THIRD DIVISION
April 27, 2011

No. 1-09-0478

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. 02 CR 27150
	)	
RODNEY LOVE,	)	Honorable
	)	Marjorie C. Laws,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE STEELE delivered the judgment of the court.
Presiding Justice Quinn and Justice Neville concurred in the judgment.

O R D E R

HELD: Where defendant raised postconviction claim that counsel was prevented from questioning State witness about possible favorable treatment in exchange for his testimony, and record did not completely contradict defendant's assertion, petition stated the gist of a meritorious constitutional claim; the circuit court's summary dismissal of the petition was reversed and the case remanded for second-stage postconviction proceedings.

Defendant Rodney Love appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West

2008)). On appeal, defendant contends he stated the gist of a constitutional claim in asserting: (1) his counsel should have been allowed to question a State witness about whether he received a reduced sentence; and (2) his counsel on direct appeal was ineffective in failing to raise that issue. We reverse and remand for further proceedings under the Act.

Following a jury trial, defendant was convicted of first degree murder in the August 28, 2002, shooting death of Lyphus Pouncy. At trial, Christopher Young, who was Pouncy's cousin, testified that he witnessed the shooting and described the gunman as a dark-skinned male with braided hair. Young identified defendant in a lineup as the gunman and also identified defendant at trial. Young stated he had never seen defendant before the shooting. At the time of the shooting, Young was on house arrest for a weapon charge.

Ronald Neal testified he was with defendant immediately before the shooting. Derek Nash also was present, but was shot and killed later that night. According to Neal, defendant left with a gun and returned to tell Neal he shot the victim. In contrast, defendant testified he, Neal and Nash were together before the shooting, but that Neal and Nash left while he stayed behind. Upon their return, Nash told defendant that he shot the victim. Ten days after the shooting, defendant was found to be in possession of the weapon used to kill the victim. Defendant said the gun belonged to Neal.

Defendant was sentenced to 55 years in prison, which included a 25-year sentence enhancement for the use of a firearm in the commission of the offense. On direct appeal, this court affirmed defendant's conviction and sentence. *People v. Love*, 377 Ill. App. 3d 306, 318 (2007). On March 26, 2008, the Illinois Supreme Court denied leave to appeal. *People v. Love*, 227 Ill. 2d 591 (2008).[1]

On September 15, 2008, defendant mailed a *pro se* petition for postconviction relief from prison. The petition was received by the circuit court on October 3, 2008. On December 16, 2008, the court dismissed the petition as frivolous and patently without merit in a written order.

On December 15, 2008, one day prior to that dismissal, defendant mailed a "supplemental petition for post-conviction relief."[2] In that filing, defendant claimed, *inter alia*, that

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[1] The parties' disagreement about whether defendant's initial petition was timely filed under the Act is noted; however, the timeliness of a petition is not relevant at the first stage of postconviction proceedings. See, *e.g.*, *People v. Wheeler*, 392 Ill. App. 3d 303, 308 (2009).

[2] We note that the verification page of defendant's December 15, 2008, filing required by section 122-1(b) of the Act, in which defendant attests to the truth of his petition and the date on which it was mailed, contains a space for notarization but

his trial counsel was prevented from cross-examining Young about his sentence of boot camp on an aggravated robbery conviction and whether he received that punishment in exchange for his testimony against defendant. Defendant also asserted his appellate counsel was ineffective for failing to raise that issue on direct appeal. On January 13, 2009, the circuit court denied the petition, finding it contained "no meritorious claims."

On appeal, defendant contends his supplemental petition stated the gist of a constitutional claim as to the cross-examination of Young and the ineffectiveness of his appellate counsel. Before addressing the viability of defendant's post-conviction claim, it is necessary to consider the State's contention that defendant's supplemental filing constituted a successive petition because that document did not arrive in the circuit court until after the court ruled on the first petition.

A defendant may amend a postconviction petition until the circuit court has considered and ruled upon the defendant's claims. *People v. Watson*, 187 Ill. 2d 448, 451 (1999). In *Watson*, the Illinois Supreme Court held that the filing of a

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does not bear the signature or seal of a notary public. Affidavits filed pursuant to the Act must be notarized to be valid. *People v. Carr*, Nos. 2-09-0426, 2-09-0710 (cons.), slip op. at 3 (Ill. App. Feb. 25, 2011); *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003).

defendant's amended postconviction petition restarts the 90-day period during which the circuit court could dismiss the petition as frivolous and patently without merit. *Watson*, 187 Ill. 2d at 450; see also *People v. Ceja*, 381 Ill. App. 3d 178, 181 (2008). The court's holding in *Watson* suggests a defendant may amend or supplement his postconviction claims until the court has ruled on the defendant's first filing. See, *e.g.*, *People v. Sparks*, 393 Ill. App. 3d 878, 881-82 (2009) (defendant mailed supplement to postconviction petition two weeks after initial filing; appellate court considered claim in supplemental petition).

