

No. 1-09-0657

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).

SIXTH DIVISION
June 17, 2011

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. 02 CR 9220 |
| |) | |
| ROBERTO MATA, |) | Honorable |
| |) | Matthew E. Coghlan |
| |) | and Wilbur E. Crooks, |
| Defendant-Appellant. |) | Judge Presiding. |

PRESIDING JUSTICE GARCIA delivered the judgment of the court.
Justices Cahill and McBride concurred in the judgment.

ORDER

HELD: Defendant filed a *pro se* postconviction petition alleging that trial counsel was ineffective for failing to litigate a motion to suppress defendant's statements as involuntary and that appellate counsel, in turn, was ineffective for failing to argue trial counsel's ineffectiveness. The circuit court summarily dismissed the petition as frivolous and patently without merit. This court affirmed the dismissal because the petition was contradicted by the record.

Defendant Roberto Mata appeals from the first-stage dismissal of his *pro se* petition filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2008)). He contends that he stated a claim of arguable merit that trial counsel was ineffective for failing to litigate a motion to suppress his statements as involuntary. We affirm.

Defendant is currently serving a natural life sentence imposed on his 2005 jury trial convictions of aggravated battery with a firearm and two counts of first degree murder for the gang-related shootings of Sandar Mosqueada, Adrian Padilla, and Edwin Delgado. Defendant's convictions rested largely on the testimony of Delgado, the only victim to survive, and defendant's videotaped confession, which this court has reviewed. Defendant did not deny shooting the victims, but advanced a defense of second degree murder on the claim that he believed he was justified in the use of deadly force.

Prior to trial, defendant filed a motion to suppress evidence seized from his home and car without a warrant and to suppress all statements as involuntary. In support of the latter allegation, he stated that he was held by police for two days without *Miranda* warnings; he was "poked and profaned," kept in solitary confinement, forced to stand handcuffed to cell walls for hours, and threatened by police officers. Following a severed hearing on the first claim, the court granted the motion to suppress the evidence taken during a warrantless search of defendant's home and car. The court also stated that the motion to suppress statements was still "viable." Defense counsel thereafter mentioned the pending motion to suppress statements three separate times, but no hearing was held on the motion.

The case proceeded to trial. Delgado testified for the State that there was a gang-related

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scuffle between him and Reynaldo Mares. Mares struck Delgado in the chest. Delgado then pinned Mares to the ground but did not strike him, and Mares called to defendant, his long-time friend, for help. At that point, defendant pointed a gun at Delgado. Delgado released Mares and turned away, but defendant fired six shots in Delgado's direction, hitting him in the buttocks. Defendant also shot Delgado's friend Padilla. As Delgado and Padilla attempted to flee, defendant shot in their direction again. Padilla was shot a second time and fell "like a brick *** right on the street." Defendant shot in another direction, and Delgado saw his friend Mosqueada stagger and fall onto the sidewalk. Defendant ran away. Delgado later identified defendant as the shooter from both a photographic array and a lineup. Defendant was arrested.

Chicago police detectives Kevin Bor and Patrick Smith testified that following defendant's arrest and at separate times, they advised defendant of his *Miranda* rights. In both instances, defendant stated that he understood his rights. Defendant then made a statement that he had left a party with his girlfriend Esmeralda Herrera, Mares, and several other friends when he saw four or five men outside. Defendant stated that he heard gunshots and ran away. He later added that he saw Mares with a gun that "just kind of went off."

The day after his arrest, assistant State's Attorney (ASA) Lizette Mojica interviewed defendant, with Detective Smith present. She informed defendant of his *Miranda* rights and stated that she was a prosecutor, not his attorney. Defendant stated he understood his rights. Defendant elected to make a videotaped statement, and signed a consent form to that effect.

