2019 IL App (1st) 1170642-U

SIXTH DIVISION
March 8, 2019

No. 1-17-0642

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 JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 18227
	)	
CHRISTOPHER COOPER,	)	Honorable
	)	Joel Greenblatt,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 ***Held:*** The circuit court properly dismissed defendant's petition for postconviction relief because the petition does not make a substantial showing of a constitutional violation and the issues raised are barred by *res judicata*.

¶ 2 BACKGROUND

¶ 3 After he was convicted on various sexual assault charges, defendant Christopher Cooper filed a postconviction petition, alleging he had received ineffective assistance of counsel. The circuit court dismissed the petition. We affirm.

¶ 4 This court discussed the factual background of the underlying case in the opinion on defendant's direct appeal. *People v. Cooper*, 2013 IL App (1st) 113030. Here, we provide only the specific facts most relevant to the postconviction petition now before us.

¶ 5 Defendant was charged with four counts of predatory criminal sexual assault and four counts of criminal sexual assault of his younger adopted sister, R.C. Before trial, defendant moved to suppress a recorded confession that he had given to the police. In the motion, he alleged that the confession was not voluntary because his "will was overborne in that it is clear from the transcript that the Detectives clearly tried to create a position of trust by stating he [sic] knew [defendant's] father," and that "the Detectives appeared to coerce [him] into making a confession by stating he was a victim of circumstance." Additionally, he argued that he was especially susceptible to coercion because he "has an IQ of 79, is diagnosed with ADHD, had a traumatic brain injury [at] birth, learning disability, as well as restricted reading and spelling abilities with low intellectual functioning."

¶ 6 The only witnesses at the hearing on defendant's motion were two police detectives. Detective Jeff Caldwell testified that he arrested defendant for criminal sexual offenses. Shortly after he returned to the Rosemont police station with defendant, an attorney arrived on defendant's behalf and was allowed to speak with him. When the attorney came out of the room, he said, "I don't want my client to talk to you guys." No police had attempted to speak with defendant before the attorney arrived, and none attempted to do so after he left.

¶ 7 The next afternoon, Detective Caldwell removed defendant from his cell to bring him to a bond hearing. He first brought him into a booking room where Detective Richmond and Detective Muich were present. The detectives instructed him to change into his street clothes. Defendant asked them whether he would receive bond and how long he would have to remain in

jail. Detective Caldwell responded that he would not get bond and that he did not know how long he would remain in jail. Detective Caldwell testified that defendant then said, "I'm guilty. I did all those bad things to my sisters that were said that I did." Detective Caldwell told defendant "not to say anything else; that we had to do some paperwork, and we would be back to talk." Detective Caldwell testified that defendant told the detectives that he wanted to speak to them "without his lawyer present."

¶ 8 Detective Caldwell testified that he read defendant his *Miranda* rights and obtained his signature on a *Miranda* rights form. He then took defendant's statement in the presence of Detective Muich, who tape-recorded it. During their conversation, Detective Caldwell told defendant that he would get him some help, but only after defendant said that he needed it. When asked by defense counsel, Caldwell denied that he told defendant to "man up" and confess.

¶ 9 Detective Ronald Muich then testified that he was also present at defendant's arrest. Defendant was brought into a Rosemont police station holding room. Detective Muich testified that he stayed with defendant for about two hours and engaged in "[v]ery minimal conversation" with him. Detective Muich testified that the conversation "was just some small talk about his father, and he was telling me how much he missed his dad and really just about his dad." Detective Muich testified that he told defendant that he knew his father, and that "he was a real nice man, and, you know, I'm sorry that he passed away and that was pretty much it."

¶ 10 The following afternoon, Detective Muich saw defendant again when he was taken out of his cell for a bond hearing. Defendant changed into his own clothes and was eventually handcuffed, and Detective Caldwell explained the bond hearing procedure to him. Although defendant mentioned his bond, nobody told him what it would be. Detective Muich did not recall defendant asking how long he would have to remain in jail. Detective Muich testified that

defendant, who was in handcuffs, turned to him and Detective Caldwell and said, "I'm guilty. I did all these bad things to my sister—my sisters." Detective Caldwell then put up his hand and asked, "Christopher, are you reinitiating conversation with us," and defendant replied, "yes, I am."

