2019 IL App (1st) 161078-U

No. 1-16-1078

Order filed February 28, 2019

Fourth Division

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. 11 CR 14419
	)	
VANESSA NELSON,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's dismissal of defendant's *pro se* post-conviction petition is affirmed. Defendant's claim on appeal that trial counsel was ineffective for failing to file a motion to quash arrest causing her to involuntarily enter into a guilty plea is forfeited because the claim is raised for the first time on appeal.

¶ 2 Defendant Vanessa Nelson appeals from the trial court's summary dismissal of her *pro se* postconviction petition under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* West 2014)). On appeal, defendant contends her postconviction petition stated an arguable claim that

trial counsel was ineffective for failing to file a motion to quash her illegal arrest, causing her to involuntarily enter into a guilty plea. We find defendant's claim forfeited, and therefore affirm.

¶ 3 Defendant and codefendants, Avery Cooper and David Vines, were charged with twenty-five counts of home invasion, sixteen counts of armed robbery, eight counts of attempt armed robbery, and two counts of aggravated battery.[1] In December 2013, defendant pled guilty to one count of home invasion while armed with a firearm (720 ILCS 5/12-11(a)(3) (West 2010)) in exchange for a sentence of 21 years in prison.

¶ 4 Before the guilty plea hearing, defendant had filed a motion to suppress statements she made to the police after the incident. She argued she made the statements as a result of police interrogation and after she elected to consult with an attorney and remain silent. Defendant asserted she was incapable of appreciating and understanding the full meaning of the *Miranda* warnings and, therefore, she did not make any statements voluntarily or knowingly.

¶ 5 At the hearing on defendant's motion, John Nelson, defendant's father, testified that, on July 23, 2011, at 9 p.m., Detective Campbell told him that it would help defendant's case if she would identify a third individual involved in the home invasion. Nelson met with defendant alone at the police station. Defendant told Nelson that the detectives told her she would not see Nelson again if she did not talk to them. Defendant told Nelson that Campbell physically threatened her and told her, "I am going to lay you out."

¶ 6 Chicago police detective John Campbell testified that the victims of the July 21, 2011, home invasion informed him that defendant had left the home during the offense. Campbell obtained defendant's cellular telephone number in order to interview her and called her.

[1] Codefendants are not a party to this appeal.

Defendant did not answer so Campbell left a message on her voicemail and sent her a text message, stating: "I am Chicago Police Detective Campbell. Please call me. This is very important."

¶ 7 Defendant returned Campbell's phone call. Campbell told defendant he wanted to speak to her about a home invasion and asked her to drive to the Area 3 police station. Defendant agreed to meet with Campbell and told him she would take a bus to the police station. Defendant asked Campbell if she could meet him at State Street and Madison Avenue, but subsequently called him back and asked to meet him "somewhere along Madison because the neighborhood was kind of frightening to her." Defendant told Campbell the number of her bus, and Campbell maintained contact with defendant by telephone while she was on the bus heading to the police station.

¶ 8 At 2 a.m. on July 22, 2011, Campbell and Sergeant Tom Mitchell met defendant at a bus stop at Madison and Pulaski Avenue. Campbell parked his unmarked vehicle in front of the bus at the bus stop and defendant "freely" got off of the bus. Campbell did not signal the bus to stop, activate his emergency lights, or go to the bus to get defendant. He testified he was driving a Ford Crown Vic and did not think his vehicle had lights on it. Campbell opened the back door of his vehicle for defendant and she got in. He did not put handcuffs on defendant and she was not searched. Campbell advised defendant of her constitutional rights. Defendant indicated she understood her rights and agreed to speak to Campbell.

¶ 9 Campbell drove to the police station and took defendant to a small-size interview room. He left the door open. There was a handcuff ring on the wall but defendant was not placed in handcuffs at any time during Campbell's entire encounter with her. Campbell read defendant her

Miranda rights and made sure she understood them. Campbell presented defendant with a consent to search form for her cellular phone and explained it to her. Defendant indicated she understood the form and signed it. She gave Campbell her phone, as he had not searched her. He had only asked that she lift up her shirt so that he could make sure she did not have a gun in her waistband.

