

No. 1-16-1940

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County
)	
v.)	No. 09 CR 10876-01
)	
FREDERICK CLAIBORNE,)	Honorable
)	Brian Flaherty,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court’s first-stage summary dismissal of the petitioner’s *pro se* post-conviction petition is affirmed. The petitioner’s argument on appeal that his trial counsel was ineffective for failing to attack a witness’s testimony with evidence of prior personal and professional misconduct was not raised in his post-conviction petition and is waived. The petitioner’s arguments originally raised in his post-conviction petition are waived for failure to raise them in the instant appeal.

¶ 2 The petitioner, Frederick Claiborne, appeals from the first-stage dismissal of his *pro se* post-conviction petition, under the Post-Conviction Hearing Act (Act) (725 ILCS 122-1 *et seq.* (West 2008)). On appeal, the petitioner abandons the arguments made in his petition and

contends only that his trial counsel was ineffective for failing to attack Detective Manuel Escalante's testimony that the petitioner confessed to committing armed robbery with evidence of the detective's prior personal and professional misconduct. For the reasons that follow, we affirm.

¶ 3 The petitioner was charged by indictment with one count of armed robbery with a firearm in violation of section 18-2(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/18-2(a)(2) (West 2008)) arising from an incident that occurred on May 14, 2009, and was tried as an adult pursuant to the automatic transfer provision of the Juvenile Court Act of 1987(Act) (705 ILCS 405/5-130(1)(a)(iv) (West 2010)). The petitioner waived his right to a jury trial and the matter proceeded to a bench trial. A full recitation of the facts can be found in this court's order on the petitioner's direct appeal. *People v. Claiborne*, 2014 IL App 12-1581-U. The following facts relevant to our disposition of this appeal were adduced from the pleadings, testimonies of London Hall, Emma Beans, Detective Manuel Escalante, Officer A. Sinnott, Officer Greg Thomas, and other evidence introduced at trial.

¶ 4 The victim, London Hall and his girlfriend, Emma Beans testified that at about 2 a.m. on May 14, 2009, Hall, was sitting in his car with Beans, behind Beans's apartment complex, when three males descended the stairwell of the complex and surrounded his car. Two of the males were positively identified as the petitioner, then age 16, and Lorenzo Richardson.¹ The petitioner then pulled out a gun and pointed it at Hall's head, while Richardson ordered Hall and Beans to exit the vehicle. After they exited the vehicle, the petitioner continued to point the gun at Hall's face from a distance of about two feet away, while Richardson searched Hall's pockets and retrieved his cell phone, money, driver's license, and social security card. The men then escaped

¹ Richardson was the petitioner's codefendant at trial, but is not a party to this appeal.

towards the front of the apartment complex, while Hall and Beans ran upstairs to Beans' apartment and called the police. When Officer A. Sinnott arrived at the scene, Hall and Beans provided him with a description of the perpetrators as well as the details of the offense.

¶ 5 Later that morning, Beans encountered Richardson in a neighbor's apartment and called the police. Beans observed the petitioner and Richardson enter another apartment in the complex. Officer Sinnott and another officer returned to the complex in response to Beans's call, and she directed them to the apartment that she observed the petitioner and Richardson enter. The officers searched the apartment and discovered the petitioner and Richardson in one of the bedrooms. According to Officer Sinnott, the petitioner was lying on the floor, but seemed to be engaged in some type of activity because he was sweating heavily. The officers retrieved a loaded handgun, along with Hall's money, social security card, identification, and cell phone near where the petitioner was found.

¶ 6 Beans and Officer Thomas testified that the officers brought three suspects out of the apartment, one-by-one, for a show-up. Beans stated that she identified the petitioner as having held the "gun to [Hall's] head." Officer Sinnott testified that Beans identified the petitioner as one of the participants in the crime, but that she did not specifically state his role. The petitioner and Richardson were taken into police custody.

¶ 7 At the police station on the morning after the robbery, Hall viewed a lineup and identified the petitioner as the individual who held the gun in his face during the robbery. That same day, Hall viewed a second lineup and identified Richardson as the individual who searched his pockets and took his belongings.