¶ 11 Detective Muich testified that Detective Caldwell then read defendant his *Miranda* rights, and defendant was advised that his statement was going to be tape-recorded, which he said was "fine." Detective Muich asked several times whether defendant was willing to reinitiate conversation without his attorney, and defendant responded, "yes, I am." Detective Muich testified that something about "help" came up, and the detectives said they "would talk to somebody in court. If he needed any kind of help, we would help him." When counsel asked Detective Muich whether he recalled having a conversation with defendant involving the statement "your father's looking down on you from heaven," Detective Muich testified that he "never brought up the word heaven." He also testified that he never used the phrase "man up."

¶ 12 Detective Muich testified that he knew defendant before arresting him. He testified that he knew defendant's family as well, stating: "As an auxiliary officer for Rosemont, I used to follow the school bus, and that's when I used to talk to Mr. [C.] a lot and he used to bring [defendant] and some of the other children to school so that's how I kind of knew the family." Detective Muich would occasionally see defendant at Allstate Arena, where he worked in maintenance.

¶ 13 The defense entered into evidence a copy of the *Miranda* waiver executed by defendant. The parties also stipulated that defendant has an intelligence quotient of 79. Counsel then argued that defendant's statement was not voluntary under the totality of the circumstances. Counsel noted that defendant "does not have such a low IQ where we are alleging any kind of mental

retardation but it is the susceptibility that he had." He also noted that Detective Caldwell told defendant that he would not receive bond, that the detectives specifically promised him that they were going to help him, and that it was "undignified being told to change in a holding area or booking room with people walking around."

¶ 14 Ultimately, the court denied defendant's motion to suppress, and the case proceeded to jury trial. Among other evidence at trial, R.C. testified that defendant had sexually abused her and that she had to undergo an abortion after he impregnated her. The State also presented defendant's recorded confession. The jury found defendant guilty on all counts.

¶ 15 Defendant then hired new counsel. The new counsel moved for a new trial alleging, *inter alia*, that trial counsel was ineffective for (1) failing to investigate and present evidence that defendant's mental impairments made him unable to competently and knowingly waive his *Miranda* rights; (2) failing to present evidence from expert witnesses; (3) presenting hostile witnesses at the hearing on the motion to suppress; (4) not objecting to the admission of prior consistent statements of the victim; (5) creating an inference that defendant had sexually assaulted other victims; and (6) not calling witnesses who could contradict the victim. Defendant attached to the motion a psychiatric evaluation report by Dr. Albert Stipes and a psychological evaluation report by Michael Rabin, Ph.D., a licensed clinical and forensic psychologist. Both reports indicated that defendant had some understanding of his *Miranda* rights, and that he was able to articulate them. Nevertheless, both reports opined that defendant was unable to appreciate his *Miranda* rights and the consequences of waiving them.

¶ 16 After a hearing, the circuit court denied the motion and sentenced defendant to a total of 32 years' imprisonment. On direct appeal, defendant was represented by the same counsel as on his posttrial motion. On appeal, defendant claimed that he received ineffective assistance of trial

counsel, that the victim should not have been permitted to testify that she had an abortion as a result of becoming impregnated by defendant, that the state impermissibly implied that he had sexually abused other victims, and that the jury was not properly instructed. We affirmed the conviction and sentence.

¶ 17 On October 23, 2014, defendant, through new counsel, filed a petition for postconviction relief. Defendant attached to his petition the reports of Drs. Stipes and Rabin, the defendant's own affidavit describing his interrogation, and the joint affidavit of Patricia and Robin C., defendant's adopted mother and sister, swearing that they informed defendant's original counsel of defendant's mental limitations and medical history. The petition alleged that defendant's first attorney rendered ineffective assistance at the hearing on the motion to suppress because he (1) failed to investigate defendant's mental handicaps and prepare for the suppression hearing; (2) failed to retain an expert on defendant's capacity to make an intelligent and knowing waiver of his *Miranda* rights; (3) failed to cite specific authorities in support of suppression; and (4) failed to rebut the State's evidence. The petition also alleged that defendant's posttrial/appellate counsel rendered ineffective assistance by failing to cite to and argue specific authorities. Finally, the petition included a perfunctory claim that defendant is actually innocent.

