2019 IL App (1st) 161075-U

No. 1-16-1075

Order filed on May 7, 2019.

Second Division

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 DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	08 CR 3880
	)	
JOSE ALVIDREZ,	)	The Honorable
	)	Mary M. Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant forfeited his first-stage postconviction petition claim on appeal and even if he hadn't, it was legally meritless. This court affirmed the decision of the circuit court dismissing defendant's postconviction petition.

¶ 2 Defendant appeals from the summary dismissal of his *pro se* petition filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)) and now argues he set forth a meritorious claim that his appellate counsel was constitutionally ineffective. We affirm.

¶ 3 BACKGROUND

¶ 4 Following a jury trial, defendant Jose Alvidrez was found guilty of the first-degree murder of his 18-month-old son, Joshua Alvidrez, who died as a result of a severe head injury suffered at home while under defendant's care. At trial, defendant maintained the child fell off an adult bed from about a knee-high distance to the bedroom floor. Defendant, who was home alone with Joshua for about an hour on the day in question, specifically testified that he placed Joshua on an adult bed for a nap, propping him on pillows and covering him with a comforter. Defendant then went across the hall to shave for some 15 minutes. Although he did not hear anything, upon returning, he found Joshua on the floor, facedown with the blanket covering his lower legs, but his feet still on the bed. Believing Joshua was simply "knocked out," defendant patted his cheeks and called his name.

¶ 5 Joshua was unresponsive, but breathing. Defendant then splashed water on Joshua's face, Joshua opened his eyes, moaned, and started to cry. Defendant again placed Joshua on the bed, propping him on pillows. Joshua could at that time point to his nose, chin, and eyes. He also drank from a sippy cup. Some 30 minutes later, however, defendant found Joshua with his eyes rolled back in his head, and stiff like a board. Defendant for the first time shook Joshua so as to wake him up. However, he denied severely shaking, throwing, or shoving Joshua at any time.

¶ 6 Joshua was subsequently transported by ambulance to the hospital, where diagnostic testing revealed, among other traumas, that Joshua had an extensive subdural hematoma (bleeding from the brain under the dura, inside the skull) requiring a craniotomy to relieve intracranial pressure. Eight days later, Joshua died.

¶ 7 At trial, defendant presented expert testimony that the injuries could have been caused by a shortfall from the bed, particularly if Joshua had been standing and hit his head on a piece of

furniture when falling. The State presented evidence demonstrating that the extent of bruising, brain damage and retinal trauma Joshua suffered would only be attributable to severe physical abuse and would not occur during the type of simple fall onto a carpeted hardwood floor, as described by defendant. As such, the State's case rested on circumstantial evidence that defendant shook and/or beat his child to death within the one-hour time span when no other individuals were present, and the treating physicians testified that Joshua's injuries could not have been anything but intentionally caused. Thus, both sides presented expert testimony supporting their theory. As stated, the jury found defendant guilty, and he was then sentenced to 25 years' imprisonment.

¶ 8 Defendant filed a direct appeal raising several issues, but he did *not* challenge the sufficiency of the evidence. Following a more detailed factual recitation of the case, this court affirmed the judgment.[1] See *People v. Alvidrez*, 2014 IL App (1st) 121740, *pet. for leave to appeal denied*, No. 121740 (Dec. 23, 2014). Defendant then filed the present *pro se* postconviction petition, alleging in relevant part that he was "denied due process when the State failed to prove its case against the defendant beyond a reasonable doubt as clearly stated in the 3 part prong of elements of 1st degree murder." He further alleged his appellate counsel was ineffective for "not bringing up this compelling evidence." The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed that dismissal and now raises the present collateral attack against the trial judgment.

¶ 9 ANALYSIS

¶ 10 The Act provides a method by which persons under criminal sentence in this State can assert that their convictions were the result of a substantial denial of their rights under the United

[1]On direct appeal, this court also granted defendant additional presentence custody credit and corrected certain fines and fees.

