2018 IL App (2d) 160748
No. 2-16-0748
Order Filed December 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-479
RUBEN BETANCE-LOPEZ,	)	Honorable John A. Barsanti,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Presiding Justice Birkett and Justice Schostok concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed the judgment of the trial court properly dismissing the postconviction petition at the first stage, and defendant forfeited his claims by not raising them in his direct appeal.

¶ 2 Defendant, Ruben Betance-Lopez, appeals an order of the circuit court of Kane County summarily dismissing his petition under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2016)) seeking relief from his conviction of predatory criminal sexual assault of a child based on anal penetration (720 ILCS 5/12-14.1(a)(1) (West 2010)). We affirm.

¶ 3 I. BACKGROUND

¶ 4 The victim of defendant's crimes was his six-year old step-granddaughter, M.M. On May 19, 2011, a grand jury returned a 16-count indictment, charging defendant with committing

offenses against M.M. between September 1, 2010, and March 5, 2011. As it pertains to this appeal, count I charged defendant with predatory criminal sexual assault of a child in that he committed an act of sexual penetration by putting "his penis in the sex organ of M.M." Count VII charged defendant with predatory criminal sexual assault of a child in that he committed an act of sexual penetration by putting "his penis in the buttocks of M.M." Count XIV charged defendant with aggravated criminal sexual abuse in that he "placed his penis on the buttocks of M.M." for the purpose of sexual gratification or arousal.

¶ 5 A bench trial commenced on March 4, 2013. Karla Betance testified that she was M.M.'s mother and defendant's step-daughter. On March 5, 2011, she and M.M. lived with defendant. Around 2 p.m. that day, Karla arrived home and called out to M.M. to come downstairs to eat. When M.M. did not respond, Karla went upstairs to find her. The door to defendant's room was locked, but Karla was able to open it. Upon opening the door, she saw defendant stand up from the bed. M.M. was in the bed, partially covered by a blanket. It appeared to Karla that M.M. was pulling up her pants. Karla removed the blanket and saw that M.M.'s pants and underwear were down.

¶ 6 Karla immediately drove M.M. to Kendall Immediate Care. During the drive, Karla asked M.M. what had happened. M.M. first started crying and refused to answer, and then disclosed that defendant "would put his pito in her chochita." According to Karla, "pito" meant "penis," and "chochita" meant "vagina."

¶ 7 M.M. was eight years old at the time of trial. She testified that her "grandpa" "was doing something bad to me." It happened in defendant's room, where M.M. would go to watch the Disney channel. She and defendant were under the covers. M.M. testified that his "private parts" touched her "on the back of [her] private parts." The State showed M.M. a drawing of an

adult male and asked her to place an "X" on the part of the body that had touched her. She marked an "X" on the male's penis. The State then showed her a drawing of a female child and asked her to place an "X" on the part of the body that defendant had touched. She marked on "X" on the female child's buttocks.

¶ 8 Dr. Vipuli Jayensinghe testified that she was a physician at Kendall Immediate Care, where she examined M.M. on March 5, 2011. M.M. told Dr. Jayensinghe that her grandfather would put "his pipito in her pee area," that it hurt when he did it, and that it had happened several times. Dr. Jayensinghe's physical examination revealed three small red dots, as well as redness in the left pubic area. The doctor concluded "mostly by the history" that M.M. had been sexually abused. She called the police and sent M.M. to the emergency room for further examination.

¶ 9 Dr. Sangita Rangala testified as an expert in the field of "sexual assault examination of children." On March 5, 2011, she examined M.M. at the pediatric emergency department of Edwards Hospital and completed a sexual assault kit. As part of the sexual assault kit, she collected M.M.'s clothing and swabbed the internal and external parts of the vagina and anus.

¶ 10 Dr. Rangala testified that she categorized her findings upon examination of M.M. as "intermediate," because there were "no acute findings of sexual assault trauma." However, the doctor explained that the absence of findings of acute trauma did "not at all" indicate the absence of sexual abuse. She testified that 98% of her examinations were normal, because "[a] lot of times, abuse do[es] not leave a mark" or it leaves only redness or irritation that disappears within a few hours.

