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2011 IL App (3d) 090705-U

Order filed August 19, 2011

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Plaintiff-Appellee,	)	Will County, Illinois,
	)	
v.	)	Appeal No. 3-09-0705
	)	Circuit No. 05-CF-787
DENNIS BAILEY,	)	
	)	Honorable
Defendant-Appellant.	)	Robert P. Livas,
	)	Judge, Presiding.

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JUSTICE O'BRIEN delivered the judgment of the court.  
Justices Holdridge and Lytton concurred in the judgment.

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**ORDER**

¶ 1 *Held:* Trial court did not err in summarily dismissing defendant's postconviction petition alleging ineffective assistance of trial and appellate counsel where affidavits attached to petition were not notarized as required by the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2008)) and the affiants' statements were cumulative to evidence presented or irrelevant to defendant's guilt.

¶ 2 Defendant Dennis Bailey filed a *pro se* postconviction petition alleging ineffective assistance of trial and appellate counsel. The trial court summarily dismissed the petition, finding it to be without merit. We affirm.

¶ 3

## FACTS

¶ 4 In July 2005, defendant Dennis Bailey was indicted on two counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)) and four counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(d) (West 2004)) against his two nieces, S.B. and K.B. The indictment alleged that Bailey committed acts of mouth to vagina and penis to vagina penetration against S.B. and touched her breasts one time in June 2004 and committed the same acts against K.B. three times in June and July 2004. A jury trial took place where the following evidence was presented.

¶ 5 At the time the offenses took place, S.B. was 14 years old and K.B. was 10 years old. Bailey lived with the girls in their mother's apartment. Their mother, Regina, is Bailey's sister. He would babysit S.B. and K.B. while Regina worked. The girls resented that Bailey disciplined them and made them perform chores. One morning in June 2004, Bailey awoke S.B. and K.B., and S.B.'s 15-year-old friend Carmen F., who lived next door and had spent the night. He ordered K.B. and Carmen to go to Carmen's house. He then assaulted S.B. A week or two later, he assaulted K.B., and repeated the assault on K.B. on two more occasions. On July 22, 2004, Christina W., the victims' older sister, asked K.B. if Bailey had touched her. K.B. admitted the assaults had occurred and S.B. called the police.

¶ 6 Bailey denied that he assaulted K.B. and S.B. He asserted that the girls had made up the allegations of abuse in retaliation for him disciplining them and requiring them to do household chores in the hope that he would stop living with them. Bailey pointed to a physical altercation he had with S.B. after he had punished K.B. where S.B. threatened to get him in trouble. He also pointed to an incident where he and his girlfriend saw a friend of S.B. in the alley looking as if she had "just got done having sex" and S.B. became angry because he told others of the incident.

¶ 7 The jury convicted Bailey on all counts and the trial court sentenced him to 57 years for both counts of predatory criminal sexual assault and 30 years for each count of aggravated criminal sexual assault, for a total of 234 years' imprisonment, with the sentences to run consecutively. Bailey filed a *pro se* posttrial motion alleging that his trial counsel was ineffective. A hearing was conducted on his motion after which the trial court found that Bailey's counsel was not ineffective. Bailey appealed, raising six issues, including ineffective assistance of counsel. This court rejected his claims of ineffective assistance of counsel, affirmed his conviction, and vacated one 30-year sentence on one-act, one-crime principles. *People v. Bailey*, No. 3-06-0205 (2008) (unpublished order under Supreme Court Rule 23). He filed a *pro se* postconviction petition, arguing various issues related to the alleged ineffectiveness of trial and appellate counsel. Included with Bailey's petition was a *pro se* "supplemental brief" which he described as "part 2" of his postconviction petition. Bailey also included several affidavits as attachments to his petition. The affidavits are offered in support of Bailey's assertion that trial counsel was ineffective for failing to call the affiants as witnesses at his trial. According to Bailey, their testimony would have supported his defense, corroborated his testimony, and impeached the testimonies of K.B. and S.B.