A postconviction petition is considered to be filed on the day it was mailed. *People v. Saunders*, 261 Ill. App. 3d 700, 703 (1994); *People v. Johnson*, 232 Ill. App. 3d 882, 884 (1992) (incarcerated defendant's postconviction petition is deemed "filed" when placed in prison mail system); see also generally *People v. Lugo*, 391 Ill. App. 3d 995, 1003 (2009) (noting "mailbox rule" for documents of incarcerated litigant) and *People v. Tlatenchi*, 391 Ill. App. 3d 705, 713 (2009) (recognizing *Johnson*).

Our reading of this precedent persuades us that in this case, defendant's second filing should not be treated as a successive petition. Applying the "mailbox rule," defendant's supplemental petition was filed on its mailing date of December 15, 2008, which was a day before defendant's initial filing was considered by the circuit court. Accordingly, defendant's second

filing constituted a supplement to his initial postconviction filing and was not a successive petition.

In the first stage of postconviction review, the circuit court considers the substantive merit of the petition and may dismiss the petition if the allegations there, taken as true, render the petition "frivolous or patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition is frivolous and 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). More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," which encompasses assertions that are fantastic or delusional. *Hodges*, 234 Ill. 2d at 16-17. If any claim in a postconviction petition meets this standard, the entire petition proceeds to the second stage of review, where counsel is appointed for defendant and the State may move to dismiss defendant's claims. 725 ILCS 5/122-4 through 122-6 (West 2008); *People v. Rivera*, 198 Ill. 2d 364, 374 (2001). This court reviews the summary dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

Defendant asserted in his petition that his trial counsel was not permitted to question Young about receiving a sentence of boot camp for a conviction for aggravated robbery. A defendant has the fundamental constitutional right to confront the

witnesses against him, which includes a reasonable right of cross-examination to inquire into a witness's bias, interest or motive to testify falsely. *People v. Nelson*, 235 Ill. 2d 386, 420-21 (2009). The evidence must raise an inference that the witness has something to gain or lose by testifying. *Nelson*, 235 Ill. 2d at 421; *People v. Triplett*, 108 Ill. 2d 463, 475-76 (1985).

The following exchange occurred during Young's direct testimony:

> "Q. At approximately 3:15 in the afternoon on August 28, 2002, do you remember where you were at?
>
> A. Yes, sir.
>
> Q. Where were you?
>
> A. In the house.
>
> Q. What were you doing in your house at that time?
>
> A. I was on house arrest.
>
> Q. What were you on house arrest for?
>
> A. Gun case.
>
> Q. Did you eventually get probation on that gun case?
>
> A. Yes, sir.
>
> Q. You also have a conviction for aggravated robbery, right?

A. Yes, sir.

Q. You got boot camp for that?

A. Yes, sir."

On cross-examination, defense counsel asked Young about his statement given to police "on October 2nd." Later in cross-examination, defense counsel requested a sidebar at which the following exchange took place:

"MS. PLACEK [assistant Public Defender]: Judge, the basis of the argument or the basis of the question would be as to subsequent matter.

MS. MCBETH [assistant Public Defender]: The aggravated robbery, he said he got boot camp for that. We think we should be able to make it clear that is a felony conviction. Because it is sort of ambiguous, if they don't know the class of the offense.

THE COURT: What's your response?

MR. CANELLIS [assistant State's Attorney]: I don't think it is ambiguous. He was convicted of aggravated robbery.

THE COURT: He got boot camp. You want to know whether it was a misdemeanor or felony?

MS. PLACEK: Yes.

THE COURT: Case law says you can put out the conviction and the sentence. I think that's sufficient. You don't have to go through whether it is a felony or misdemeanor. Aggravated robbery.

MS. PLACEK: The problem is, and this is why I asked to come back rather than get into a fight in front of the jury, because of the fact that we believe that boot camp is an alternative sentence. And that we're allowed to question dealing with any possibly [*sic*] kind of -

MS. MCBETH: Violation of the terms.

MS. PLACEK: Not violation of the terms. Credit for testifying or witnessing, since we believe it happened after October 2nd.

THE COURT: Was he eligible for the boot camp?

MR. CANELLIS: No adult background.

MS. PLACEK: He had background.

MR. CANELLIS: Not adult.

THE COURT: Was he charged with a higher class felony, was it reduced?

MR. CANELLIS: Aggravated robbery.

MS. MCBETH: He was 17 in August of '02. He was on house arrest for a gun offense and subsequently got probation. That is an adult probation.

