements. He admitted ties to the Latin Kings. He described being in a car with two other people with Kings affiliations, Hector and Chris. He got out of the car with a gun and shot at a moving car. His statements were contradictory about whether he did the shooting before or after he was at a party. He was uncertain about where the shooting occurred and the kind of gun he used.

¶ 5 Defendant sought to have his inculpatory statements excluded from his trial. However, the court ruled that the statements were admissible.

¶ 6 At trial, the State's primary evidence, other than the recording of defendant's statements, came from the testimony of Chris (whom the State did not charge) and Hector (who had pleaded guilty to conspiracy to murder, under an agreement to testify against defendant). Both described the three as leaving the party and getting into a car. Defendant got out and shot at a vehicle. When he returned to the car, he commented to the effect that he had gotten his target. The three then returned to the party, where the Kings' enforcer treated them as gang members. The parties stipulated that Chris had initially told the police that the shooting occurred before the three were at the party. Defendant presented the testimony of his brother and a friend that defendant was at home and in bed at the time of the shooting.

¶ 7 The jury found defendant guilty of murder with the additional finding that he had been the one who fired the gun.

“Defendant filed a posttrial motion, challenging, among other things, the admission of the inculpatory statements. The court denied the motion and sentenced defendant to 45 years’ imprisonment, a sentence that included a 25-year enhancement based on defendant’s discharge of the firearm. *** Defendant timely appealed, challenging [only] the propriety of the statements’ admission [on the basis that they were involuntary, and a \$100 fine] ***.”
Valle, 405 Ill. App. 3d at 55.

We upheld the statements’ admissibility, but specifically noted that Illinois’ voluntariness standard is not primarily driven by concerns of reliability. *Valle*, 405 Ill. App. 3d at 59-61. Further, we did not address as a pure evidentiary matter the way the recording was presented to the jury.

¶ 8 On April 26, 2011, the trial court received defendant’s petition under the Act. (Defendant mailed it on January 24, 2011, but to the wrong court.) Defendant included a summary at the start of the petition, in which he listed eight claims. Several of the first six clearly related to the performance of trial counsel. For instance, claim five was that “Counsel’s failure to file a MOTION of LIMINIE [*sic*] denied defendant of a fair trial.” The summary section of the petition ended with a declaration in the form of a certification under section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2010)) that the facts set out in the petition were true and correct to the best of defendant’s knowledge.

¶ 9 Defendant’s claims four and seven are the ones at issue in this appeal. Defendant summarized claim four as “Counsel’s failure to argue REASONABLE DOUBT denied defendant of a fair trial.” He summarized claim seven, which is the only claim relating to appellate counsel,

as “Appellate counsel’s failures to file these issues denied defendant of a fair trial.” The full version of defendant’s claim seven is not entirely coherent. It seems to refer to the events of defendant’s arrest and to suggest that one arresting officer’s identification of him was improper. He suggested that trial counsel should have moved to suppress that officer’s identification of him. Defendant then argued as follows:

“[H]ad counsel argued [inadmissibility of the identification,] then asked the Court to consider not whether there is any evidence to support a state conviction, but whether there was SUFFICIENT EVIDENCE to justify a rational trier of facts to find guilt beyond a reasonable doubt... [citation.]

*** [C]ounsel’s failure to do this was not a strategic decision, but one that undermined confidence in the outcome. [T]his let the state dress up a weak and inconclusive case in the trappings of another person could have committed the crime. [H]ad counsel argued ‘CORRECTLY’ then showed that the record is void of probable cause, void of why officers were at defendant’s house, that someone was a suspect, but was released, then argued REASONABLE DOUBT CORRECTLY there is a probability that the motion would have been granted and there is a probability that the outcome of the proceedings would have been different.”

Thus, as to trial counsel, defendant seemed mostly concerned with the events surrounding his arrest, and thought that counsel should have sought to quash the arrest as made without probable cause.