¶ 8 Gloria Bailey's affidavit stated that she had been served with a subpoena and was present at the courthouse during the trial. If she had been called to testify, she would have stated that Dennis babysat her five daughters from the time they were infants until they were teenagers and that none of her daughters complained that Dennis engaged in sexual misconduct with them. She would also have stated that her niece, K.B., lived with her after the alleged abuse, that she did well in her academics and extracurricular activities, and behaved like a normal teenager.

¶ 9 Dorothy Bailey's affidavit stated that she appeared in court on due days pursuant to a

subpoena and was informed by defense counsel that she did not need to appear on a third day as her testimony would not be needed. If she had testified, she would have stated that Bailey would pick her up from work in July 2004 with S.B. and Carmen in the car; that she told her sister Regina, the victims' mother, that Regina's oldest daughter was engaging in sexual intercourse while S.B. and K.B. were present; and that she would explain that Bailey and S.B. had a disagreement in the middle of July 2004 after which S.B. said she would make sure Bailey went to jail "for putting his hands on her." She would also have testified about S.B.'s vindictive, violent and manipulative behavior.

¶ 10 Billy Bailey's affidavit stated that he was subpoenaed and appeared in court but waited in the hallway and was not questioned by anyone. If he had testified, he would have stated that Bailey did not drive a white Monte Carlo until after July 22, 2004, because he did not have his driver's license. He further would have testified that he visited his Aunt Regina's apartment most days in June and July 2004, and saw K.B., S.B., and Carmen playing and joking with Bailey numerous times. Billy further averred that had he been called to testify, he would have explained that he and Bailey joked about Bailey catching S.B.'s friend "having sex in the alley;" that S.B. became angry and threatened Bailey; and that S.B. was a "habitual liar" with "major influence over her sister [K.B]."

¶ 11 The affidavit of Tawanda Logan states that she received a subpoena to testify at her uncle's trial, that she appeared, and that Bailey's attorney did not question her. She would have testified, if called, that Bailey used to babysit her and her sisters and that nothing sexually inappropriate ever occurred and that she visited Regina's apartment several times during June and July 2004 and saw K.B. and S.B. playing and laughing with Bailey. She also saw them riding with Bailey in his car in July 2004. She would further testify that after Bailey moved in with Regina, the apartment was cleaner, and Bailey would help the girls and their friends with reading skills. K.B. and S.B. disliked

Bailey for making them clean up and study. She never noticed anything strange or unusual with K.B. and S.B. She described S.B. as smart but “very devious and misleading when someone upsets her.” In her opinion, Bailey was not a child molester and could not commit the sexual offenses against S.B. and K.B.

¶ 12 The trial court summarily dismissed Bailey’s petition, finding it to be without merit. The trial court also dismissed Bailey’s motions for grand jury transcripts and police reports. He appealed.

¶ 13 **ANALYSIS**

¶ 14 The issue on appeal is whether the trial court erred when it dismissed Bailey’s postconviction petition at the first stage of postconviction proceedings. Bailey argues that he alleged the gist of a constitutional claim that trial counsel was ineffective for a number of failings, including to call certain witnesses at trial who would have corroborated his testimony and impeached the victims’ testimonies, and that appellate counsel was ineffective for failing to raise the issues on direct appeal.

¶ 15 The Postconviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2008)) provides a remedy for defendants who have suffered a substantial violation of their constitutional rights. *People v. Edwards*, 197 Ill. 2d 239, 243-44 (2001). In reviewing a first-stage dismissal of a postconviction petition, this court must determine whether the allegations in the petition are frivolous or patently without merit. *People v. Holt*, 372 Ill. App. 3d 650, 652 (2007). An allegation is frivolous or patently without merit when it fails to state the gist of a constitutional claim. *Holt*, 372 Ill. App. 3d at 652. To satisfy the gist standard, a petitioner need only set forth a limited amount of detail and is not required to present his claim in its entirety or include legal citation. *Edwards*, 197 Ill. 2d at 244 (quoting *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996)). However, a petitioner must set forth

