2011 IL App (1st) 100471-U

FIRST DIVISION
FILED: OCTOBER 11, 2011

No. 1-10-0471

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. 04 CR 2605
	)	
MURRAY OVER, JR.,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Karnezis and Rochford concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary dismissal of *pro se* post-conviction petition affirmed where defendant failed to set forth an arguable basis in law and in fact that appellate counsel was ineffective for failing to raise the ineffective assistance of trial counsel.

¶ 2 Defendant Murray Over 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)). He contends that the circuit court erred in summarily dismissing his petition where he presented an arguable basis in law and in fact that appellate counsel was ineffective for failing to raise the

claim that trial counsel should have called his girlfriend, Tiffany Williams, to testify at the hearing on his motion for a new trial.

¶ 3 Defendant's conviction arose from his participation in the fatal stabbing of his sister, Niquita Johnson, on August 25, 1999. In a videotaped statement given to an assistant State's Attorney on August 27, 1999, defendant acknowledged that he had spoken to an attorney but wanted to give his statement outside the presence of his attorney. He also stated that he was treated well by the police, he was given food and drink, and allowed to use the bathroom.

¶ 4 Defendant continued, and explained that he lived with Tiffany Williams, their two sons, and Niquita, who was his legal guardian until he turned 14 or 15 years old. Niquita was in charge of the $181,000, they had inherited from their mother, and she made sure he had food, clothing, shelter, and school supplies. In 1996, he was incarcerated in Cook County jail and released from boot camp on October 31, 1997. Several days after his release, he discovered that only $8,000 of the inheritance remained.

¶ 5 Defendant further related that on August 25, 1999, the date of the incident, he learned that the home telephone was about to be disconnected because Niquita did not pay the bill. At the time, he was on electronic home monitoring for a pending case and afraid that he would have to go back to jail if the telephone was disconnected. He paged several friends who came to his home, but had no money to lend him. Tiffany, however, had $190, and his friend Lloyd agreed to cover the remainder of the bill.

¶ 6 After the bill was paid, he and his friends Lloyd, Buford, Dennis, and Tiffany's brother, Jermaine, drank cognac and smoked marijuana in the basement. Lloyd and Jermaine teased him about how Niquita mishandled his inheritance which made him angry. Lloyd said, "we should fuck her up," but Jermaine said to wait until she fell asleep. An hour later, when Niquita and her 11-month-old daughter, Queenie, were asleep, he took two knives from the kitchen and gave

them to Dennis and Buford. He stood in the hallway outside Niquita's bedroom as Lloyd hit Niquita with a shovel, Dennis stabbed her three times in the chest, and Buford stabbed her three or four more times. He then took Queenie from Jermaine, went downstairs and told Tiffany to clean the blood off the baby. Meanwhile, his friends placed Niquita's body in the trunk of her car and pushed it away from the house.

¶ 7 Prior to trial, defendant unsuccessfully moved to suppress his statements to the police. In denying defendant's motion, the court rejected his claim that the police coerced or beat him up, and found it "patently ridiculous for [defendant] to suggest he never had bathroom privileges over a number of days [at the police station] and was able to hold it. "

¶ 8 At trial, defendant testified similarly to his videotaped statement, but claimed that Lloyd told him to get the knives and that he was afraid of what Lloyd would do if he did not comply. Defendant added that he never told his friends that he wanted to kill Niquita, and he did not want them to hurt her. He also claimed that he was not allowed to use the bathroom for several days and urinated in the police interview room two hours before giving his videotaped statement, which was beaten out of him.

¶ 9 The jury found defendant guilty of first degree murder, and his attorneys moved for a new trial. As relevant here, defendant alleged in his supplemental motion for a new trial that the State knowingly withheld "impeaching" evidence "that prior to Tiffany Williams giving her statement to the police, she was not allowed to use the bathroom and was forced to urinate on herself and then not allowed to clean herself up afterwards, they certainly would have cast more doubt on her already suspicious testimony." This information was allegedly revealed during the course of a conversation, after trial, on April 27, 2005, when a detective told one of defendant's attorneys and a social worker that "Williams was forced to urinate on herself prior to her agreeing to talk to the police about her knowledge of the facts surrounding the murder."

According to defendant, this information was significant because "[t]he crux of the defense was that [he] was mistreated while in custody and his statement was not voluntary nor was it recorded completely and that Tiffany's statement was coerced and untrue."