¶ 18 At the second stage of postconviction proceedings, the State moved to dismiss the petition, arguing that all of defendant's claims were barred by *res judicata* or were otherwise deficient. The circuit court granted the State's motion on multiple grounds. Specifically, the court ruled that the allegations of ineffective assistance of counsel at the suppression hearing were barred by *res judicata* because that issue was raised and resolved in the direct appeal. The court also found that the failure to present certain evidence or cite certain authorities were strategic decisions that could not support a claim of ineffectiveness. As to the allegations of

ineffective assistance of posttrial/appellate counsel, the court ruled that defendant had not and could not show that he had been prejudiced by that counsel's strategic decision not to cite specific cases. Finally, the court ruled that the petition did not adequately plead actual innocence. The court dismissed the petition. This appeal followed.

¶ 19 ANALYSIS

¶ 20 "The Post-Conviction Hearing Act [(725 ILCS 5/122-1 et seq. (West 2014)) (Act)] provides a procedural mechanism through which a criminal defendant can assert that his federal or state constitutional rights were substantially violated in his original trial or sentencing hearing." *People v. Davis*, 2014 IL 115595, ¶ 13. A proceeding initiated pursuant the Act is "not a substitute for a direct appeal, but rather is a collateral attack on a prior conviction and sentence." *Id.* The Act allows inquiry into constitutional issues arising in the original proceeding which have not been raised and could not have been adjudicated on direct appeal. *Id.* Issues raised and decided on direct appeal are therefore barred by the doctrine of *res judicata*, and issues that could have been raised on direct appeal are forfeited. *Id.* The procedural bars of *res judicata* and forfeiture may be relaxed "where fundamental fairness so requires; where the alleged forfeiture stems from the incompetence of appellate counsel; or where facts relating to the claim do not appear on the face of the original appellate record." *People v. Blair*, 215 Ill. 2d 427, 450-51 (2005).

¶ 21 Proceedings under the Act are divided into three stages. *People v. Pendleton*, 223 Ill. 2d 458, 472 (2006). At the first stage, a petition may be summarily dismissed if the trial court finds that it is "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). If, however, the petition states the "gist of a constitutional claim" or if the trial court does not rule on the petition within 90 days of filing, then the petition proceeds to the second stage. *People v.*

Ligon, 239 Ill. 2d 94, 104 (2010); *Pendleton*, 223 Ill. 2d at 472; see also 725 ILCS 5/122-2.1(b) (West 2008).

¶ 22 At the second stage, the trial court "must determine whether the petition and any accompanying documentation make 'a substantial showing of a constitutional violation.'" *People v. Tate*, 2012 IL 112214, ¶ 10 (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). In making that determination, the court must take as true "all well-pleaded facts that are not positively rebutted by the trial record." *Pendleton*, 223 Ill. 2d at 473. We review the court's second stage dismissal of a postconviction petition *de novo*. *Id.*

¶ 23 Claims of ineffective assistance of counsel are governed by the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and adopted in *People v. Albanese*, 104 Ill. 2d 504, 525-26 (1984). To succeed on such a claim, a defendant must prove (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that there exists a reasonable probability that, absent the errors, the outcome would have been different. *Strickland*, 466 U.S. at 687. A reasonable probability is a probability sufficient to undermine confidence in the outcome. See *Albanese*, 104 Ill. 2d at 525. Ineffective assistance of appellate counsel is subject to the same test, and the defendant "must show both that appellate counsel's performance was deficient and that, but for counsel's errors, there is a reasonable probability that the appeal would have been successful." *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010).

¶ 24 Before we can reach the merits of any of defendant's arguments, we must determine which, if any, are barred by the doctrines of *res judicata* or forfeiture. The primary thrust of defendant's petition and appeal is that his original counsel rendered ineffective assistance in preparing for and arguing the motion to suppress his recorded confession. Specifically, he argues that trial counsel failed (1) to investigate his neurological and cognitive impairments; (2) to

retain a forensic expert to determine the impact of those impairments with respect to his Miranda rights; (3) to cite specific authorities in support of suppression; and (4) to rebut the State's evidence. Those arguments were raised and rejected on direct appeal. See *Cooper*, 2013 IL App (1st) 113030, ¶ 55 (failure to investigate defendant's impairments and retain an expert); ¶ 62 (failure to present evidence in support of suppression). Consequently, those arguments are barred by the doctrine of *res judicata* unless there is some applicable exception.