States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq*. (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The threshold inquiry at the first-stage of proceedings is whether the allegations contained in the petition are frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2014); *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A petition is frivolous or patently without merit if the allegations contained therein, taken as true and liberally construed in favor of the petitioner, have no arguable basis in law or fact, *i.e.* they are based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-13, 16; *Edwards*, 197 Ill. 2d at 244. An indisputably meritless legal theory, for example, is one which is completely contradicted by the record, while fanciful factual allegations include those which are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. Our review is *de novo*. *Id*. at 9.

¶ 11 Defendant argues he set forth a meritorious claim that his appellate counsel was constitutionally ineffective for failing to assert he lacked the required mental state for first-degree murder in his direct appeal. He contends appellate counsel should have argued "the State only proved involuntary manslaughter." The State responds that defendant forfeited this specific issue because he failed to plead it in his postconviction petition. See 725 ILCS 5/122-3 (West 2014). Defendant, meanwhile, counters that petitions filed *pro se* must be given a liberal construction and are to be viewed with a lenient eye, allowing borderline cases to proceed. See *People v. Mescall*, 403 Ill. App. 3d 956, 962 (2010). While a *pro se* defendant need only allege enough facts for a claim that's arguably constitutional for purposes of invoking the Act, we agree with the State that defendant did not plead the claim he now raises. See *Hodges*, 234 Ill. 2d at 9.

¶ 12 Here, defendant's petition alleged that his constitutional rights were violated when the State failed to prove first-degree murder beyond a reasonable doubt. The elements of first-degree murder are: one, the defendant intended to kill or do great bodily harm to the victim or knew his

acts would cause death; two, he knew such acts created a strong probability of death or great bodily harm to the victim; or three, he had attempted or committed a forcible felony other than second degree murder. 720 ILCS 5/9-1 (West 2014). However, in his postconviction petition, defendant did not focus on intent or knowledge as the basis for challenging his conviction. Rather in support of his allegation, defendant elaborated that it was the contradictory nature of the State's expert testimony and lack of any eyewitnesses that rendered the evidence insufficient to satisfy the elements of first-degree murder. That, plus the medical examiner's testimony, defendant wrote, was "compelling evidence and casts a huge and very reasonable doubt. And based on the overwhelming evidence to support the argument[,] this line should have been brought up at direct appeal." Defendant again reiterated that appellate counsel was ineffective "for not contesting the beyond a reasonable doubt prong given the compelling evidence of contradictory statements given by the State[']s key witnesses." In fact, defendant acknowledged his trial theory was that Joshua fell from the bed, and defendant did not "shake or hurt his son."

¶ 13 Defendant's petition thus contradicts his present contention that appellate counsel should have argued the State only proved involuntary manslaughter. As more fully explained below, such an argument would have required some admission that he committed the underlying acts. See 720 ILCS 5/9-3(a) (West 2014) (noting, a person commits involuntary manslaughter if he performs acts that are "likely to cause death or great bodily harm to some individual, and he performs them recklessly"); *People v. Lengyel*, 2015 IL App (1st) 131022, ¶ 44 (noting, involuntary manslaughter requires a less culpable state of mind than first-degree murder). Moreover, defendant's petition did not make any mention of a lesser-included offense, recklessness, or involuntary manslaughter. The circuit court did not read defendant's petition as

raising this constitutional issue, and nor do we. He thus forfeited the matter. See *People v. Shief*, 2016 IL App (1st) 141022, ¶¶ 53-54.