¶ 10 Defendant told Campbell she had information about "this robbery" but demanded she "get a guarantee" that she would not be prosecuted. Campbell told her he did not have authority to make that promise. Campbell looked at the text messages on defendant's telephone, noted some messages had been deleted, and questioned her about the home invasion. Defendant gave Campbell the name of two individuals involved in the home invasion.

¶ 11 About two hours later, Campbell presented defendant with a consent to search form for her hotel room and vehicle. He explained that, by signing the form, she was waiving her rights and allowing him to enter her hotel room and search for proceeds from the robbery. He explained she did not have to sign it and that, if she did not want to sign it, he would need to get a search warrant. Defendant indicated she understood the form and signed it. She was formally placed under arrest at 4:30 a.m. that morning.

¶ 12 Campbell went to defendant's hotel room and, during this time, defendant was not allowed to leave the police station. Campbell recovered some items from defendant's hotel room and went to the victim's house to have the proceeds identified. On July 22, 2011, at 7:30 a.m., after searching defendant's hotel room, Campbell had another conversation with defendant at the police station. He advised defendant of her *Miranda* rights again. Defendant indicated she understood her rights.

¶ 13 On July 23, 2011, at about 2:45 a.m., an assistant State's Attorney (ASA) spoke with defendant in Campbell's presence. The ASA read defendant her rights. Defendant asked the ASA if she could get a guarantee that she would not be charged if she talked. The ASA told defendant she could not make that promise. Defendant asked for a lawyer, which was the first time she had done so.

¶ 14 Defendant's father arrived at the police station at about 10 or 11 p.m. on July 23, 2011. He met with defendant for over an hour, alone in an interview room with the door open. Campbell never told defendant or her father that they would not see each other again if defendant did not give Campbell a name of another offender. Campbell did not make any threats or promises to defendant.

¶ 15 On cross-examination, asked whether it was fair to say that defendant was having difficulty arriving at the Area 3 police station, Campbell testified that defendant "did not want to come there. That was apparent" and that she had told him that "it was out of [his] jurisdiction." He testified he eventually convinced her to come to the police station. He did not tell her she was wanted for the home invasion, only that he wanted to talk to her about it.

¶ 16 The court denied defendant's motion to suppress statements. In doing so, it noted that defendant "agreed to come" to the police station and "[s]he wasn't going to drive, but she was going to take a bus." It stated that, at the police station, defendant was advised of her *Miranda* rights and agreed to speak. The court found that defendant made her statements voluntarily.

¶ 17 In December 2013, the State informed the court that, in exchange for defendant pleading guilty to one count of home invasion with a firearm, it offered her a sentence of 21 years in prison. Defendant acknowledged in court that she wanted to plead guilty, she had a right to have

a trial before a judge or a jury, she was giving up certain rights by pleading guilty, no one threatened or promised her anything to plead guilty, and she was pleading guilty out of her own free will.

¶ 18 The State presented a factual basis for the plea. The victim, Christopher Loriz, would testify that defendant and about 12 of Loriz's friends were at a party at his home. After defendant arrived, Loriz noticed that she was texting on her cellular phone. Shortly thereafter, three masked individuals armed with firearms entered his home and ordered the guests to the ground. The individuals took cellular phones, electronic equipment, and a small amount of cannabis. Defendant asked the three masked individuals if she could leave and they gave her permission to do so. One of the masked individuals hit one of Loriz's guests in the head with a handgun. The offenders fled. Loriz told the police that the offenders let defendant leave during the incident.

¶ 19 Defendant agreed to speak with the police and signed a consent to search form for her hotel room. The clerk at the hotel identified defendant as an individual who entered defendant's hotel room during the early morning hours following the robbery. The police executed the consent to search defendant's hotel room and recovered proceeds from the robbery in that room. After defendant received her *Miranda* warnings, she admitted she helped plan the home invasion and her role was to attend the party and "text when she knew that there was money or drugs or other electronic items at the party."

¶ 20 Defendant stipulated that these facts would be the State's evidence. The court found that defendant entered the plea freely and voluntarily and a factual basis existed for the plea. The court accepted defendant's plea of guilty and found her guilty of home invasion with a firearm. Pursuant to the plea agreement, the court sentenced defendant to 6 years in prison plus 15 years

for the firearm enhancement for a total of 21 years in prison. Defendant did not file a postplea motion or notice of appeal.