¶ 25 Defendant, relying on *People v. Veach*, 2017 IL 120649, argues that his claims should not be barred because the record on direct appeal was incomplete. In *Veach*, our supreme court stated that "ineffective assistance of counsel claims may sometimes be better suited to collateral proceedings but only when the record is incomplete or inadequate for resolving the claim." *Id.*, ¶ 46. Defendant argues that this is such a case, and that the exhibits attached to his petition constitute new evidence that was not part of the trial record. The new evidence consists principally of defendant's own affidavit and the joint affidavit of Patricia and Robin C. The State responds that defendant misreads *Veach*, and that the exhibits to the petition do not constitute newly discovered evidence sufficient to avoid the procedural bar of *res judicata*. We agree.

¶ 26 First, *Veach* does not support defendant's contention that his postconviction petition is the proper mechanism for raising his claim of ineffective assistance of counsel. In fact, the supreme court remanded that case to this court with instructions "to review the merits of defendant's ineffective assistance of counsel claim" on direct appeal. *Id.*, ¶ 53. Although the supreme court has said that collateral proceedings are occasionally appropriate to address claims of ineffective assistance of counsel, "[i]t is not the function of collateral review to consider claims that could have been presented on direct review." *Id.*, ¶ 47. If collateral review is inappropriate for claims that *could* have been presented on direct appeal, it is even less

appropriate in a case such as this, where the issue actually *was* presented and rejected on direct appeal. See *Blair*, 215 Ill. 2d 427, 453 (2005).

¶ 27 Second, none of the exhibits to the petition are newly discovered evidence. Newly discovered evidence is "evidence that has been discovered since the trial and that the defendant could not have discovered sooner through due diligence." *People v. Ortiz*, 235 Ill. 2d 319 (2009). "[T]he mere fact that *** affidavits are dated after the time of trial does not render the evidence newly discovered." *People v. Harris*, 206 Ill. 2d 293, 301 (2002). In his reply brief, Defendant cites a number of cases for the proposition that *res judicata* should not bar him from raising his ineffective assistance claims in a postconviction petition. But all of those cases emphasize that to avoid the effects of *res judicata*, the defendant must base his claim on facts that were not available in the earlier proceedings. See *Veach*, 2017 IL 120649, ¶ 46 (collateral proceeding is only appropriate if the record is incomplete); *People v. Cherry*, 2016 IL 118728, ¶ 33 (Post-Conviction Hearing Act compels petitioners to advance evidence that is not part of the original record); *People v. Carroccia*, 352 Ill. App. 3d 1114, 1124 (2004) (holding that *res judicata* was inapplicable because of facts that postdated the original final order).

¶ 28 The defendant's own affidavit and the joint affidavit of his mother and sister do not contain any information that the defendant did not personally have before the trial. Similarly, the reports of Drs. Stipes and Rabin do not constitute newly discovered evidence because they were exhibits to his posttrial motion and were part of the record on direct appeal. See *Cooper*, 2013 IL App (1st) 113030, ¶ 45. There is no reason, therefore, to relax the bar of *res judicata* with respect to defendant's claims that his trial counsel failed to investigate his mental capacity, retain an appropriate expert, or present evidence in favor of the motion to suppress his recorded confession. See *People v. Erickson*, 161 Ill. 2d 82, 87-88 (1994) ("Reason to relax the bar occurs

only when what is offered in the papers also explains why the claim it supports could not have been raised on direct appeal.")

¶ 29 As to the claim that trial counsel should have raised and cited specific case law in support of the motion to suppress, that issue is also barred by the doctrine of *res judicata*. Defendant claims that trial counsel should have cited a number of cases, including *People v. Flores*, 315 Ill. App. 3d 387 (2000), *Brown v. Sternes*, 304 F.3d 677 (7th Cir. 2002), and others. But that is simply another iteration of the claim that counsel did not properly prepare for the hearing and meaningfully challenge the voluntariness of defendant's confession. As discussed above, those issues were raised on direct appeal. See *Cooper*, 2013 IL App (1st) 113030, ¶¶ 55, 62.