¶ 10 In the full version of his claim seven, defendant concluded:

“[A]ll the issues are of the record, and could have been filed by appellate counsel. [T]his decision not to file them is ERROR.”

¶ 11 On July 20, 2011, the court entered an order summarily dismissing defendant’s petition. The court ruled that trial counsel’s decision not to pursue a motion to quash defendant’s arrest was within the range of choices that the court could presume to be proper trial tactics. It therefore ruled that trial counsel’s choice was not a proper basis for a claim on appeal of ineffective assistance of counsel.

¶ 12 With respect to defendant’s claim seven, the court noted that counsel had filed a posttrial motion arguing that the evidence had been insufficient. The court ruled that, because counsel *did* argue that the evidence was insufficient, defendant’s claim seven did not state a claim for ineffective assistance of trial counsel, and that defendant’s claim of ineffective assistance of appellate counsel therefore failed on this point as well. Defendant timely appealed this dismissal.

¶ 13 II. ANALYSIS

¶ 14 On appeal, defendant devotes just four sentences (not including citations) to the postconviction proceedings in his statement of facts:

“Valle filed a *pro se* petition for post-conviction relief on April 26, 2011. *** He attached affidavits from himself and his brother, Armando Valle. *** The trial court summarily dismissed the petition in a written order dated July 20, 2011. *** This appeal follows.”

In the argument section, defendant asserts, “In his *pro se* post-conviction petition, Valle alleged that his counsel on direct appeal was ineffective for failing to raise a claim challenging the sufficiency of the evidence.” He then argues that his statements in the recorded interrogation were “problematic” and that the statements by Chris and Hector lacked credibility because both witnesses were trying to avoid murder charges and because neither witness was clear on the sequence of

events. He therefore argues that a claim that the evidence was insufficient could have been successful on appeal.

¶ 15 Defendant’s petition cannot reasonably be read to say what defendant now says that it does. As the quoted excerpts show, defendant’s claims primarily related to the conduct of trial counsel. He treated appellate counsel’s conduct in summary fashion, which related back to his fourth claim that trial counsel was ineffective for not arguing the sufficiency of the evidence in the context of probable cause and reasonable doubt. Thus, defendant claimed that appellate counsel was ineffective for not raising the issue of trial counsel’s ineffective assistance. By starting the argument with the incorrect premise that “[i]n his *pro se* post-conviction petition, Valle alleged that his counsel on direct appeal was ineffective for failing to raise a claim challenging the sufficiency of the evidence,” he cuts the legs out from under the rest of his argument. Because defendant’s ineffective-assistance-of-appellate-counsel claim was not in his petition, it is forfeited. 725 ILCS 5/122-3 (West 2010). Further, defendant has forfeited any argument concerning why we should consider his claim despite forfeiture. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 16 Given the failure of defendant’s brief, the State’s response is of limited relevance. The State asserts that, because we held that the trial court did not err in admitting defendant’s statements, “the argument relating to the credibility of defendant’s statement is *res judicata* as it has already been ruled on.” On direct appeal, we noted that “[d]efendant would have to look to [a specified group of] out-of-state cases to find decisions holding statements made under comparable circumstances to be involuntary.” *Valle*, 405 Ill. App. 3d at 59-60. As to those cases, we pointed out:

“[The out-of-state cases discussed] share a trait not characteristic of Illinois law: a concern with empirical evidence of what police tactics make confessions unreliable. That concern

led those courts to place a much greater weight on the use of deception and implications of leniency than has any Illinois decision of which we are aware.” *Valle*, 405 Ill. App. 3d at 61. In other words, rather than addressing the merits or lack thereof of the accuracy of the statements, we determined it was not a substantive factor relating to the admissibility of the statement(s). We were careful to note that, had Illinois law made the accuracy of confessions the primary concern for admissibility, the result might have been different. We did not determine, as the State suggests, the nature and extent of the accuracy of the statements.

¶ 17

III. CONCLUSION

¶ 18 For the reasons stated, we affirm the dismissal of defendant’s postconviction petition.

¶ 19 Affirmed.