¶ 21 In December 2015, defendant filed a *pro se* postconviction petition. She alleged trial counsel was ineffective, "handled her case unreasonably," and "did not devote a full effort to myself." Defendant claimed trial counsel's actions violated her fifth amendment rights. She asserted that trial counsel allowed Campbell to commit perjury at the motion to suppress hearing, and claimed Campbell lied at the hearing when he testified that his vehicle did not have lights on it and that he did not pull the bus over. Defendant asserted that, if Campbell would lie about the lights on his police car, "why wouldn't he lie about me never requesting a lawyer, mirandizing [*sic*] me or threatening physical harm." She argued that, had counsel been effective, he would have caught Campbell's lies, "thrown out" his testimony, and raised the proper questions to impeach him, and her statements would have been suppressed.

¶ 22 Defendant also argued that trial counsel should have filed a motion to dismiss the home invasion charge after her case was severed from codefendants. She asserted there was never a firearm recovered and counsel should have "motioned to suppress that charge as well." Defendant claimed that trial counsel should have argued that the "whole case was hearsay and some of the evidence was questionable" and that, had counsel had a "better defense theory and not made so many crucial errors in my defense, I would have gone to trial or had a significantly better plea bargain." Defendant attached to her petition excerpts from Campbell's testimony at the hearing on the motion to suppress and his supplemental police report.

¶ 23 The trial court summarily dismissed defendant's petition, finding that it was frivolous and patently without merit. It noted that defendant criticized her trial counsel's performance at the

suppression hearing and on matters that occurred before she entered her guilty plea. It found that, because the alleged errors occurred before defendant entered her guilty plea, she waived these claims by pleading guilty. It noted that defendant did not allege in her petition that her guilty plea was rendered involuntarily through advice she received from counsel.

¶ 24 Defendant contends on appeal that her postconviction petition raised an arguable claim that trial counsel was ineffective for failing to file a motion to quash arrest. She claims Detective Campbell's harassment and threats transformed the interaction from a consensual encounter to an illegal seizure without probable cause. She asserts that, had counsel filed a motion to quash arrest, all of the evidence obtained from her interrogation and as a result of her consent to search would have been suppressed and it is arguable that counsel's failure to file the motion caused her to involuntarily enter into a guilty plea.

¶ 25 Under the Post-Conviction Hearing Act, a defendant may attack a conviction by asserting that it resulted from a substantial denial of his or her constitutional rights. 725 ILCS 5/122-1 *et seq.* (West 2010); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction action is not a direct appeal from a conviction but is a collateral attack on the judgment. *Id.* In noncapital cases, the postconviction petition process involves three stages. *Id.* ¶ 9.

¶ 26 At the first stage, which applies here, a *pro se* defendant need only present the "gist of a constitutional claim." *People v. Edwards*, 197 Ill. 2d 249, 244 (2001). The trial court shall summarily dismiss a first stage petition if it determines the petition is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition is considered frivolous or patently without merit if it has no arguable basis either in law or in fact, *i.e.*, it is "based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d

1, 11, 16 (2009). An indisputably meritless legal theory is one that is "completely contradicted by the record" and a fanciful factual allegation is one that is "fantastic or delusional." *Id.* At the first stage, the allegations of fact are considered true, unless they are affirmatively rebutted by the record. *People v. Thomas*, 2014 IL App (2d) 121001, ¶ 47. We must "liberally" construe postconviction petitions. *Thomas*, 2014 IL App (2d) 121001, ¶ 5. We review a trial court's summary dismissal of a postconviction petition *de novo*. *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 27 A voluntary guilty plea waives all non-jurisdictional errors or irregularities, including constitutional ones. *People v. Townsell*, 209 Ill. 2d 543, 545 (2004). Thus, generally, after a defendant pleads guilty, he may not raise claims of deprivation of constitutional rights that occurred prior to the entry of the guilty plea. *People v. Ivy*, 313 Ill. App. 3d 1011, 1017 (2000). In *Tollett v. Henderson*, 411 U.S. 258, 267 (1973), the United States Supreme Court stated that, when a "defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." A defendant may only attack the voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within the range of competence demanded of attorneys in criminal cases. *Tollett*, 411 U.S. at 266-67.