¶ 11 Christopher Webb testified that he was a forensic scientist with the Illinois State Police and that he performed forensic testing of the evidence collected from M.M. as part of the sexual assault kit. The vaginal swab, the anal swab, the external genitalia swab, and the underwear all

tested positive for semen. The semen stains on the underwear were in the "inside front area" and "inside crotch area." The semen found on the underwear produced a male DNA profile from which defendant could not be excluded. The semen found on the external genitalia swab produced a male DNA profile that matched defendant's DNA profile. The semen found on the anal swab did not produce a sufficient amount of male DNA to develop a DNA profile.

¶ 12 Orlando Arroyo testified that he was a child protection investigator with the Department of Children and Family Services (DCFS). Arroyo testified that he participated in an audio-recorded interview of defendant with Commander Timothy Bosshart at the Aurora police department on March 7, 2011. During the interview, Commander Bosshart spoke English, defendant spoke Spanish, and Arroyo served as the interpreter. Specifically, Commander Bosshart asked questions in English, Arroyo repeated them in Spanish, defendant answered in Spanish, and Arroyo repeated the answers in English. According to Arroyo, defendant admitted during the interview to rubbing his penis on M.M.'s vagina and buttocks. When asked how defendant described touching his penis on the buttocks, Arroyo testified that he "described just a circular motion around the—on the buttocks not the anus."

¶ 13 Before playing the audio-recording of the interview for the court, the State showed Arroyo a written transcript of the recording, in which the English portion of the interview was transcribed verbatim and the Spanish portion of the interview was translated into English. Arroyo testified that he had reviewed the transcript and that it "fairly and accurately translate[d] from whatever Spanish words were made to English." He further testified that the transcript was a fair and accurate transcription of the interview.

¶ 14 The State moved to admit the written transcript into evidence, and defense counsel objected on two bases. First, defense counsel argued that "we don't know who transcribed those

audio statements" and "we don't know whether [the] Spanish portion[s] [were] translated correctly and accurately." Second, defense counsel argued that the transcript was unnecessary and improperly "highlight[ed]" defendant's statements, when the recording alone was sufficient.

¶ 15 The court overruled the objections, finding Arroyo's testimony that he reviewed the transcript and that it fairly and accurately reflected both the English and Spanish portions of the recording, was sufficient to lay a foundation to admit the transcript. Further, the court found that the transcript did not "highlight" the evidence, because the Spanish portions of the recording "would have no meaning" to the court without the English-translation transcript.

¶ 16 At this point, defense counsel offered a third objection. Counsel argued that, because the recording contained Arroyo's live interpretations of defendant's Spanish answers, the English-translation transcript was unnecessary. The State responded that the transcript's English translations allowed the court to assess whether Arroyo's live interpretations were accurate. Defense counsel then responded, "if the [d]efense believes that there's an unfair translation, we would certainly call a witness to that effect." Defense counsel further stated, "[a]t this point, we don't take issue with the translation." Defense counsel indicated that "[w]e accept that Investigator Arroyo has accepted that it's fair and accurate." The court then admitted the audio-recording and the written transcript into evidence.

¶ 17 During the recorded interview, which was played for the court, defendant admitted touching M.M.'s vagina with his hand and penis on approximately four occasions. However, he denied inserting his penis into her vagina. In addition, he admitted placing his mouth, lips, and tongue on M.M.'s vagina. He further admitted to grabbing M.M.'s buttocks with his hands and rubbing his penis on her buttocks. Defendant was then asked if he "put it inside." Arroyo's live interpretation of defendant's answer was: "No just rubbing it on her butt. I did not insert it or

anything." The written transcript's English translation of defendant's answer was: "No only around the rim I would do like this but I would not put it inside or anything." Defendant admitted that this happened "three or four times."

¶ 18 The State rested its case, and defendant presented no evidence.

