

No. 1-09-0211

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SECOND DIVISION
JANUARY 11, 2010

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. 03 CR 21293
)	
GLENN PAYTON,)	Honorable
)	Kevin M. Sheehan,
Defendant-Appellant.)	Judge Presiding.

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

O R D E R

HELD: Where defendant's *pro se* post-conviction petition alleging ineffective assistance of counsel had an arguable basis both in law and in fact, summary dismissal was improper.

Defendant Glenn Payton, who was convicted of first degree murder and sentenced to 30 years' imprisonment, appeals from the summary dismissal of his *pro se* petition for relief under the

Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2008). On appeal, he contends that his petition presented arguable claims that his trial counsel was ineffective both for failing to contact, investigate, and present testimony from witnesses who would have corroborated his theory of defense, and for preventing him from testifying. For the reasons that follow, we reverse and remand.

The underlying facts of the case are set forth in detail in our decision on direct appeal and will not be repeated here except as necessary. In brief, on September 11, 2003, the victim, Carl Richardson, was working as a security guard in a store on North Cicero Avenue. Defendant and Richardson engaged in a physical altercation in the store. When defendant left the store, Richardson followed. Shortly thereafter, Richardson was hit by the back wheels of a truck and died as a result of his injuries.

At trial, the State presented four eyewitnesses to testify as to how Richardson came to be in the path of oncoming traffic. The store owner, Don Dong Ha Kim, testified that defendant dropped Richardson's handcuffs onto the ground and Richardson went to retrieve them. As Richardson neared the handcuffs, defendant grabbed him by the neck and pushed him into the street, where he stumbled and fell under an oncoming truck. M.J. Dukes testified that he saw Richardson leave the store and walk toward

defendant, who was backing into the street. As Richardson approached, defendant turned toward oncoming traffic, grabbed Richardson's shirt near his shoulder, and "spinned [sic] him out, towards the street" into the path of a truck, which hit him. James Jones testified that defendant and Richardson were arguing in the street when defendant looked into oncoming traffic, grabbed Richardson, and "slung" him into the street under the back wheels of a truck. Finally, Ishmael Gonzalez testified that Richardson followed defendant into the street. Defendant, who was facing oncoming traffic, grabbed Richardson by the collar and threw him toward an oncoming truck, which struck Richardson.

Defendant rested without presenting any evidence. The trial court convicted him of first degree murder, finding that he threw Richardson into the street knowing that his actions created a strong probability of death or great bodily harm. Defendant thereafter received a sentence of 30 years in prison. We affirmed defendant's conviction and sentence on direct appeal. *People v. Payton*, No. 1-05-1850 (2008) (unpublished order under Supreme Court Rule 23).

In 2008, defendant filed a *pro se* petition for post-conviction relief raising several allegations of ineffective assistance of trial counsel, as well as ineffective assistance of appellate counsel for failing to raise the issue of trial counsel's ineffectiveness. Two of defendant's claims of

ineffective assistance of trial counsel are at issue in this appeal.

First, defendant alleged that counsel failed to investigate, interview, and call as witnesses several individuals who would have testified that Richardson charged at defendant, stumbled, and fell under the truck accidentally. According to defendant, his mother contacted trial counsel with the information that Antonio Jones, Cortney Jones, Zenada Gordon, and Larry Quinn, Jr. had witnessed the incident and were willing to testify on defendant's behalf, and counsel indicated to defendant's mother that he was going to send an investigator to interview the potential witnesses. Defendant further alleged that Antonio Jones and Cortney Jones went to one of his court appearances and attempted to speak with counsel, but that counsel "informed them he had another court appearance to attend to, and that he will send an investigator to interview and discuss the events of what they had seen happen." However, according to defendant, none of the potential witnesses were ever contacted by counsel or an investigator.

Defendant asserted that during opening arguments, counsel "primed the judge to hear a different version of the incident," but then failed to produce any evidence to support this alternate version, leaving the trial court with the impression that counsel "could not live up to the claims made in the opening." Defendant

argued that had the trial court been presented with the testimony of defense witnesses -- and thus the option of finding his conduct to be unintentional -- there was a reasonable probability that a different result would have been reached.

Defendant attached to his petition supporting affidavits executed by his mother, Gordon, and Cortney Jones. He explained that he tried to obtain affidavits from Antonio Jones and Larry Quinn, Jr., but because he was incarcerated and indigent, he was unable to locate their current addresses without assistance from the court. Gordon stated in her affidavit that defendant and Richardson were wrestling on the ground in the middle of the street when someone yelled, "Get out of the street." Defendant got up and ran to the curb, but when Richardson tried to get up, he was hit by a truck. In his affidavit, Cortney Jones stated that he witnessed two men fighting when "one guy broke loose and tried to run at the other guy and lost his footing and fell but he slid head-first into Cicero ongoing [sic] traffic and an 18-wheeler rear tire caught him." Defendant's mother, Geneva Payton, averred in her affidavit that she had contacted counsel with potential witnesses and stated, "I took it upon myself to even bring two brothers information and told them and me he was going to send his investigator to talk to them, he never did."