In the videotaped statement, defendant acknowledged that ASA Mojica was not his lawyer and that she had advised him of his constitutional rights. She advised him again of his

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rights on tape, and defendant stated that he understood each one as she read them. Defendant stated that he understood his rights and wished to make the videotaped statement. Free of handcuffs, he identified the signed consent form.

Defendant stated that on the night in question, he had attended a party with his girlfriend, Mares, and others. He brought a loaded handgun. After leaving the party, he witnessed two men he had seen at the party holding Mares and two others surrounding Mares. Mares called out to defendant. Defendant fired one shot in the direction of the four men, and they backed away. As he helped Mares off the ground, defendant saw one of the men reach into his pocket. Defendant feared that man was reaching for a gun and that the altercation was not over because it "looked like they were actually going to stay around." Defendant reacted by firing five more shots in the direction of the men. Their backs were to defendant, and they were walking away. He and his friends then ran to a car and drove away. Defendant admitted that he never saw any of the four men with a weapon.

Defendant stated that the police detectives and ASA had treated him well. He stated that he had been served two meals, as well as beverages, and had been permitted to use the bathroom when needed. Defendant stated that he was making the statement freely and voluntarily and that no one had made any threats or promises in exchange for the statement.

The medical examiner confirmed that Padilla suffered from two gunshot wounds, one to his middle back and one to his chest. The medical examiner testified that the paths of the gunshot wounds were consistent with Padilla moving and running away from the shooter. There were no wounds indicating that he participated in a fight. The medical examiner testified that

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Mosqueada suffered from a gunshot wound to his shoulder.

Following this evidence, the State rested.

Defendant's theory at trial was second degree murder, *i.e.* although unreasonable under the circumstances, defendant believed he was justified in the use of deadly force. Defendant testified that he saw men beating Mares on the ground, so he fired a warning shot in the air. As he helped Mares up, defendant saw one of the men reach toward his waist. Although defendant admitted he never saw any of the men with a gun, defendant feared for his life, and reacted by firing more shots. He did not recall how many shots or hitting anyone. As defendant ran for the car, he saw a man running down the street shooting a gun.

Herrera and Mares also testified that the group of men beat Mares. They later saw an unknown man with a gun running in the street. Mares saw that man shooting his gun.

The jury found defendant guilty as charged, and he was sentenced to two natural-life terms for murder, plus 10 years for aggravated battery with a firearm, to be served consecutively.

Following his convictions, defendant filed a direct appeal. He argued that defense counsel was ineffective for failing to impeach Delgado with prior inconsistent statements and consecutive sentences were improper. This court affirmed his conviction and corrected the mittimus to reflect concurrent-term sentences. *People v. Mata*, No. 1-05-0527 (2007) (unpublished order under Supreme Court Rule 23).

In 2008, defendant filed the instant postconviction petition. He alleged, *inter alia*, that defense counsel was ineffective for failing to argue the videotaped statement should be suppressed. He alleged that appellate counsel, in turn, was ineffective for failing to raise that

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issue. Defendant alleged that had the trial court considered the motion to suppress, the court would have granted it.

The circuit court summarily dismissed defendant's petition as frivolous and patently without merit. Defendant appealed.

We review the first-stage summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009).

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 States Constitution, the Illinois Constitution, or both. 725 ILCS 5/122-1 *et seq.* (West 2008); *Hodges*, 234 Ill. 2d at 9. A *pro se* postconviction petition may be summarily dismissed as frivolous and patently without merit if it has no arguable basis in law or fact, *i.e.* if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 11-12, 16-17.

Defendant contends his petition is sufficient to survive summary dismissal under the Act because he stated a claim with arguable merit that trial counsel was ineffective for failing to litigate his motion to suppress statements as involuntary.

The State initially responds that defendant waived this claim by failing to raise it on direct appeal. See *People v. Harris*, 224 Ill. 2d 115, 124-25 (2007).

We agree with the State. Although trial counsel filed the motion to suppress statements as involuntary, he apparently abandoned the motion. The State played defendant's videotaped confession at trial and provided testimony regarding his earlier statements to police and the ASA.