¶ 19 The trial court found defendant guilty of counts I, VII, and XIV. Regarding count I, which charged defendant with predatory criminal sexual assault of a child in that he committed an act of sexual penetration by putting "his penis in the sex organ of M.M.," the trial court found that the words "in the sex organ of M.M." were surplusage. The court explained that, to prove an act of sexual penetration, the State had to prove "any contact, however slight, between the sex organ or anus of one person by an object, the sex organ, mouth or anus of another person" (720 ILCS 5/12-12(f) (West 2010)). The court found that defendant admitted to contact between his penis and M.M.'s vagina and that the DNA evidence corroborated defendant's confession.

¶ 20 Regarding count VII, which charged defendant with predatory criminal sexual assault of a child in that he committed an act of sexual penetration by putting "his penis in the buttocks of M.M.," the court again found that the words "in the buttocks of M.M." were surplusage, and found that defendant had used his penis to make contact with M.M.'s anus. The court based its finding on defendant's confession during his police interview that he rubbed his penis "around the rim" of M.M.'s anus, and the presence of semen on the anal swab that corroborated defendant's confession. Based on this evidence, the court also found defendant guilty of count XIV, which charged defendant with aggravated criminal sexual abuse in that he "placed his penis on the buttocks of M.M." for the purpose of sexual gratification or arousal.

¶ 21 The court imposed consecutive eight-year sentences for counts I and VII. It ruled that the conviction of count XIV merged into the conviction of count VII, so it imposed no sentence for count XIV.

¶ 22 On direct appeal, defendant challenged only his conviction of count VII, and asked that we "reverse [defendant's] conviction for predatory criminal sexual assault based on an act of anal penetration." He argued that the trial court improperly relied on the transcript of the audio-recording of his interview as substantive evidence, and that the State failed to prove beyond a reasonable doubt that his penis made any contact with the victim's anus. We determined that the trial court properly relied on the transcript—including the "around the rim" statement—as substantive evidence, and that any rational trier of fact could have found beyond a reasonable doubt that defendant's penis made contact, however slight, with the anus of M.M. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 43.

¶ 23 In his postconviction petition, defendant raised two issues alleging ineffective assistance of trial counsel: (1) trial counsel should have cross-examined Arroyo on the accuracy of the admitted transcript, and (2) trial counsel should have offered an independent written translation of the audio-recording. Defendant attached to his petition an alternative written translation of the audio-recording, which was transcribed by a private company, Multilingual Connections (MC translation). On May 24, 2018, the trial court found that defendant had waived these claims because he failed to include them in his appeal, even though he was aware of the facts that formed the bases of these claims at the time of his appeal. The trial court further noted that, even had his claims not been barred, defendant failed to demonstrate that he had been prejudiced by his counsel's performance. Consequently, the trial court summarily dismissed the petition at the first stage of the postconviction proceeding. Defendant timely appealed.

¶ 24 II. ANALYSIS

¶ 25 This appeal presents two issues: (1) whether the trial court erred in ruling that defendant forfeited his claims of ineffective assistance of trial counsel by failing to raise the issues in his direct appeal, and if not, (2) whether the trial court erred in finding that defendant failed to establish that, but for deficiencies of his trial counsel, there was a reasonable probability that the result of his trial would have been different.

¶ 26 The Act provides a method whereby a person imprisoned in the penitentiary may assert that his or her conviction was the result of a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1(a)(1) (West 2016). The action is limited to a review of constitutional claims not presented at trial. *People v. Greer*, 212 Ill. 2d 192, 203 (2004). "[A]ny issues considered by the court on direct appeal are barred by the doctrine of *res judicata*, and issues which could have been considered on direct appeal are deemed procedurally defaulted." *Ligon*, 239 Ill. 2d at 103. Moreover, any claim not raised in the "original or amended petition is deemed waived."[1] *Ligon*, 239 Ill. 2d at 103-04.

