

No. 1-11-0582

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

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Respondent-Appellee,)	Cook County.
)	
v.)	99 CR 22617
)	
RUDOLFO GARCIA,)	Honorable
)	Matthew E. Coghlan,
Petitioner-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justice Lampkin and Justice Reyes concurred in the judgment.

ORDER

HELD: Trial court's dismissal of petitioner's postconviction petition following a third-stage evidentiary hearing was not manifestly erroneous.

¶ 1 Petitioner Rudolfo Garcia appeals the third-stage dismissal of his petition for postconviction relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2002)). For the reasons that follow, we affirm.

No. 1-11-0582

¶ 2 On June 23, 2000, following a bench trial, petitioner was found guilty of first-degree murder of Pablo Gomez under an accountability theory and was sentence to 20 years' imprisonment. Petitioner appealed his conviction, arguing the trial court erred in finding him accountable for the victim's beating death and that the court further erred in finding he did not withdraw from the criminal enterprise. We affirmed petitioner's conviction and sentence on direct appeal. *People v. Garcia*, No. 1-00-3614 (2002) (unpublished order under Supreme Court Rule 23). The Illinois Supreme Court denied his petition for leave to appeal. *People v. Garcia*, 202 Ill. 2d 682 (2003).

¶ 3 Petitioner filed a *pro se* postconviction petition alleging, among other things, ineffective assistance of trial and appellate counsel. The *pro se* petition was docketed and defense counsel was appointed.

¶ 4 Appointed counsel filed a supplement postconviction petition. Counsel alleged that trial counsel had been ineffective for: failing to file a motion to suppress petitioner's videotaped statement; misapprehending the law of accountability when he conceded that the victim's beating death was a foreseeable consequence of the petitioner's conduct; and misinforming petitioner about the exculpatory nature of his statement resulting in a waiver of his right to testify.

¶ 5 The State moved to dismiss the *pro se* postconviction petition and the supplemental postconviction petition. After hearing arguments from the parties, the court denied the State's motion to dismiss and scheduled an evidentiary hearing. The State moved to clarify and reconsider. After considering the State's motion, the court dismissed the issues raised in the *pro se* postconviction petition and determined that the evidentiary hearing would only address the issues raised in the supplemental postconviction petition.

No. 1-11-0582

¶ 6 Following the evidentiary hearing, the court entered an order dismissing the supplemental postconviction petition. The court denied appointed counsel's motion for reconsideration or for a new evidentiary hearing. The court subsequently vacated its previous order dismissing petitioner's supplemental postconviction petition and issued a revised order dismissing the petition. The revised order included a response to the petitioner's motion for reconsideration.

¶ 7 This appeal followed. The parties are familiar with the underlying facts of the case. Moreover, the facts are set out at length in our decision on direct appeal and therefore we repeat only those facts relevant to the disposition of the issues raised in this postconviction appeal.

¶ 8 ANALYSIS

¶ 9 In a noncapital case such as this, the Act provides a three-stage process by which criminal defendants may assert that their convictions or sentences were the result of a substantial denial of their constitutional rights. *People v. Coleman*, 183 Ill. 2d 366, 378-79 (1998). A postconviction action is not an appeal from the judgment of conviction, but rather is a collateral attack on the trial court proceedings. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Therefore, issues that were decided on direct appeal are barred by *res judicata* and issues that could have been raised, but were not, are forfeited. *Beaman*, 229 Ill. 2d at 71.

¶ 10 In the instant case, petitioner's petition advanced to a third-stage evidentiary hearing. If a petition is dismissed following a third-stage evidentiary hearing at which fact-finding and credibility determinations were made, the dismissal is reviewed for manifest error. *Beaman*, 229 Ill. 2d at 72. "Manifest error is that which is 'clearly evident, plain, and indisputable.'" *People v. Johnson*, 206 Ill. 2d 348, 360 (2002) (quoting *People v. Ruiz*, 177 Ill. 2d 368, 384-85 (1997)).

No. 1-11-0582

¶ 11 On appeal, petitioner raises several claims of ineffective assistance of counsel. Both the United States and Illinois Constitutions guarantee a criminal defendant the assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8. This requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *United States v. Cronin*, 466 U.S. 648, 655-56 (1984).

¶ 12 The test for determining an ineffective assistance of counsel claim was established in *Strickland v. Washington*, 466 U.S. 668, 691-98 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). The test is comprised of two prongs: deficiency and prejudice.

