2019 IL App (1st) 161550-U

SIXTH DIVISION
March 1, 2019

No. 1-16-1550

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County
	)	
v.	)	No. 11 CR 5122
	)	
MAURICE WILLIAMS,	)	Honorable
	)	Charles P. Burns,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Connors concurred in judgment.

ORDER

¶ 1 ***Held:*** We affirm the order dismissing petitioner's *pro se* postconviction petition at the first stage. Both claims are positively rebutted by the trial record and therefore without merit.

¶ 2 Petitioner-appellant, Maurice Williams, was arrested and convicted of three counts of criminal sexual assault based on three different types of sexual penetration. Petitioner was also convicted of kidnapping. The trial court then sentenced him to five years' imprisonment for each of the three sexual assaults and three years' imprisonment for kidnapping. The sentences were to be served consecutively. On direct appeal, this court affirmed both his conviction and sentence.

¶ 3 In January 2016, petitioner filed a *pro se* postconviction petition. The petition advanced five separate claims alleging either ineffectiveness of trial counsel or ineffectiveness of appellate counsel. After reviewing each claim, the trial court dismissed the petition after determining the issues were barred because they were not raised on direct appeal or they were positively contradicted by the record.

¶ 4 Before this court, petitioner asks us to reverse the dismissal and remand for a second stage postconviction hearing. He argues the trial court erred in dismissing his postconviction petition at the first stage because two of his claims alleging ineffective assistance of trial counsel were not frivolous or patently without merit. His first claim alleges improper conduct by his trial attorney caused him to waive his right to a jury trial. His second issue alleges trial counsel failed to properly investigate the victim's hospital records.

¶ 5 After reviewing the record and relevant case law, we affirm the dismissal of the *pro se* postconviction petition because both claims are rebutted by the trial record. The claims are therefore frivolous and without merit.

¶ 6 JURISDICTION

¶ 7 We initially dismissed this appeal as untimely, however, in an order dated January 25, 2019, the Illinois Supreme Court, in the exercise of its supervisory authority, ordered the prior Rule 23 order be vacated and for us to consider the merits of petitioner's appeal. Accordingly, this appeal follows.

¶ 8 BACKGROUND

¶ 9 The facts of this case are adequately set forth in this court's order in the petitioner's direct appeal (*People v. Williams*, 2015 IL App (1st) 130196-U) and will be repeated only where necessary for the disposition of this postconviction appeal.

¶ 10 After this court affirmed both his conviction and sentence for criminal sexual assault and kidnapping, petitioner timely filed a *pro se* postconviction petition on January 27, 2016. The petition advanced six separate claims alleging either ineffectiveness of trial counsel or appellate counsel on direct appeal. The claims included: (1) trial counsel was ineffective because he threatened to withdraw from petitioner's case unless petitioner waived his right to a jury trial, (2) trial counsel failed to conduct any type of investigation to support petitioner's defense that he had consensual sexual relations with the victim, (3) trial counsel provided ineffective assistance when he failed to interview witnesses who would have supported the petitioner's claims that the victim was a neighborhood prostitute who was exchanging sex for money and drugs, (4) trial counsel provided ineffective assistance by not pursuing a plea deal prior to trial, (5) appellate counsel provided ineffective assistance by failing to raise trial counsel's failure to bring a motion to dismiss based on the State's failure to allege the offense of criminal sexual assault and kidnapping, and (6) petitioner was denied effective assistance of appellate counsel when counsel failed to argue on direct appeal that the State failed to prove him guilty of the charges beyond a reasonable doubt. The petition was supported by affidavits from the petitioner and his mother, Latonya Williams Vortes.

¶ 11 On April 8, 2016, the trial court dismissed petitioner's *pro se* postconviction petition at the first stage. In its order, the court initially determined each claim had been waived or barred by the doctrine of *res judicata*. The court went further and determined all of the claims were also substantially rebutted by the record. Based on its findings, the court dismissed the petition as frivolous and patently without merit.

¶ 12 ANALYSIS

¶ 13 The Post-Conviction Hearing Act creates a procedural instrument allowing a criminally convicted individual to assert a substantial denial of his constitutional rights in the proceedings which resulted in the conviction. 735 ILCS 5/122-1 (West 2016). A postconviction action represents a collateral attack on a conviction and sentence (*People v. Brisbon*, 164 Ill. 2d 236, 242 (1995)) and, as such, does not act as a replacement for a direct appeal (*People v. Kokoraleis*, 159 Ill. 2d 325, 328 (1994)). Illinois case law holds that a postconviction proceeding is limited to "constitutional matters that have not been, nor could have been, previously adjudicated." *People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