¶ 8 Detective Escalante testified that he spoke with the petitioner on the day of his arrest and that he confessed to participating in the armed robbery; however the petitioner claimed that he

used a toy or a “BB” gun that was similar to the handgun recovered by police at the time of his arrest. When asked if he gave the petitioner an opportunity to write down his confession, Detective Escalante stated, “[w]e just took his statement.” There is no evidence in the record that the State introduced audio, video, or a written recording of the petitioner’s confession. The State rested, and thereafter, the petitioner rested without testifying or calling any witnesses.

¶ 9 Following closing arguments, the trial court found the petitioner guilty of armed robbery with a firearm, stating that it relied on: (1) Detective Escalante’s testimony that the petitioner confessed to committing the crime; (2) the fact that Hall’s belongings were found near where the petitioner was lying down, appearing to pretend to sleep while sweating and having a rapid heartbeat; and (3) the fact that Hall had four or five minutes to view the petitioner as he held the gun in his face. The petitioner’s motion for a new trial was denied, and the matter proceeded to a sentencing hearing. The petitioner was sentenced to 10 years’ imprisonment for the robbery conviction, plus a mandatory 15-year enhancement for the use of a firearm with a term of 3 years’ mandatory supervised release. The trial court denied the petitioner’s motion to reconsider the sentence.

¶ 10 On direct appeal, the petitioner maintained that: (1) the statutory scheme under which he was prosecuted and sentenced violated his rights under the state and federal constitutions by mandating that he be sentenced as an adult and giving no regard to his youthfulness and its attendant circumstances; (2) the mandatory sentence enhancement under section 18-2 of the Code, as applied to him, was unconstitutional; (3) the trial court abused its discretion in imposing his sentence by failing to properly consider substantial mitigating evidence, and applying its own “emotional attachment” to the case, along with an improper double enhancement. This court

rejected the petitioner's claims of error and affirmed his conviction and sentence. *Claiborne*, 2014 IL App 12-1581-U.

¶ 11 The petitioner filed a *pro se* post-conviction petition, in which he maintained that his trial attorney was ineffective for the following reasons: (1) “[s]he failed to impeach the states [sic] witnesses London Hall, Emma Bean, Officer M. Escalante #412, Officer Greg Thomas #819 and Officer A. Sinnot [sic] #960 with inconsistent [sic] statements made on the scene report and the indictment report and then again at trial;” (2) “My attorney was ineffective for failing to challenge witness description of petitioner on the scene report[,] indictment report[,] and at trial;” (3) “she failed to set grounds for perjury [sic] of [Beans] *** where she stated on the *** scene report and at trial that she did not know us or nothing about us, yet *** on stand *** stated she knew petitioner;” (4) “counsel refused to ask any questions petitioner asked trial counsel to ask states [sic] witnesses which would stand to further prove victims [sic] and petitioner knew each other better than witness lead [sic] on;” and (5) “allow[ed] state’s witness [sic] to change their original statement from the indictment report. During trial each witness testified to something different than [sic] their original indictment testimony.”

¶ 12 The petitioner also maintained in his post-conviction petition that his appellate attorney was ineffective for “failing to raise ineffective assistance of counsel against petitioner [sic] trial attorney for [f]ailing to object [to] and/or raise the above stated points.” Lastly, the petitioner contended that “he was not proven guilty beyond a reasonable doubt, when considering the fact that the trial judge based his finding of guilt on Detective Escalante [sic] unsupported testimony that petitioner allegedly admitted to his participation in the crime.” The petitioner explained that he was unable to attach copies of police reports to his petition because his attorney did not have them and, the Harvey Police Department had not responded to his requests for the documents.

The only affidavit attached to the petition was the petitioner's own affidavit. He explained that he intended to attach the affidavits of two additional witnesses, but was unable to locate the witnesses, was indigent, and incarcerated.