some facts that may be corroborated and are objective in nature, or explain why the facts are absent. *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008). First-stage dismissal is appropriate only if the petition has no arguable basis in either law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). The Act requires that the petition be accompanied by affidavits, records or other evidence supporting its allegations. 725 ILCS 5/122-2 (West 2008). The accompanying documentation “must identify with reasonable certainty the sources, character, and availability of the alleged evidence supporting the petition’s allegations.” *Delton*, 227 Ill. 2d at 254. Accompanying affidavits must be notarized to be valid. *People v. Carr*, 407 Ill. App. 3d 513, 515 (2011). When the petition does not comply with the Act’s requirements, it is properly dismissed. *Carr*, 407 Ill. App. 3d at 515. We review summary dismissal of a postconviction petition *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 16 Claims of ineffective assistance are reviewed under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Under the first prong, a defendant must establish that counsel’s performance was below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687. To satisfy the second prong, a defendant must demonstrate that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 687. When evaluating an ineffective assistance claim based on counsel’s failure to investigate, the value of the evidence not presented must be considered, as well as the closeness of the evidence presented. *People v. English*, 403 Ill. App. 3d 121, 137 (2010). Counsel’s performance is not ineffective if he fails to present evidence that is cumulative to other evidence presented. *People v. Phyfiher*, 361 Ill. App. 3d 881, 886-87 (2005). In addition, counsel’s decision as to whether to present a witness is generally a matter of trial strategy and is presumed to be a product of sound trial strategy which will not support an ineffective

assistance claim. *English*, 403 Ill. App. 3d at 138.

¶ 17 Bailey asserts that his postconviction petition presents an arguable claim of ineffective assistance of trial counsel for counsel's failure to present witnesses who would have corroborated Bailey's theory of defense or impeached the credibility of the victims. He points to the affidavits of Dorothy Bailey, Billy Bailey, Tawanda Logan, and Gloria Bailey, which he attached to his postconviction petition, as supportive of his claim. These affidavits are not notarized as required by the Act and are invalid. Moreover, as determined by the trial court, Bailey's postconviction claims are without merit, lacking an arguable basis in fact or law. The arguments he makes in his petition, that trial counsel failed to call the witnesses who would testify according to their affidavits, and that such testimony would have corroborated his testimony and impeached the testimonies of the victims, do not establish ineffective assistance of counsel.

¶ 18 Our review of the record leads us to conclude that the offered testimony would not have affected the outcome of the trial. The evidence that Bailey seeks to offer is either cumulative to evidence presented at trial or irrelevant to his guilt or innocence. For example, he relies on the affidavit statements of Dorothy, Billy and Tawanda as corroborative evidenced of his theory that S.B. and K.B. made up the allegations because they resented him for disciplining them and assigning them chores. At trial, Bailey testified regarding this theory and the facts he claimed in support of it. Regina, the victims' mother and Bailey's sister, also testified that he was strict with her daughters. Gloria's affidavit statements that Bailey babysat her daughters without incident, and Tawanda's corroboration of that information is irrelevant to whether he assaulted K.B. and S.B. Similarly irrelevant is the statements in Billy's affidavit that Bailey did not have the Monte Carlo in his possession until after the alleged assault of S.B.

¶ 19 Bailey’s postconviction petition, which we construe as including the “part 2” “supplemental brief,” fails to satisfy either *Strickland* prong. The decision to call a witness is a matter of trial strategy which is generally immune from ineffective assistance claims. *People v. Munson*, 206 Ill. 2d 104, 139-40 (2002). However, counsel may be deemed ineffective for failing to present exculpatory evidence or to call witnesses when he or she is aware that the testimony would support an uncorroborated defense. *People v. Redmond*, 341 Ill. App. 3d 498, 516 (2003). Here, trial counsel subpoenaed the witnesses identified in Bailey’s postconviction petition and determined not to put them on the stand. Based on their purported testimony as set forth in their affidavits, none of the witnesses would have presented any exculpatory evidence or any evidence in support of his defense. It was not unreasonable for trial counsel not to present the witnesses and failure to do so did not amount to ineffective assistance of counsel. Moreover, even if they had testified, their testimony would not have affected the outcome of the trial as the testimony was irrelevant or cumulative. Because the petition lacked an arguable basis in fact or in law, the trial court did not err in dismissing it at the first stage of postconviction proceedings.

¶ 20 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 21 Affirmed.