¶ 14 A postconviction proceeding progresses in three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). Within 90 days of an individual filing a postconviction petition, a first stage proceeding occurs during which the circuit court reviews the petition, taking all allegations as true, and determines whether "the petition is frivolous or is patently without merit." *People v. Hodges*, 234 Ill. 2d 1, 11 (2009) (quoting *Edwards*, 197 Ill. 2d at 244). Claims are frivolous or patently without merit only when they have no arguable basis in law or fact. *Hodges*, 234 Ill. 2d at 12. The mere unlikelihood of a factual allegation does not make it fantastic or delusional, since the unlikely can turn out to be true. *People v. Wright*, 2013 IL App (4th) 110822, ¶ 21 (citing *Hodges*, 234 Ill. 2d at 13 & n. 5). If the circuit court determines the petition is frivolous or patently without merit, then the court will dismiss it via a written order. 725 ILCS 5/122-2.1(a)(2) (West 2016). This court will review the dismissal of a postconviction petition at the first stage *de novo*. *Hodges*, 231 Ill. 2d at 9.

¶ 15 In his only reviewable issue, petitioner contends the trial court erred in dismissing his petition at the first stage. He argues that two of the claims contained in the petition demonstrate a

substantial violation of his constitutional rights: (1) that he waived his right to a jury trial under duress because of his attorney's threat to withdraw and (2) trial counsel was ineffective for failing to investigate the victim's medical records.[1]

¶ 16 Petitioner first claims that during the trial proceedings his attorney threatened to withdraw from representation if petitioner did not agree to proceed to a bench trial. The affidavit states:

> "My trial counsel did not talk to me about bench trial versus a jury trial. I wanted a jury trial but my trial counsel states we having a bench trial and if I did not agree, he would withdraw from representing me.
>
> I signed the jury waiver under duress of my attorney threats of my trial counsel withdrawing from my case, after me and my family had paid him."

Petitioner claims that since the record is silent as to his allegation, it is unrebutted and should be advanced to the second stage.

¶ 17 Initially, we disagree with the trial court that this claim has been waived due to petitioner's failure to raise it on direct appeal. The purpose of a postconviction proceeding is to allow an inquiry into constitutional issues concerning a conviction or sentence that could not have been determined on direct appeal. *People v. Griffin*, 178 Ill. 2d 65, 72-73 (1997). Given the nature of a postconviction proceeding, "issues that could have been presented on direct appeal, but were not, are waived." *People v. Towns*, 182 Ill. 2d 491, 503 (1998).

¶ 18 As our supreme court has explained, "it is not so much that such a claim 'could not have been presented' or 'raised' by a party on direct appeal, but rather that such a claim could not have been *considered* by the reviewing court because the claim's evidentiary basis was *de hors*

[1] By failing to raise the other issues contained in his postconviction petition, petitioner has waived appellate review of them. See *People v. Munson*, 206 Ill. 2d 104, 113 (2002) (concluding that the petitioner abandon several postconviction claims by failing to raise them on appeal).

the record." (Emphases in original.) *People v. Whitehead*, 169 Ill. 2d 355, 372 (1996) (*overruled on other grounds by People v. Coleman*, 183 Ill. 2d 366, 382-83 (1998)). A postconviction claim will fall into an exception to the waiver rule if the claim was "incapable of consideration by a reviewing court because of rules governing the scope of appellate review." *Id.* This claim is based on petitioner's allegations set forth in his postconviction petition. This could not have been part of the appellate record on direct appeal because it was not part of the trial record. Accordingly, the evidentiary basis of petitioner's claim was *de hors* the record and can be addressed in a postconviction proceeding.

¶ 19 While the trial court erred in finding the issue waived, a dismissal of this claim at the first stage was still proper. A criminal defendant's right to a trial by jury is part of the foundation of our legal system. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Both the United States Constitution and Illinois Constitution protect this right. U.S. Const. amends. VI & XIV; Ill. Const. 1970, art. 1, §§ 8, 13. Given the fundamental nature of this right, only the defendant can give up the right (*People v. Ramey*, 152 Ill. 2d 41, 54 (1992)) and such action must be "made expressly and understandingly." *People v. Smith*, 106 Ill. 2d 327, 334 (1985).

¶ 20 Before this court, petitioner claims his waiver of a jury trial was not voluntary because of the threat to withdraw made by his trial counsel. There is no set formula and whether a waiver was voluntarily made turns of the "facts and circumstances of each particular case." *People v. Frey*, 103 Ill. 2d 327, 332.

¶ 21 Here, the record rebuts petitioner's claim that his decision to waive a jury trial was not voluntarily made. The record discloses the jury issue was discussed at three separate hearings. On June 5, 2012, petitioner, along with both of his attorneys, was present for a hearing on the

State's motion to present other crimes evidence.[2] At the end of the hearing, after the State suggested a June 27, 2012 trial date, the following conversation occurred in petitioner's presence:

"THE COURT: Bench or Jury?