¶ 13 The circuit court summarily dismissed the petitioner's post-conviction petition at stage one as frivolous and patently without merit, stating that the petitioner seemed to be "second guessing his attorney regarding the decisions the attorney made on what witnesses to call and not call." The circuit court found that those are strategic trial decisions that the trial attorney is allowed to make. The court also stated that the issues could have been raised on direct appeal, but were not. This appeal followed.

¶ 14 On appeal, the petitioner has raised no claim of error based upon the arguments raised in his *pro se* post-conviction petition. He argues only that his petition raised an arguable claim of ineffective assistance based upon his counsel's failure to attack Detective Escalante's testimony regarding his confession with available evidence of Detective Escalante's personal and professional misconduct. The State contends that the petitioner's argument on appeal is waived because it was not raised in his post-conviction petition. We agree with the State.

¶ 15 Pursuant to the Act, a post-conviction proceeding, that does not involve the death penalty, has three distinct stages. 725 ILCS 5/122-1 *et seq.* (West 2008); *People v. English*, 2013 IL 112890, ¶¶ 22-23. In the first stage, the defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). In order to survive dismissal at this stage, a petition must present only the "gist" of a constitutional claim. *Id.* (citing *People v. Porter*, 122 Ill. 2d 64, 74 (1988)). The term "gist" describes what the petitioner must allege at the first stage; it is not the legal standard used by the court to evaluate the petition. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). The legal standard is

whether the petition is frivolous or patently without merit, meaning it has no arguable basis in law or fact. *Id.* at 16. “A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation.” *Id.* We review the summary dismissal of a post-conviction petition *de novo*. *Id.* at 9.

¶ 16 The question raised on appeal from a dismissal of a post-conviction petition is whether the allegations in the petition, liberally construed and taken as true, are sufficient to invoke relief under the Act. *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (citing *People v. Coleman*, 183 Ill. 2d 366, 388 (1998)). Generally, a claim not raised in a post-conviction petition cannot be argued for the first time on appeal. *Jones*, 213 Ill. 2d at 505. While our supreme court may relax the waiver rule by invoking its supervisory power, this court “is not free, *** to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition.” *Id.* at 508.

¶ 17 The petitioner maintains that this court should interpret his arguments that: (1) his trial counsel was ineffective for failing to impeach Detective Escalante with inconsistent statements in the “scene report,” “indictment report,” and during trial; (2) his trial counsel was ineffective for allowing state’s witnesses to testify inconsistently with their “original indictment testimony;” and (3) he was not proven guilty beyond a reasonable doubt when the trial court relied on the unsupported testimony of Detective Escalante that he confessed to committing the crime, as a claim that his trial counsel was ineffective for failing to attack Detective Escalante’s testimony with evidence of the detective’s personal and professional misconduct. However, the arguments that Detective Escalante should have been impeached with inconsistent statements, that other witnesses testified inconsistently with their “original indictment testimony,” and that the petitioner was not proven guilty beyond a reasonable doubt are not equivalent to the argument

that Detective Escalante should have been attacked with evidence of his personal and professional misconduct. Because the petitioner raised the argument that his trial counsel was ineffective for failing to attack Detective Escalante's testimony with evidence of his personal and professional misconduct for the first time on appeal, we find that it is waived. *Jones*, 213 Ill. 2d at 505, 508. However, the petitioner is not entirely without recourse as he "may raise the issue in a successive petition if he can meet the strictures of the 'cause and prejudice test.'" *Id.* at 508.

¶ 18 Additionally, we note that the petitioner made no argument in the instant appeal addressed to the specific allegations in his *pro se* post-conviction petition. Since all issues known to the petitioner or his counsel are forfeited if not raised on appeal, the petitioner has forfeited all claims of error addressed to allegations raised in his *pro se* post-conviction petition. *People v. Logan*, 49 Ill. App. 3d 787, 791 (1977).

¶ 19 Based upon the foregoing analysis, we affirm the judgment of the circuit court dismissing the petitioner's post-conviction petition.

¶ 20 Affirmed.