[1] We acknowledge that the terms "waiver" and "forfeiture" have at times been used interchangeably, though they each represent distinct doctrines. *People v. Hughes*, 2015 IL 117242, ¶ 37. "Waiver" is the voluntary relinquishment of a known right, whereas "forfeiture" is a failure to timely comply with procedural requirements. *Hughes*, 2015 IL 117242, ¶ 37. A party's failure to raise an issue in his or her posttrial motion or petition for leave to appeal results in a "forfeiture" of that issue. See *People v. McCarty*, 223 Ill. 2d 109, 122-23 (2006). Thus, while the trial court and litigants relied on caselaw that used the term "waiver," they were actually discussing whether defendant "forfeited" particular issues.

¶ 27 Postconviction proceedings advance in three stages. At the first stage, the trial court conducts an independent review, considering the allegations of the petition as true, and summarily dismisses any petition that is frivolous or patently without merit if it has "no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Petitioners need only present the gist of a constitutional claim to survive this initial stage. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). We conduct a *de novo* review of first-stage summary dismissals. *Brown*, 236 Ill. 2d at 184.

¶ 28 Defendant argues that his claims were not procedurally forfeited and that they had arguable bases in law and fact. The State responds that these issues were not raised in defendant's direct appeal, though they could have been, and that they are forfeited.

¶ 29 In his petition, defendant alleged that his trial counsel's performance was deficient because she did not question Arroyo on certain differences between the audio-recording and the written transcript. Defendant further alleged that his trial counsel was deficient because she failed to offer a potentially exculpatory independent translation of the audio-recording, and that these deficiencies prejudiced him at trial.

¶ 30 Before addressing the substance of defendant's arguments, we must first determine whether they are barred by the doctrine of forfeiture. Defendant raises two arguments for overcoming forfeiture. He first asserts that, to the extent that his claims rely on the record on direct appeal, it was ineffective assistance of appellate counsel to fail to bring the claims. *People v. Pitsonbarger*, 205 Ill. 2d 444, 458 (2002) (a reviewing court may overlook a procedural default when it stems from ineffective assistance of appellate counsel). Defendant acknowledges that he did not raise this issue of ineffective assistance of appellate counsel in his petition, and he attempts to circumvent that omission by citing *People v. Turner*, 187 Ill. 2d 406, 412-13 (1999),

suggesting that appointed counsel "can easily rectify this error at the second stage" in an amended petition.

¶ 31 In *Turner*, our supreme court referred to a common method of evading forfeiture by alleging ineffective assistance of appellate counsel for failing to allege ineffective assistance of trial counsel. *Turner*, 187 Ill. 2d at 413. It found that the appointed counsel's performance was deficient when he "failed to make a routine amendment to the post-conviction petition which would have overcome the procedural bar of [forfeiture] ***." *Turner*, 187 Ill. 2d at 414-15. The present case is distinguishable from *Turner*. The defendant in *Turner* was under sentence of death and had a statutory right to appointed counsel at the first stage of his postconviction proceeding (725 ILCS 5/122-2.1(a)(1) (West 1998)). Since counsel had already been appointed at the first stage in *Turner*, he was required to represent the defendant in a competent manner, which included amending his petition as required. See *Turner*, 187 Ill. 2d at 412. Here, defendant is not under a sentence of death and has no right to counsel at the first stage. His statutory right to counsel stems only from the Act, and the Act permits the trial court to appoint counsel only if his petition advances to the second stage (725 ILCS 5/122-4 (West 2014)).

¶ 32 Moreover, our supreme court has clearly held that a defendant in a postconviction proceeding may not raise an issue for the first time on appeal. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Indeed, the appellate court is without authority to excuse a forfeiture caused by the failure of a defendant to include issues in a postconviction petition. *People v. Jones*, 213 Ill. 2d 498, 508 (2004). The proper venue for a claim newly discovered by appellate counsel in a postconviction proceeding is a successive postconviction petition, provided that it can meet the requirements of the "cause and prejudice test." *Jones*, 213 Ill. 2d at 508-09. Therefore, no amount of "liberal construction," which defendant argues we should employ, will transform a

claim of ineffective assistance of trial counsel into a claim of ineffective assistance of appellate counsel. See *People v. Stockton*, 2018 IL App (2d) 160353, ¶ 16. Consequently, the trial court did not err in finding that these claims were barred by forfeiture.