¶ 14 In any event, even if we were to rule that defendant's petition, when liberally construed, stated the present claim, it still it would fail.[2] This is because defendant cannot show appellate counsel's failure to raise that issue arguably was objectively unreasonable and that decision arguably prejudiced defendant, *i.e.* there is a reasonable probability that but for his counsel's unprofessional errors, the result of the proceeding would have been different. See *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010); *People v. Easley*, 192 Ill. 2d 307, 329-30 (2000). As stated, given the trial evidence, intent and knowledge were not at issue where defendant positively denied any involvement in Joshua's injuries. In other words, his theory at trial was that the injuries resulted when defendant was not present, and defendant asserted absolute innocence. Thus, his claim on appeal is rebutted by defendant's own trial testimony and defense theory. See *People v. Hunt*, 234 Ill. 2d 49, 56 (2009) (noting, the theory under which a case is tried in the trial court cannot be changed on review); *People v. Major-Flisk*, 398 Ill. App. 3d 491, 500 (2010) (noting, a party is estopped from taking a position on appeal that is inconsistent with a position the party took in the trial court). As such, appellate counsel would have had no basis in the record to raise the contention. See *People v. Medina*, 221 Ill. 2d 394, 410 (2006) (noting, for a defendant to be entitled to a lesser-included offense instruction, the evidence must be such that a jury could rationally find the defendant guilty of the lesser offense, yet acquit him of the greater); *cf. Lengyel*, 2015 IL App (1st) 131022, ¶¶ 64-65 (reducing the defendant's conviction to involuntary manslaughter where the evidence, including medical testimony, supported that the

[2]We note that although issues regarding the sufficiency of the evidence are not proper in postconviction proceedings, they are cognizable for the limited purpose of determining whether appellate counsel's failure to raise the sufficiency of the evidence on direct appeal constituted ineffective assistance. *People v. Franzen*, 251 Ill. App. 3d 813, 822 (1993).

defendant acted recklessly). Thus, defendant cannot establish that appellate counsel's decision was arguably unreasonable or caused prejudice.

¶ 15 We would also note that at the close of the trial evidence in this case, the record shows that defendant and his trial counsel "went through the pluses and minuses of whether or not to ask for this lesser included offense of involuntary manslaughter," but defendant specifically chose only the first-degree murder instruction. The trial court verified on the record that was defendant's choice. Where, as here, a defendant acquiesces in proceeding in a given manner, he is not in a position to claim prejudice. See *People v. Villarreal*, 198 Ill. 2d 209, 227 (2001). Moreover, given trial counsel's reliance on the theory of defendant's absolute innocence, counsel's decision not to present an option of involuntary manslaughter was strategic and not incompetence.[3] See *People v. Spiller*, 2016 IL App (1st) 133389, ¶ 39.

¶ 16 Likewise, defendant cannot establish that had appellate counsel challenged the sufficiency of the evidence based on intent or knowledge, the appeal would have succeeded. The extensive medical evidence, including the severity of injuries to Joshua, was more than sufficient to prove beyond a reasonable doubt that defendant intended to murder Joshua, knew that would occur, or knew his acts created a strong probability of death or great bodily harm to the child. See *People v. Kibayasi*, 2013 IL App (1st) 112291, ¶ 49 (finding, the medical evidence about the severity of injuries was sufficient to prove they were knowingly inflicted after noting that the factual determination of whether a defendant acted knowingly or with intent may be inferred from the circumstances surrounding the incident, defendant's conduct, and the nature and severity of the victim's injuries).

[3]Notably, defendant forfeited any contention that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness, as defendant did not set forth such an allegation in his postconviction petition or on appeal. See *Shief*, 2016 IL App (1st) 141022, ¶ 49. Defendant likewise forfeited any argument that trial counsel misapprehended the law as to declining the involuntary manslaughter instruction. See *Spiller*, 2016 IL App (1st) 133389, ¶ 39.

¶ 17 If the underlying issue is without merit, defendant cannot suffer prejudice from appellate counsel's failure to raise the issue. *People v. Hanks*, 335 Ill. App. 3d 894, 900 (2002). For all the reasons stated, there is no arguable basis to conclude that had appellate counsel raised the issue, there is a reasonable probability that it would have succeeded. See *Shief*, 2016 IL App (1st) 141022, ¶¶ 56-57.

¶ 18 CONCLUSION

¶ 19 We affirm the judgment of the circuit court dismissing defendant's postconviction petition as frivolous and patently without merit.

¶ 20 Affirmed.