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The motion to suppress and defendant's videotaped confession therefore were matters in the trial record, such that defendant could have raised the present claim on direct appeal. See *e.g. People v. Harris*, 389 Ill. App. 3d 107, 134-35 (2009) (direct appeal challenging trial counsel's effectiveness for failure to litigate a motion to quash/suppress); *People v. Velez*, 388 Ill. App. 3d 493, 503-06 (2009) (same).

Nevertheless, the question we now address is whether the allegations in *the petition*, liberally construed and taken as true, are sufficient to invoke relief under the Act. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998). In his petition, defendant also argued that appellate counsel was ineffective for failing to argue trial counsel's ineffectiveness. The doctrine of waiver should not bar consideration of an issue where the alleged waiver stems from incompetency of counsel on appeal. *People v. Coleman*, 168 Ill. 2d 509, 522-23 (1995). Thus, although postconviction appellate counsel has failed to argue ineffective assistance of direct appeal counsel, based on defendant's petition, we proceed in our review. See *Coleman*, 168 Ill. 2d at 522-23.

Claims of ineffective assistance of appellate counsel are evaluated under *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that defendant show both deficient performance by counsel and resultant prejudice. *Coleman*, 168 Ill. 2d at 523. Appellate counsel need not raise every conceivable argument, and counsel's assessment of what to argue will not be questioned unless his judgment was patently erroneous. *Coleman*, 168 Ill. 2d at 523. Unless the underlying issues are meritorious, defendant obviously suffered no prejudice due to appellate counsel's failure to raise the arguments on direct appeal. *Coleman*, 168 Ill. 2d at 523.

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Turning to the underlying merits, in order to sustain a claim of ineffectiveness based on failure to litigate a motion to suppress, a defendant must establish that the motion would have been granted, thereby assuring a different trial result. *People v. Bew*, 228 Ill. 2d 122, 128-29 (2008); *Harris*, 389 Ill. App. 3d at 134.

Defendant contends he has established just that. Defendant contends his motion to suppress correctly states that he was not given *Miranda* warnings and his statement was involuntary based on physical and mental abuse by the police.

Defendant's contentions, however, are contradicted by the trial record. Detective Bor, Detective Smith, and ASA Mojica all testified that at separate times following defendant's arrest, they advised him of his *Miranda* rights and, in each instance, he stated he understood them. In the videotaped statement played at trial, ASA Mojica again advised defendant of his *Miranda* rights, and he stated he understood each one as she read them. Defendant acknowledged ASA Mojica was not his attorney, but stated that he wished to make the videotaped statement anyway. Defendant further stated that the police detectives and ASA had treated him well, providing him with sustenance, and that he was making the statement freely and voluntarily absent threat or promise in exchange. Defendant, in fact, elected to praise Detective Smith for treating him fairly while in custody. Because the record flatly contradicts defendant's claims of abuse, and defendant has not pointed to any evidence outside the trial record or affidavits in support of his claims, there is no reason to believe defendant's motion to suppress would have been granted.

Given this record, we can also presume defense counsel intended to abandon the motion as part of sound trial strategy. See *Bew*, 228 Ill. 2d at 128; *People v. Harris*, 206 Ill. 2d 293, 303

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(2002). This is especially true where counsel successfully argued a motion to suppress evidence seized at the time of defendant's arrest and zealously represented defendant at trial by presenting the testimony of a number of witnesses involved in the incident on the evening in question.

Because we may presume trial counsel abandoned the motion as part of sound trial strategy and, most importantly, because defendant's motion had no likelihood of success, appellate counsel cannot be faulted for failing to argue on direct appeal that trial counsel was ineffective for not litigating the motion to suppress. Defendant's *Strickland* claim has no arguable merit, and the circuit court therefore properly dismissed his petition at the first stage of proceedings.

We affirm the decision of the circuit court of Cook County.

Affirmed.