MR. LEVINSOHN: Bench trial.

THE COURT: DDT, indicating bench.

MR. LEVINSOHN: Thank you."

On June 27, 2012, the State told the court it was ready for trial but petitioner was not because his counsel, Mr. Levinsohn, was trying a different case in another part of the county. Petitioner was represented by Mr. Levinsohn's associate Mr. Kottenstette. Petitioner's other attorney, Mr. Dunne, was also present for this hearing. After resetting the trial for July 27, the trial court again inquired as to whether it would be a bench trial. Mr. Kottenstette, in petitioner's presence, responded "Yes." On July 27, before the commencement of trial, the following exchange occurred between petitioner and the trial court:

"THE COURT: Mr. Williams, when you plead not guilty, you have a right to have a trial, and specifically you have a right to have a jury trial. I have in front of me a jury waiver, is this your signature on that document, sir?

THE DEFENDANT: Yes.

THE COURT: By signing that document, you understand you give up you right to have a trial by jury?

THE DEFENDANT: Yes.

[2] The record demonstrates petitioner had two attorneys present at the June 5 hearing: Mr. Levinsohn, who represented petitioner in this criminal matter and Mr. Dunne, who represented petitioner in a different criminal matter, which was pending at the same time. According to the record, Mr. Dunne was from the public defender's office.

THE COURT: Do you understand that the legal effect of signing that piece of paper is that I'm going to decided [sic] today whether you're guilty or not guilty based on the evidence I hear in court; do you understand that?

THE DEFENDANT: Yes.

THE COURT: Have you had an opportunity to talk with Mr. Levinsohn about that decision?

THE DEFENDANT: Yes.

THE COURT: Let the record reflect I find the jury waiver to be knowing, voluntary, and intelligently waived. I'm going to accept the waiver, it's stamped, we're going to make it part of the court record. Okay. Jury has been waived."

The record contains petitioner's jury waiver, which is signed and dated July 27, 2012.

¶ 22 We agree with the trial court that petitioner's claim that his jury waiver was not voluntarily made is rebutted by the record. At three separate court hearings, petitioner indicated he wanted to proceed to a bench trial. At the first hearing, petitioner stood silent as his counsel indicated a bench trial. See *People v. Brials*, 315 Ill. App. 3d 162, 176 (2000) (finding defendant's silence while counsel requested a bench trial in defendant's presence is evidence defendant knowingly and voluntarily waived the right). At a second hearing, when the attorney who threatened to withdraw was not present, petitioner again stood silent when an associate responded the case would still proceed as a bench trial. While the affidavit states that petitioner's attorney "did not talk to me about bench trial versus a jury trial," this is rebutted by his admission to the trial court on the eve of trial that he had an opportunity to talk with his attorney about the decision.

¶ 23 On the eve of trial, petitioner specifically told the judge he wished to waive a jury trial. He informed the court he understood what it meant to waive a jury trial, and then submitted a signed jury waiver form. We also note that petitioner had interacted with the justice system before and had another criminal matter pending in which he was represented by different counsel. See *People v. Bannister*, 232 Ill. 2d 52, 71 (2008) (noting that a reviewing court may also consider a defendant's prior interactions with the justice system in determining whether an individual voluntarily waived a jury trial). The record demonstrates that petitioner expressly and understandingly waived his right to a jury.

¶ 24 In reaching this conclusion, we find the case relied upon by petitioner, *People v. Barkes*, 399 Ill. App. 3d 980 (2010), to be distinguishable from the facts of this case. In *Barkes*, the petitioner alleged his trial counsel was ineffective for refusing to let him waive his right to a jury trial. *Id.* at 988. The petitioner claimed he wanted a bench trial but his trial counsel retorted that he "was running the show and [defendant] was getting a jury trial." *Id.* In remanding for an evidentiary hearing, this court noted that prejudice " 'is presumed if there is a reasonable probability that the defendant would have waived a jury trial in the absence of the alleged error.' " *Id.* (quoting *People v. McCarter*, 385 Ill. App. 3d 919, 943 (2008)). Petitioner notes that the inverse scenario occurred here, but argues for the same outcome.

¶ 25 We disagree *Barkes* requires remand in this case. Where a defendant proceeds to a jury trial, as in *Barkes* and *McCarter*, there are no procedural safeguards in place to determine if that is the desire of the individual defendant. In those situations, there is nothing in the record to rebut petitioners' claims of desiring a bench trial. In contrast to *Barkes* and *McCarter*, the petitioner in this matter was present on three different occasions when the trial court inquired as to whether this matter would be heard by the court or a jury. At the first and second hearing, defendant stood

silent. At the third hearing, the trial court specifically questioned petitioner about his desire for a bench trial. The court informed petitioner: (1) he had a right to a trial by jury; (2) whether he understood that right; and (3) whether he understood the legal effect of the jury waiver he signed. Petitioner responded that he understood his right, and he knew he was giving up that right when he signed the jury waiver. Unlike *Barkes* and *McCarter*, the procedural safeguards rebut petitioner's claim.