¶ 10 During the hearing on defendant's motion for a new trial, the State presented the testimony of Detective Michael Hughes, who was present when Williams gave her videotaped statement, and defendant presented the testimony of Renee Neely, the social worker who was present during the April 27 conversation. In denying defendant's motion, the court credited the testimony of Detective Hughes that Williams smelled of urine but declined opportunities to use the bathroom, over that of Neely, whose recollection of the April 27 conversation appeared tentative. The court noted that this case involved not only the testimony of Williams, but also the videotaped statement of defendant, which was consistent with Williams's testimony and the forensic evidence showing defendant's guilt beyond a reasonable doubt. The court emphasized the fact that Williams urinated on herself before she gave her statement would not have changed the outcome of the case against defendant, and further noted that because Williams was allowed to be deposed by the defense before trial, defendant could have questioned her then. At sentencing, the court found defendant eligible for the death penalty, but citing mitigating factors, sentenced him to 55 years' imprisonment.

¶ 11 On direct appeal, this court affirmed defendant's murder conviction and sentence, and rejected, *inter alia*, his contention that the trial court erred in denying his motion for a new trial based on "newly discovered evidence" that Williams had urinated on herself before giving her statement to police and was sitting in her own urine during her videotaped statement. *People v. Over*, No. 1-05-2470, order at 11 (2008) (unpublished order under Supreme Court Rule 23). We found that the evidence referred to by defendant was not "newly discovered" where he had the opportunity to depose Williams before trial and to cross-examine her during trial. *Over*, No. 1-

05-2470, order at 12. Following this court's denial of defendant's petition for rehearing, the supreme court denied his petition for leave to appeal on January 28, 2009. *People v. Over*, 231 Ill. 2d 646 (2009).

¶ 12 On December 22, 2009, defendant filed the subject *pro se* post-conviction petition alleging, in pertinent part, that his appellate counsel was ineffective for failing to challenge the failure of his trial attorneys to call Williams as a witness at the hearing on his motion for a new trial, "which would have brung further evidence that would have corroborated with the defense's argument of 'newly discovered evidence' that Tiffany Williams had been forced to urine [*sic*] on herself and that her statement was not given freely." Defendant maintained that this evidence, in turn, would have corroborated his claim that his statement was similarly coerced. We observe that defendant's petition was not notarized, verified by affidavit, or accompanied by supporting documents.

¶ 13 In summarily dismissing defendant's petition as frivolous and patently without merit, the circuit court found that "[t]here is nothing new here that has not been raised before." The court noted that defendant's underlying claims of ineffective assistance were issues that had been previously adjudicated and resolved, that "it was part of the [direct] appeal." Defendant now appeals from that ruling, and our review is *de novo*. *People v. Delton*, 227 Ill. 2d 247, 254 (2008).

¶ 14 To survive the summary dismissal stage of post-conviction review, a *pro se* defendant need only allege enough facts, with supporting affidavits, records or other evidence, to support the gist of a constitutional claim. *People v. Munoz*, 406 Ill. App. 3d 844, 850 (2010). The term "gist" describes what must be alleged at the first stage; it is not the legal standard utilized by the circuit court to evaluate the petition under section 122-2.1 of the Act, which deals with summary dismissals. *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). Rather, a *pro se* petition seeking post-

conviction relief under the Act may be summarily dismissed as frivolous and patently without merit only if it has no arguable basis in law or in fact. *Hodges*, 234 Ill. 2d at 16.

¶ 15 "A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating such failure was objectively unreasonable and that counsel's decision prejudiced defendant." *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). A claim that counsel failed to investigate and call a witness must be supported by an affidavit from the proposed witness. *People v. Palmer*, 352 Ill. App. 3d 877, 885 (2004) (*citing People v. Enis*, 194 Ill. 2d 361, 380 (2000)). Without such an affidavit, defendant's mere allegation that had Williams testified "that she was forced to sit in her own urine while giving her statement, this would have provided strong corroboration" for his claim that the same was done to him and possibly changed the outcome of his motion for a new trial, is mere speculation, and more precisely, what defendant wished Williams would say. *People v. Harris*, 224 Ill. 2d 115, 142 (2007). Because defendant filed no evidentiary support for his claim, we affirm the circuit court's decision to dismiss his claim summarily.

¶ 16 Affirmed.