THE COURT: You are talking about two different ones?

MS. PLACEK: Right. He said he had no background.

MR. CANELLIS: As an adult.

MS. PLACEK: That is an adult conviction.

THE COURT: Hold on.

MR. CANELLIS: It says he was adjudicated delinquent on a JD number. It was a juvenile conviction.

MS. PLACEK: We will, in fact, then take the rap sheet and we will understand. It would be our contention that we would still make the argument, though, that boot camp is an alternative sentence and we should be allowed to ask that.

THE COURT: No. I'm going to deny that.

MS. PLACEK: Okay.

THE COURT: He was convicted, that's out there, of aggravated robbery."

Defendant contends his petition stated an arguably

meritorious claim that the trial court should have allowed counsel to ask if Young received boot camp as a lesser sentence in exchange for his testimony. Evidence that a witness has been arrested or charged with a crime is a proper subject for cross-examination where it would reasonably tend to show that the witness's testimony might be influenced by bias, interest or motive to testify falsely. *People v. Truly*, 318 Ill. App. 3d 217, 225 (2000). For example, it is entirely relevant for a cross-examiner to elicit testimony that the witness is currently under arrest, indictment or incarcerated. *People v. Dace*, 184 Ill. App. 3d 1082, 1086-87 (1989); see also *People v. Balayants*, 343 Ill. App. 3d 602, 605 (2003) (witness may be impeached by evidence that he faces pending charges or is in State custody at time of trial). This line of questioning can reveal that a witness is testifying in exchange for favorable treatment from the State regarding his current charges or custodial situation.

Defendant argues his counsel should have been allowed to question Young further about the aggravated robbery conviction that resulted in a sentence of boot camp. Our inquiry at this stage of postconviction review is whether defendant's assertion is indisputably meritless and clearly contradicted by the record. See *Hodges*, 234 Ill. 2d at 16.

The colloquy recounted herein illustrates that during the State's direct examination of Young, the State elicited evidence of Young's previous convictions, likely in anticipation of the

defense doing so on cross-examination to weaken Young's credibility. During that direct examination by the State, it was revealed that Young received boot camp for an aggravated robbery conviction. Then, on cross-examination, defense counsel asked in a sidebar that she be allowed to explore whether the aggravated robbery was a felony or misdemeanor.

During the sidebar, the trial judge and attorneys discussed two separate lines of questioning of Young, *i.e.*, impeaching him with prior convictions and also the possibility of favorable treatment, such as an alternative sentence for his aggravated robbery conviction in exchange for Young's testimony, which would be relevant to bias or motive to testify falsely. The sidebar discussion ended with the court denying the defense's request to ask Young if boot camp was an "alternative sentence." Defense counsel had earlier asserted that evidence was relevant to "credit for testifying or witnessing" since counsel "believed" Young's conviction happened after he identified defendant as the gunman.

As we have noted, to be relevant to a witness' bias, the evidence sought to be introduced must suggest that a witness has something to gain or lose by testifying. See *Nelson*, 235 Ill. 2d at 421. A charge or conviction should be either current or close enough in time to the witness's testimony that the witness could be offering his account in exchange for or in contemplation of favorable treatment from the State. The record establishes that

in this case, defense counsel was prevented from exploring that line of questioning. See, *e.g.*, *Balayants*, 343 Ill. App. 3d at 605-06 (new trial warranted when defendant was barred from cross-examining complainant regarding a pending charge and complainant was sole witness called against defendant).

The State contends on appeal that the defense was allowed to impeach Young "quite extensively" and that any connection between his testimony and his aggravated robbery conviction is "remote and uncertain." The State argues the record "reveals a common understanding between the parties and the court" that Young's conviction and boot camp occurred well before his testimony in defendant's trial and that Young's case was "closed" when he testified in defendant's case.

In fact, those contentions by the State underscore our conclusion that the timing of Young's conviction and his subsequent punishment are not ascertainable from the record. Moreover, while the State points to the trial court's discretion in limiting counsel's inquiry into the potential bias of a witness, that is not the standard to be applied here.

Our inquiry is not whether defendant will ultimately prevail on his postconviction claim. Applying the low standard required by *Hodges*, we can not conclude that defendant’s claim rests on an indisputably meritless legal theory completely contradicted by the record. Given that conclusion, defendant's second contention that his counsel on direct appeal was ineffective for failing to

raise that issue also cannot be dismissed as lacking in merit at this stage of postconviction review.

Accordingly, the circuit court's dismissal of defendant's postconviction claims is reversed and this case is remanded for second-stage proceedings under section 122-4 through 122-6 of the Act (725 ILCS 5/122-1 through 122/6 (West 2008)).

Reversed and remanded.