¶ 33 Defendant's second argument for overlooking forfeiture is that the MC translation is critical new evidence supporting his claims of ineffective assistance of trial counsel, and that it could not have been raised on direct appeal because it lies outside the record. See *People v. Newbolds*, 364 Ill. App. 3d 672, 676 (2006) (an exception to forfeiture exists where the claim's evidentiary basis is *dehors* the record, preventing consideration by a reviewing court). Defendant is essentially arguing that the MC translation provides proof of an irreconcilable discrepancy between the audio-recording and the admitted transcript. Defendant asserts that there is a reasonable probability that the trial court may have ruled differently had the phrase "around the rim" not been included in the transcript of his statement. The "around the rim" phrase is absent from the MC translation, and he therefore argues that this new evidence presents the gist of a constitutional claim.

¶ 34 The trial court listened to the audio-recording of defendant's statement to the police, which in relevant part is as follows:

> "DEFENDANT: [Speaking Spanish]
>
> INVESTIGATOR ARROYO: (interpreting defendant): And so, I also put my penis, um, on her butt, um, uh, (describing defendant's movement): motioning with his hand that he was rubbing it but not in, uh, [Speaking Spanish, asking defendant a question]. (interpreting his own question to defendant): Did he put it inside?
>
> DEFENDANT: [Speaking Spanish]

INVESTIGATOR ARROYO: (interpreting defendant): No, just rubbing it up and down on her butt. I did not insert it or anything."

The court also read the admitted transcript of that exchange, which stated:

"[INVESTIGATOR ARROYO][2]: And so I also put my penis um…on her butt um…motioning with his ah hand that he was rubbing it but no [*sic*] in

[INVESTIGATOR ARROYO]: did you put it inside?

[INVESTIGATOR ARROYO]: did you put it inside?

[DEFENDANT]: No only around the rim I would do like this but I would not put it inside or anything.

[INVESTIGATOR ARROYO]: (interpreting defendant): no just rubbing it on her butt. I did not insert it or anything."

¶ 35 There are clear differences in the precise wording between the audio-recording and the written translation of defendant's statement. It was up to the court, as the trier of fact in a bench trial, to fairly "resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *People v. Brown*, 2013 IL 114196, ¶ 48 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Here, the court concluded that the totality of the evidence indicated that defendant had made contact with M.M.'s anus with his penis. Determinations of the trier of fact can be challenged and a conviction reversed where the evidence is so unreasonable, improbable, or unsatisfactory as to justify reasonable doubt. *Brown*, 2013 IL 114196, ¶ 48. Defendant challenged these findings in his direct appeal, arguing

[2] For the sake of consistency, we refer to the parties as "INVESTIGATOR ARROYO" and "DEFENDANT," though the admitted transcript identified them as "I.O.A." (Investigator Orlando Arroyo) and "R.B." (Ruben Betance).

that the trial court improperly relied on the transcript and that the State failed to prove anal contact beyond a reasonable doubt. *Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 24. We rejected defendant's arguments and affirmed the conviction. *Betance-Lopez*, 2015 IL App (2d) 130521, ¶¶ 36, 46, 63.

¶ 36 Defendant now argues that his trial counsel was ineffective for not offering an independent translation that would have differed materially from the audio-recording and the State's transcript. Defendant does not acknowledge, however, that the differences between these concomitant pieces of evidence were already present in the record, as is illustrated above. The argument that trial counsel was ineffective for failing to offer her own translation could have been made in defendant's direct appeal, with or without the MC translation.

¶ 37 Defendant demonstrated his awareness of these differences in the record in his opening brief of his direct appeal.[3] He first argued:

> "[T]he recording did not include the statement from the transcript that the court used to find [defendant] guilty. Given this conflict between the recording and the transcript, the court's reliance on the transcript was improper."

He later added:

> "Although the transcript indicates that [defendant] told the officers that he put his penis 'around the rim' of M.M.'s butt, that statement is not contained in the recording of the interview."