¶ 28 Here, defendant pled guilty and, when the trial court accepted her plea, it found that she entered the plea knowingly and voluntarily. Because defendant pled guilty, she forfeited any claims relating to the deprivation of constitutional rights due to trial counsel's ineffectiveness that occurred prior to the entry of the guilty plea. See *People v. Smith*, 383 Ill. App. 3d 1078,

1085-86 (2008) ("All the errors that defendant contends her trial counsel committed relate to claims she voluntarily relinquished when she pled guilty, and we will not consider her attorney's alleged deficient performance on issues that defendant waived."); *Ivy*, 313 Ill. App. 3d at 1017.

¶ 29 Defendant nevertheless asserts that her claim is not forfeited because she may attack the voluntary character of her plea by showing that it was based on trial counsel's ineffective assistance of counsel for failing to file a meritorious pretrial motion to quash arrest.

¶ 30 However, defendant did not allege in her petition that she entered her guilty plea unknowingly or involuntarily, let alone that she did so based on counsel's failure to file a motion to quash arrest. If a claim is not raised in the original petition, then it may not be raised for the first time on appeal. *People v. Pendleton*, 223 Ill. 2d 458, 475 (2006); 725 ILCS 5/122-3 (West 2010). Although defendant included other claims of trial counsel's ineffectiveness and alleged generally that trial counsel "handed her case unreasonably," her claim on appeal that trial counsel's ineffectiveness in failing to file a motion to quash caused her to involuntarily plead guilty was not raised in her petition. Even under the first stage standard where we must liberally construe her petition, nonspecific and implicitly raised claims in a petition may not be raised on appeal. See *People v. Reed*, 2014 IL App (1st) 122610, ¶ 63 (the defendant's "nonspecific" claim of ineffective assistance of appellate counsel that was not "clearly set forth" in the petition resulted in forfeiture on appeal); *People v. Cole*, 2012 IL App (1st) 102499, ¶¶ 11-16 ("implicit" claims in a postconviction petition may not be raised for the first time on appeal when the trial court never ruled upon those postconviction issues). We therefore find that defendant's claim on appeal that counsel was ineffective for failing to file a motion to quash arrest, which "arguably" caused her to involuntarily plead guilty, is forfeited.

¶ 31 Even if defendant's claim that she arguably involuntarily pleaded guilty as a result of counsel's failure to file a motion to quash arrest was not forfeited, we would find she has not set forth an arguable claim warranting second stage proceedings.

¶ 32 At the first stage of postconviction proceedings, a petition that alleges ineffective assistance of counsel may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. With respect to a guilty plea, a counsel's conduct is considered deficient if counsel failed to ensure that the defendant entered the plea voluntarily and intelligently. *People v. Rissley*, 206 Ill. 2d 403, 457 (2003). To prove prejudice, a defendant must show that there is a "reasonable probability" that, but for counsel's conduct, she would not have pled guilty and would have insisted on going to trial. *Rissley*, 206 Ill. 2d at 457 (quoting *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)). Because a defendant must prove both elements, we may review the prejudice prong first (*People v. Gray*, 2012 IL App (4th) 110455, ¶ 25), and do so here.

¶ 33 Defendant argues counsel was ineffective for failing to file a pretrial motion to challenge her initial seizure. She asserts that Campbell's use of threats and harassment to force her to submit to police questioning transformed the interaction from a consensual encounter to an illegal seizure, as Campbell did not have probable cause to arrest her before she was interrogated. Defendant claims that a motion to quash arrest would have been meritorious and the evidence obtained from the illegal seizure should have been suppressed. She argues counsel's failure to file the motion therefore arguably caused her to involuntarily plead guilty.

¶ 34 Defendant cannot establish that she was arguably prejudiced by counsel's alleged deficient performance. She cannot show that there is a reasonable probability that, had counsel filed the motion to quash arrest, the motion would have been meritorious and, as a result, the evidence would have been suppressed and she would not have pled guilty.

¶ 35 An arrest or illegal detention without probable cause violates a person's fourth amendment constitutional rights against unreasonable searches and seizures. *People v. Soto*, 2017 IL App (1st) 140893, ¶ 49. A seizure is considered an arrest for purposes of the fourth amendment. *Soto*, 2017 IL App (1st) 140893, ¶ 49. However, not every interaction between police officers and citizens results in a seizure under the fourth amendment. *People v. Gomez*, 2018 IL App (1st) 150605, ¶ 19. Courts have grouped police-citizen encounters into three categories: (1) an arrest or detention of an individual supported by probable cause; (2) brief investigative stops, supported by a reasonable, articulable suspicion of criminal activity; and (3) consensual encounters involving neither coercion nor detention, which do not implicate the fourth amendment. *Gomez*, 2018 IL App (1st) 150605, ¶ 19.