¶ 13 In order for a defendant to obtain reversal of a conviction based on an ineffective assistance of counsel claim, he or she must show that: (1) counsel's performance was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance so prejudiced defendant that there is a reasonable probability that, absent the errors, the outcome of the trial would have been different. *People v. White*, 322 Ill. App. 3d 982, 985 (2001). "The fundamental concern underlying this test is 'whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *People v. Powell*, 355 Ill. App. 3d 124, 14 (2004) (quoting *Strickland*, 466 U.S. at 686).

¶ 14 A defendant must satisfy both prongs of the *Strickland* test in order to prevail on a claim of ineffective assistance of counsel. However, it is well settled that if the claim can be disposed of on the ground that defendant did not suffer prejudice from the alleged ineffective performance, then the

No. 1-11-0582

court need not determine whether counsel's performance was constitutionally deficient. *Strickland*, 466 U.S. at 697; *People v. Griffin*, 178 Ill. 2d 65, 74 (1997); *People v. Flores*, 153 Ill. 2d 264, 283-84 (1992).

¶ 15 Petitioner first contends trial counsel was ineffective for failing to move to suppress his videotaped statement because it was obtained in violation of his fifth amendment right to counsel. Petitioner maintains that after he was arrested, he requested his counsel's presence before giving the videotaped statement, but that investigators ignored the request and continued to interrogate him in violation of his right to counsel. Petitioner claims that prior to trial, he informed trial counsel of the circumstances surrounding his custodial interrogation, but counsel still failed to move to suppress his videotaped statement.

¶ 16 The decision whether to file a motion to suppress is generally considered a matter of trial strategy that typically will not support a claim of ineffective assistance of counsel. *People v. Snowden*, 2011 IL App (1st) 092117, ¶ 70. In order for a defendant to establish he was prejudiced by counsel's failure to file a motion to suppress, he must show a reasonable probability the motion would have been granted and that the outcome of the trial would have been different if the evidence at issue had been suppressed. *People v. Henderson*, 2012 IL App (1st) 101494, ¶ 8. The failure to file a motion to suppress does not establish incompetent representation when it turns out the motion would have been futile. *People v. Givens*, 237 Ill. 2d 311, 331 (2010).

¶ 17 Applying these principles to the instant case, we find petitioner has failed to show that trial counsel's performance was constitutionally deficient or that he was prejudiced by counsel's decision not to file a motion to suppress his videotaped statement. Petitioner's allegations that he requested

No. 1-11-0582

his counsel's presence before giving the videotaped statement and that investigators ignored the request and continued to interrogate him was rebutted by the videotape.

¶ 18 During the videotaped portion of the interview, the following exchange occurred between petitioner and the assistant state's attorney:

"MR. GRAPSAS [Assistant State's Attorney]: Rodolfo Garcia, I explained that I am an Assistant State's Attorney, a lawyer and prosecutor and not your lawyer; is that correct?

PETITIONER: Yes.

MR. GRAPSAS: And before we spoke, I advised you of your constitutional rights; is that correct?

PETITIONER: Yes.

MR. GRAPSAS: I am going to read you your rights again. Do you understand that you have the right to remain silent?

PETITIONER: Yes.

MR. GRAPSAS: Do you understand that anything you say can be used against you in a court of law?

PETITIONER: Yes.

MR. GRAPSAS: Do you understand you have the right to talk to a lawyer and have him present with you while you are being questioned?

PETITIONER: Yes.

MR. GRAPSAS: Do you understand if you cannot afford to hire a lawyer and you want one, a lawyer will be appointed by the court to represent you before any questioning?

No. 1-11-0582

PETITIONER: Yes.

MR. GRAPSAS: Understanding these rights, do you wish to talk to us now?

PETITIONER: Yes.

MR. GRAPSAS: Rodolfo Garcia, I asked you if you would agree to have your statement videotaped; is that correct?

PETITIONER: Yes.

MR. GRAPSAS: This is the form you signed agreeing to have the statement videotaped, isn't it?

PETITIONER: Yes.

* * *

MR. GRAPSAS: Rudy, how have you been treated since you been there [*sic*]?

PETITIONER: Good.

MR. GRAPSAS: How have the police treated you?

PETITIONER: Good.

MR. GRAPSAS: How have I treated you?

PETITIONER: Good.

MR. GRAPSAS: Were any threats or promises made to you in return for your statement?

PETITIONER: No, sir."

¶ 19 Petitioner's allegations that his statement was involuntary and obtained in violation of his right to counsel is rebutted by his own videotape statement. See, *e.g.*, *Crawford v. State*, 105 S.W.3d

No. 1-11-0582

926, 930 (Mo. App. 2003) (defendant's contention that he requested an attorney before giving his statement was rebutted by his own videotaped statement). The videotaped statement does not at all suggest the scenario, which petitioner presents, of a hostile interview followed by an involuntary statement.