¶ 30 Even if the failure to cite specific case law were not barred by *res judicata*, that claim would not be sufficient to support postconviction relief. Counsel's decisions concerning the method and substance of his arguments during the suppression hearing are a matter of strategy and, consequently, not generally grounds for a claim of ineffectiveness. See *People v. Hillenbrand*, 121 Ill. 2d 537, 548 (1988). Such strategic decisions only rise to the level of ineffective assistance if they were so unsound that there was no meaningful adversarial testing. *People v. West*, 187 Ill. 2d 418, 433 (1999). On direct appeal, however, we specifically found that trial counsel's strategy was not so unsound. *Cooper*, 2013 IL App (1st) 113030, ¶ 65. The fact that defendant's current counsel would have relied on different cases than trial counsel did does not change our determination on that issue.

¶ 31 Finally, defendant cannot avoid the procedural bar of *res judicata* by claiming that his posttrial/appellate counsel also rendered ineffective assistance. Defendant argues that the petition should not have been dismissed because his posttrial/appellate counsel could not have been expected to argue his own ineffectiveness. See *People v. Lawton*, 212 Ill. 2d 285, 295-96 (2004)

(stating that the issue of ineffective assistance of trial counsel, when trial counsel *also* serves as appellate counsel, is often foreclosed on direct appeal because "[a]n attorney cannot be expected to argue his own ineffectiveness.") However, defendant appears to be conflating the performance of his posttrial/appellate counsel with that of his trial counsel. In the motion for a new trial and on appeal, posttrial/appellate counsel argued that trial counsel had rendered ineffective assistance with regard to the motion to suppress the recorded confession. Because posttrial/appellate counsel was not the same as trial counsel, the conflict of interest on which defendant relies does not exist as to that portion of his representation. Posttrial/appellate counsel was not put into a situation where he would have had to argue his own ineffectiveness; rather, he argued the ineffectiveness of his predecessor counsel.

¶ 32 Additionally, defendant's only argument for the ineffective assistance of posttrial/appellate counsel is that counsel did not cite specific cases or argue that trial counsel was ineffective for failing to cite those specific cases. As discussed above, the strategic decisions behind how counsel presents and argues a case are generally not grounds for a finding of inefficient assistance of counsel. Additionally, defendant's petition and briefs do not show how posttrial/appellate counsel's failure to cite to any specific cases would have had any effect on the outcome of the posttrial motion or the direct appeal. For example, defendant argues that posttrial/appellate counsel "failed to cite, let alone argue the leading cases on, *inter alia*, confessions from persons with mental infirmities," including *People v. Braggs*, 209 Ill. 2d 492 (2003). However, our opinion on direct appeal quoted from that very case for the proposition that defendant's mental infirmities alone were insufficient to establish that his *Miranda* waiver was not knowing and intelligent. *Cooper*, 2013 IL App (1st) 113030, ¶ 66 (quoting *Braggs*, 209 Ill. 2d at 515.) Since we actually relied on *Braggs* in ruling against defendant, it seems incredible

that defendant would have prevailed had his appellate counsel only cited it. And, given our determination that trial counsel did not render ineffective assistance by choosing to focus on the police conduct rather than defendant's mental capacity, (*Cooper*, 2013 IL App (1st) 113030, ¶ 65) defendant cannot show that his subsequent counsel rendered ineffective counsel by failing to cite specific cases in support of a different strategy.

¶ 33 The very heart of defendant's petition is that his trial counsel rendered ineffective assistance in the preparation and argument of the motion to suppress defendant's recorded confession. However, that claim was thoroughly addressed on direct appeal, so the principle of *res judicata* precludes us from revisiting that issue. As to the effectiveness of the assistance rendered by posttrial/appellate counsel, the allegations in the petition are not sufficient to show that counsel's strategic decisions were so unsound that there was essentially no adversarial testing. See *West*, 187 Ill. 2d at 433. Given the depth of our analysis on direct appeal and the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," (*Strickland*, 466 U.S. at 689) we cannot conclude that the failure to cite to any particular case resulted in constitutionally ineffective assistance by posttrial/appellate counsel. Whether defendant's current counsel would have performed better than his predecessors is not the issue; "ineffective assistance of counsel refers to competent, not perfect, representation." *People v. Easley*, 192 Ill. 2d 307, 344 (2000).

¶ 34 CONCLUSION

¶ 35 We affirm the judgment of the circuit court of Cook County.

¶ 36 Affirmed.