¶ 26 We also find dismissal of this issue would be appropriate because it is vague and unsupported. The petition fails to mention the time or the place when the alleged threat occurred. While petitioner's brief claims the threat occurred on the "eve of trial," the affidavits make no such claim. See *Coleman*, 183 Ill. 2d at 381 (noting that a petition must be supported by more than nonspecific and nonfactual assertions); see also *People v. Delton*, 227 Ill. 2d 247, 254 (2008) (stating *pro se* petitioner must provide some factual detail surrounding the constitutional deprivation). Moreover, by the July 27, 2012 trial date, petitioner had already stood silent on two separate occasions while his attorney (or the associate) confirmed to the trial court that it would be a bench trial.

¶ 27 Based on our findings above, this claim is patently without merit and the trial court did not err in dismissing it at the first stage.

¶ 28 Secondly, petitioner claims his trial counsel was ineffective for failing to investigate the victim's medical records from the day she received treatment. Petitioner alleges that in failing to investigate, "counsel ignored what could have been critical impeachment information, as well as information which may have yielded other questions counsel could have confronted the victim with during cross-examination at trial." This claim apparently refers to the victim's denial of using heroin the day of the rape.

¶ 29 Unlike petitioner's first claim, this claim has been waived by the failure to raise it in a direct appeal. This issue involves petitioner's trial attorney's alleged failure to investigate the victim's medical records following the rape. This issue could have been raised on directly appeal and is therefore forfeited. *People v. Coleman*, 168 Ill. 2d 509, 522 (1995).

¶ 30 Even if this issue had not been forfeited, first stage dismissal was still proper. The record reflects that the purported heroin use was a central theme in petitioner's attack on the victim's credibility (*People v. Tate*, 305 Ill. App. 3d 607, 611 (1999) (dismissal is proper where the allegations are contradicted by the trial record)). Additionally, petitioner admits "[he] engages in a bit of speculation presuming that such medical records exist and that they would provide exculpatory information – as in, they would affirm [the victim] was under the influence of narcotics when she was assaulted." See *People v. Pecoraro*, 175 Ill. 2d 294, 324 (1997) (noting that a claim of ineffectiveness cannot be based on speculation or conjecture). Either the contradicted trial record or petitioner's speculation represent an independent basis for dismissing this issue at the first stage.

¶ 31 Trial counsel was aware of the victim's alleged intoxication and repeatedly pointed out the fact to the trial court throughout the case. At a preliminary hearing, petitioner's counsel told the court, "[t]he initial interview was terminated because the victim was so intoxicated she couldn't even stay awake." The State obtained the victim's medical records and provided them to petitioner's counsel. The trial transcript shows that petitioner's counsel questioned the victim about her time at the hospital. Both the responding police officer and paramedics testified to the victim's apparent intoxication. Counsel's closing argument was heavily reliant on the fact the victim was intoxicated at the time of the sexual intercourse. He pointed out the victim's drug use, her intoxicated state and her "jumble[d] memory." He argued the evidence showed the victim

"had just used drugs, heroin, just before this event," and that "[s]he was intoxicated during this event." Based on the victim's intoxication, trial counsel argued the victim was confused and got petitioner mixed up with someone else.

¶ 32 Critically, the trial court accepted that the victim was probably intoxicated during the event. In announcing its findings, the trial court stated:

> "[Defense counsel] argues, and argues very convincingly, that [the victim] was under the influence at the time. I think the surrounding circumstances also do indicate that she was under the influence at the time of something, albeit she says she was not, according to the officers, they believed that she was and according to the stipulated testimony of the paramedics, it's inferred also that she was."

Despite agreeing with trial counsel that the victim was intoxicated, the trial court concluded the victim did not consent to the sexual interactions with the petitioner.

¶ 33 Petitioner's claim that trial counsel was ineffective for failing to investigate the victim's medical records and utilize her drug use to attack her credibility is positively rebutted by the record. *People v. Blair*, 215 Ill. 2d 427, 445 (2005) (a waived claim is subject to summary dismissal). Additionally, his claim that further investigation would uncover additional evidence is speculative. *People v. Gosier*, 165 Ill. 2d 16, 24 (1995) (speculation cannot support an ineffective assistance of counsel claim). Accordingly, the trial court did not err in dismissing this claim at the first stage.

¶ 34 CONCLUSION

¶ 35 For the foregoing reasons, we affirm the dismissal of petitioner's postconviction petition at the first stage.

¶ 36 Affirmed.