¶ 36 To determine whether a person has been arrested, we must determine whether, under the circumstances presented, a reasonable person would have believed that he was not free to leave. *People v. Prince*, 288 Ill. App. 3d 265, 273 (1997). The court considers several factors to determine whether a person has been seized under the fourth amendment: the presence of multiple police officers, the display of weapons by an officer, the officer's touching of the person, the officer's use of language suggesting that the person is compelled to obey, and the occurrence of formal arrest practices, such as searching, booking, handcuffing, photographing, and fingerprinting. *People v. Weed*, 363 Ill. App. 3d 121, 132 (2005). An individual who

voluntarily accompanies police officers for questioning has not been arrested or seized under the fourth amendment. *Soto*, 2017 IL App (1st) 140893, ¶ 49.

¶ 37 Here, the evidence at the hearing on the motion to suppress statements established that Detective Campbell left defendant one voice message and sent her one text message, requesting her to call him because it was "very important." Defendant voluntarily chose to return Campbell's message. Campbell told defendant he wanted to talk to her about a home invasion and asked her to drive to the police station. Although defendant did not want to come to the Area 3 police station, she then agreed to take a bus to meet him. She requested Campbell meet her on State Street and Madison Avenue but subsequently asked if he could meet her somewhere on Madison because it was a frightening neighborhood. She maintained contact with Campbell during the bus ride.

¶ 38 Only two officers, Campbell and his sergeant, met defendant at the bus stop on Madison Avenue. Defendant freely got off the bus and Campbell did not go to the bus to get her. Campbell did not search defendant and she was not placed in handcuffs. There is also nothing in the record to show that the officers displayed their weapons, used language suggesting she was required to get into their vehicle, or that they made any formal declarations of arrest or used any formal arrest procedures. Upon arriving at the police station, defendant was not handcuffed, photographed, or fingerprinted.

¶ 39 These facts rebut defendant's assertion on appeal that her act of going to the police station was not consensual because Campbell harassed and threatened her. Rather, the record demonstrates that defendant voluntarily met Campbell and agreed to accompany him to the police station. See *Weed*, 363 Ill. App. 3d at 132-33 (no arrest occurred when police officers,

who were in their unmarked police car, informed the defendant on the street that they were investigating a homicide and asked him to accompany them to the police station, the defendant got into the police car to go to the police station, only two officers were present, the officers did not display their weapons, they did not use language suggesting that he was required to go to the police station, and defendant was not fingerprinted or photographed at the police station).

¶ 40 Defendant claims she only submitted to Campbell's authority after he threatened to report her to her probation officer and that there is no dispute that she came to the police station because of Campbell's threat. However, the allegations in defendant's petition contradict this assertion. In defendant's petition, she asserted that she *requested* Campbell to contact her probation officer and that he did not do so. Specifically, she stated: "Along with the previous lies of the R/D [as Campbell is referred to in the supplemental police report], Campbell claimed concerns of my terms of probation [citations to the supplemental police report] why did he not contact my probation officer as requested, when terms of probation includes contacting them if you made police contact?" Accordingly, given that defendant asserted in her petition that she requested Campbell to contact her probation officer, we are unpersuaded by defendant's argument that her petition supports her claim that Campbell coerced her to meet him because he threatened to call her probation officer.

¶ 41 Accordingly, the record rebuts defendant's argument on appeal that she was coerced to come to the police station for questioning such that her initial encounter with the police was an illegal seizure without probable cause. Thus, a motion to quash arrest on this basis would not have been meritorious and defendant has not established that, had counsel filed a motion to quash arrest, there is a reasonable probability that she would have pled not guilty and insisted on

going to trial. Defendant has therefore failed to state an arguable claim of ineffective assistance of counsel based on counsel's failure to file a motion to quash arrest. The court properly dismissed her petition as frivolous and patently without merit.

¶ 42 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 43 Affirmed.