Second, defendant alleged that counsel was ineffective for denying him his right to testify. According to defendant, he

informed counsel prior to trial that he wanted to testify on his own behalf, and counsel said he would consider defendant's request. However, counsel rested without calling any witnesses. Defendant alleged that counsel did not tell him he was not going to put defendant on the stand, that counsel did not discuss the defense strategy with him, and that he did not "at any time waive [his] constitutional right to testify on [his] own behalf."

Defendant argued that had he testified, he could have refuted the testimony of the State's key witnesses. In a self-executed affidavit, he explained that his testimony would have been that Richardson was running toward him when he stumbled and, due to his own momentum, fell underneath the rear tires of the truck.

The trial court summarily dismissed the petition, finding it frivolous and patently without merit. This appeal followed.

In cases not involving the death penalty, the Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2008).

A *pro se* petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for example, a legal theory that is completely belied by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage post-conviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "a petition alleging ineffective assistance 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; see also *People v. Brown*, 236 Ill. 2d 175, 185 (2010) (citing *Hodges*).

On appeal, defendant contends that the trial court erred in summarily dismissing his petition because both his claims of ineffectiveness have an arguable basis in fact and law.

First, defendant argues that his petition presented an arguable claim that counsel was ineffective for failing to present testimony from Gordon, Cortney Jones, Antonio Jones, and Quinn. Defendant asserts these witnesses would have corroborated his theory of defense, that is, that Richardson stumbled into the truck on his own during mutual combat. Defendant argues that while counsel suggested this scenario in opening arguments, he did not call any witnesses in support of the theory. Noting that intent was a critical issue at trial, defendant asserts that the proffered testimony would have gone to this key element.

We agree with defendant that this claim of ineffectiveness is not frivolous or patently without merit. While it might be unlikely that counsel completely failed to investigate or contact witnesses for whom he had been provided contact information, such an allegation is neither fantastic nor delusional. See *Hodges*, 234 Ill. 2d at 19. We also cannot describe as fantastic or delusional the factual scenarios provided by defendant, Gordon, and Cortney Jones in their affidavits. Each of these individuals

offered a plausible explanation of how Richardson could have been hit by the back wheels of the truck without having been thrown into oncoming traffic by defendant. Defendant's petition is not based on a fanciful factual allegation. Accordingly, it has an arguable basis in fact.

A petition has an arguable basis in law if the legal theory on which it is based is not indisputably meritless. *Hodges*, 234 Ill. 2d at 16. Here, defendant's legal theory is that counsel was ineffective for failing to investigate, interview, and present Gordon's and Cortney Jones' testimony. Whether this theory is indisputably meritless is a question that focuses on defendant's theory of defense at trial and whether the potential witnesses' testimony arguably would have supported this defense. See *Hodges*, 234 Ill. 2d at 19; *People v. Jones*, 399 Ill. App. 3d 341, 369 (2010).

Counsel's theory of defense at trial was that while defendant did engage in an altercation with Richardson, he did not knowingly throw Richardson into oncoming traffic, and thus, was not guilty of the crime charged. In opening statements, counsel suggested the following factual scenario to support this defense:

"What happens out in the street, Mr. Richardson started throwing things at my client, my client goes to pick up these

handcuffs. When he goes to pick up these handcuffs, Mr. Richardson charges him. My client wasn't watching traffic. He's told by Mr. Jones, 'White boy, watch out.' Mr. Richardson is at him. He ducks out of the way. Mr. Richardson falls into the street and is, unfortunately, struck by this vehicle."

In our view, it is at least arguable that Gordon's and Cortney Jones' testimony would have supported the theory presented by counsel in opening statements. While Gordon's and Cortney Jones' versions of events differ in describing exactly how Richardson ended up under the truck's wheels, both accounts are consistent with defendant's position that he did not throw Richardson into oncoming traffic. Because the potential testimony arguably would have supported defendant's theory of defense, it is at least arguable that counsel's failure to investigate and interview these witnesses fell below an objective standard of reasonableness and prejudiced the defense. *Hodges*, 234 Ill. 2d at 22. As noted by defendant, even though counsel suggested in opening statements that Richardson fell into the street, counsel introduced no evidence to support this allegation. Gordon's and Cortney Jones' testimony could have served to fill this void. We conclude that defendant's petition

is not based on an indisputably meritless legal theory. Therefore, the petition has an arguable basis in law.

Defendant's petition should not have been dismissed as frivolous and patently without merit, as it did not lack an arguable basis either in law or in fact. Rather, the petition presented the gist of a meritorious constitutional claim sufficient to merit second-stage proceedings with the representation of an attorney. Because partial summary dismissals are not permitted at the first stage of a post-conviction proceeding, we need not address defendant's contention on appeal that counsel was ineffective for preventing him from testifying. *Hodges*, 234 Ill. 2d at 22 n.8; *People v. Sparks*, 393 Ill. App. 3d 878, 887 (2009).

For the reasons explained above, we reverse the judgment of the circuit court of Cook County and remand for further proceedings in accordance with sections 122-4 through 122-6 of the Act. 725 ILCS 5/122-2.1(b) (West 2008).

Reversed and remanded.