¶ 20 Petitioner claims there is no reason to assume his videotaped statement included everything that occurred during the interview, however the fact remains that on the videotape, he was advised of his *Miranda* rights and he voluntarily waived them. For someone who alleged he so adamantly and repeatedly requested counsel prior to giving his statement, it is unlikely he would fail to continue to do so at the time of his videotaped statement. Rather, the videotaped statement shows that before the petitioner gave his statement he was read his *Miranda* rights and indicated he understood them, he was admonished that he had a right to talk to an attorney and have an attorney present during questioning. Petitioner further indicated he had been treated well by the police and the assistant state's attorney. He also acknowledged he was not threatened or promised anything in exchange for his statement. Under these circumstances, we cannot say that defense counsel's decision not to file a motion to suppress petitioner's videotaped statement was anything other than a reasonable trial strategy.

¶ 21 Moreover, petitioner fails to demonstrate he was prejudiced by trial counsel's alleged failure to move to suppress the videotaped statement. Even if trial counsel had filed a motion to suppress the videotaped statement and the trial court granted the motion, we cannot find that the result of the trial would have been any different.

¶ 22 Witness testimony established the petitioner agreed with his fellow gang members to commit

No. 1-11-0582

a battery upon rival gang members. The victim's beating death occurred as a result of a battery which, independent of petitioner's videotaped statement, showed he knowingly participated in and facilitated by driving his vehicle into a rival gang member's car. Therefore, even if the evidence consisted only of the testimony of the State's witnesses, this was sufficient to find petitioner guilty of first-degree murder under a common design theory of accountability where he aided and facilitated the underlying battery. As a result, petitioner fails to satisfy the second prong of the *Strickland* analysis: that his defense was prejudiced by trial counsel's alleged failure to move to suppress the videotaped statement.

¶ 23 Petitioner finally contends he did not knowingly waive his right to testify at trial. A criminal defendant has a constitutional right to testify in his own defense, but that right may be waived. *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005). As a general rule, advice not to testify is a matter of trial strategy that does not constitute ineffective assistance, unless counsel refused to allow the defendant to testify. *People v. Coleman*, 2011 IL App (1st) 091005, ¶ 29.

¶ 24 Petitioner argues that his waiver of the right to testify was not made knowingly because it was predicated on his trial counsel's misunderstanding of the law of accountability. Petitioner maintains that trial counsel mistakenly believed he could not be found guilty of first-degree murder under an accountability theory unless the State proved that he intended to commit the murder itself, and not just the battery that led to the murder. Defendant's assertions are not supported by the record.

¶ 25 The record shows that after the State shifted its theory of culpability from felony murder predicated on mob action to first-degree murder based on accountability, trial counsel consistently

No. 1-11-0582

argued that the petitioner was not accountable for the victim's beating death because he withdrew from the criminal activity (throwing rocks at rival gang members' homes) prior to the commission of the crime in question. In fact, trial counsel argued that the petitioner was not even present at the scene when the fatal beating occurred. Thus, trial counsel's tactical decision to advise the petitioner not to testify at trial was not based on a misunderstanding of the law of accountability.

¶ 26 Petitioner alternatively argues that his waiver of the right to testify was not made knowingly because it was predicated on trial counsel's failure to recognize that his "likely [trial] testimony" would have been exculpatory even though his custodial statement was inculpatory. At the evidentiary hearing, petitioner claimed he told trial counsel that if he was put on the stand, he would testify he had no intent to commit an unlawful act and that he rammed his vehicle into the vehicle of rival gang members in a defensive maneuver to prevent them from exiting their vehicle. Trial counsel did not recall such a statement.

¶ 27 At the evidentiary hearing, trial counsel testified that petitioner told him his trial testimony would be consistent with his videotaped statement. Counsel advised petitioner not to testify since his testimony would be cumulative to what was already in the videotaped statement, which carried the benefit of no cross-examination. Trial counsel testified he was aware that petitioner had prior convictions that would be used to impeach his credibility and that based on his conversations with petitioner, he did not believe petitioner would be a credible witness. Petitioner ultimately decided not to testify. We do not believe trial counsel's tactical decision to advise petitioner not to testify at trial was incompetent.

¶ 28 Our review of the record of the trial court proceedings shows the trial court fully admonished

No. 1-11-0582

petitioner regarding his right to testify on his own behalf. Petitioner acknowledged he had discussed the matter with his counsel and was electing not to testify. On this record, we find trial counsel's decision not to call petitioner as a witness was a matter of trial strategy that will not support a claim of ineffective assistance of counsel.

¶ 29 For the reasons stated, we affirm the trial court's dismissal of petitioner's postconviction petition.

¶ 30 Affirmed.