Finally, defendant argued:

---

[3] Pursuant to Illinois Rule of Evidence 201(b) (eff. Jan. 1, 2011), we, *sua sponte*, take judicial notice of our own court records pertaining to the direct appeal of the conviction in this case. See also *In re N.G.*, 2018 IL 121939, ¶ 32.

> "[B]ecause there was a conflict between the transcript, which included the statement of 'rubbing it around the rim,' and the recording, which did not, the court erred in using the statement from the transcript to find [defendant] guilty."

The trial court admitted the transcript over three objections by defense counsel. Defendant nonetheless argued in his direct appeal that trial counsel was ineffective for failing to argue that it was error to rely on the transcript as substantive evidence. We see no reason, given everything contained in the record, that defendant could not have also argued that his trial counsel was ineffective for failing to offer an independent translation. Consequently, the argument is forfeited. *People v. Youngblood*, 389 Ill. App. 3d 209, 215 (2009) (claim of ineffective assistance of trial counsel forfeited when it was based on the record, not raised on direct appeal, and defendant did not allege ineffective assistance of appellate counsel). We note, however, that forfeiture is a restriction on the parties, not a limitation on the jurisdiction of this court. See *People v. Normand*, 215 Ill. 2d 539, 544 (2005). We decline to enforce the forfeiture and address defendant's contentions on their merits.

¶ 38 To prevail on a claim of ineffective assistance of counsel, a defendant must establish that (1) counsel's representation fell below an objective standard of reasonableness, and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688-94 (1984). At the first stage of a postconviction proceeding, a petition may not be summarily dismissed if both *Strickland* prongs are "arguably" satisfied. *Hodges*, 234 Ill. 2d at 17. A failure to establish arguably objective unreasonableness or prejudice under *Strickland* is sufficient to deny a claim of ineffective assistance of counsel. *People v. Cherry*, 2016 IL 118728, ¶ 24.

¶ 39 It is not at all clear that the MC translation would have aided defendant. In the MC translation, the phrase "around the rim" is replaced with the word "(unintelligible)," which indicates only that the translator was unable to clearly determine what defendant articulated at that place in the recording. At best, it leaves open the possibility that defendant said something other than "around the rim," but it is far from dispositive that he did not use the phrase in question.

¶ 40 Even if we were to accept defendant's argument that the MC translation is new evidence that offers materially relevant alternative facts, defendant's arguments fall far short of satisfying the prejudice prong from *Strickland*, that there was arguably a reasonable probability that the result would have been different.

¶ 41 Defendant overinflates the trial court's reliance on the "around the rim" phrase. It is true that the trial court mentioned the "around the rim" phrase in the explanation of its findings. But there was ample evidence beyond that phrase that could have led the trial court to the same conclusion, even without the State's written transcript. M.M. testified that defendant's "private parts" touched her "on the back of [her] private parts." When the State then showed her a drawing of a female child and asked her to place an "X" on the part of the body that defendant's penis had touched, she marked an "X" on the female child's buttocks. Dr. Rangala testified that, while completing the sexual assault kit on M.M., she swabbed the external and internal parts of the anus. Webb testified that the anal swab tested positive for semen, but that there was an insufficient amount of semen to produce a male DNA profile. However, additional semen located on the external genitalia swab produced a DNA profile that was a match for defendant, and the semen found on M.M.'s underwear produced a male DNA profile from which defendant could not be excluded. In light of substantial evidence beyond the "around the rim" phrase that

supported the court's finding of anal contact, defendant has not demonstrated that he was arguably prejudiced by the lack of an independent translation. Because defendant's has failed to establish that his claim satisfies the prejudice prong, it is unnecessary for us to address whether defendant's trial counsel's representation fell below an objectively reasonable standard. *Cherry*, 2016 IL 118728, ¶ 24 (failure to establish either prong under *Strickland* precludes a finding of ineffective assistance of counsel).

¶ 42 III. CONCLUSION

¶ 43 For the reasons stated, we affirm the judgment of the circuit court of Kane County.

¶ 44 Affirmed.