

NOTICE

Decision filed 06/15/11. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NO. 5-09-0090

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Saline County.
)	
v.)	No. 05-CF-20
)	
KARIN L. HARGRAVE, also known as)	
Karin L. Anderson,)	Honorable
)	Todd D. Lambert,
Defendant-Appellant.)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Donovan and Wexsten concurred in the judgment.

R U L E 2 3 O R D E R

Held: Defendant failed to present a gist of a meritorious claim in her postconviction petition based on an asserted ineffective assistance of counsel for a failure to present evidence of inconsistency in the testimony of a minor victim and evidence of numerous additional episodes where defendant suffered domestic abuse.

After a bench trial, defendant, Karin L. Hargrave, also known as Karin L. Anderson (defendant), was convicted on three counts of predatory criminal sexual assault. Defendant filed a postconviction petition in the circuit court of Saline County. At the first stage of proceedings, the circuit court summarily dismissed the petition. On appeal, defendant raises these issues: (1) whether the trial court applied an incorrect standard for the effective assistance of counsel and (2) whether the petition presented the gist of a meritorious claim.

We affirm.

FACTS

Defendant appeals the summary dismissal of her petition for postconviction relief (725

ILCS 5/122-1 (West 2008)). Defendant filed a postconviction petition centered on the performance of her trial counsel. Defendant contends that her trial counsel failed to professionally present her defense of compulsion.

Defendant was charged with three counts of predatory criminal sexual assault (720 ILCS 5/12-14.1(a)(1) (West 2004)). Count I alleged that defendant was accountable for her husband, James Hargrave (Hargrave), putting his penis in the mouth of defendant's minor daughter, K.K. The two other counts alleged that defendant engaged in oral sex with K.K.

At the trial, the parties stipulated to the admission into evidence, as substantive evidence, People's Exhibit #1, the evaluation report of Dr. Fred Klug, a psychologist. The stated purpose of this evaluation was to determine whether defendant had "a mental diagnosis and whether she can protect her daughter from abuse." Klug interviewed defendant and performed four standardized psychological tests. He concluded that defendant should have neither custody nor visitation with K.K.

At the trial, defendant presented testimony from Dr. Michael Althoff, a specialist in forensic psychology. Dr. Althoff testified he was hired by the initial defense counsel to evaluate defendant "relative to understanding her behavior with respect to the allegations of certain criminal activity due to the circumstances surrounding her life prior to and during the times that the alleged offenses occurred." Dr. Althoff interviewed defendant, reviewed reports, and performed psychological tests. He testified that defendant engaged in dissociative practices typical of those who have experienced trauma. This meant that defendant was unable to experience or express strong emotions. Dr. Althoff stated that there were indications that defendant was also experiencing depression and struggling with intrusive experiences and recollections of distressing past events. Dr. Althoff testified, "[B]asically over the course of their marriage there was the presence of not only physical, psychological, but also sexual abuse." Dr. Althoff commented that Hargrave subjected

defendant to engaging in behaviors such as running to the mailbox nude, having sex in public places, and placing pictures of defendant on the Internet. Dr. Althoff testified, "[T]his gradually progressively over the course of time led to his involvement[,] Mr. Hargrave's involvement with his stepdaughter, her daughter, and then eventually culminated in sexual activity involving the daughter participating directly or indirectly."

Dr. Althoff performed a battery of tests. He testified that the Minnesota Multiphasic Personality Inventory revealed a profile code type that indicated the presence of depression, suspiciousness, and feelings of victimization. Dr. Althoff testified that he administered the second version of the Millon Clinical Multiaxial Inventory in order to assess the presence of personality disorders or maladaptive personality traits. This test suggested a dependent personality disorder. The Gudjonsson scale indicated that defendant had a tendency to acquiesce and comply in order to avoid conflict. The Psychological Maltreatment of Woman Inventory was "designed to look at the nature and extent of psychological maltreatment that women experience in intimate relationships." The inventory indicated a significant degree of isolation, domination, verbal abuse, and degradation in defendant's relationship with Hargrave and three previous husbands.

Dr. Althoff diagnosed defendant with posttraumatic stress disorder, chronic in nature and present over the years, and dysthemia, a form of depression that includes long-term feelings of low self-esteem. He also diagnosed defendant with dependent personality disorder, which he described as an enduring pattern of behavior in which she goes to extensive efforts to obtain nurturing from partners, even to the point of being maltreated.

Dr. Althoff concluded that "looking at what all happened in a progressive collective kind of way *** [defendant] felt she had no other choice" but to perform the alleged sexual acts with K.K. Dr. Althoff explained that individuals who have been subjected to chronic psychological maltreatment over a course of years have their sense of self eroded. This has

been termed "psychological death." Dr. Althoff added that he believed that the prolonged victimization that occurred over the years was a significant factor, and he stated, "[Defendant] told me that she felt that she would be killed if she did not subject herself and her daughter in these sexual activities." He continued, "Well, I think that the constant fear that something bad is going to happen to her that may lead to her or her daughter's death was a factor that significantly contributed to what happened."

Dr. Althoff testified as follows:

"Well, I was trying to address the issue of, you know, what influenced the defendant to engage in this kind of behavior. And I think the most salient or parts of the conclusion is [*sic*] that, number one, [defendant] has a personality disorder where she's dependent, tends to acquiesce, tends to avoid conflict, tends to seek nurturance from someone even if they are abusing her or treating her in some sort of malevolent way. Number two, [defendant] had an overly close relationship with [K.K.]"

Dr. Althoff was critical of the report of Dr. Klug for being dismissive of the abuse that defendant had endured.

After the bench trial, defendant was convicted of all three charges and sentenced to 20 years' imprisonment for each count. In issuing the conviction the court stated the following:

"She's willing—[defendant] in this case is willing to suborn perjury apparently in order to get her way in a custody case. I find that substantially undermines her credibility. In going through the charges, [c]ount I charges that the defendant committed an act that aided and abetted James Hargrave in placing his penis in the mouth of the child. I find that from the evidence that [*sic*] that count has been proven beyond a reasonable doubt.

The defendant raises an issue of compulsion. In order to be an effective

defense she must show—at least initially raise evidence indicating that she was acting under a threat or menace of imminent infliction of death or great bodily harm.

I didn't hear evidence of that nature. The fact that the stepfather, the defendant's husband, was a large man, that he owned guns, that he had a temper and he had once hit [defendant] does not mean there was imminent danger of great bodily harm or death at the time of this occurrence.

[Defendant's] position's also undermined I think by the fact that she's an auxiliary police person. She's a person who has a .38 caliber pistol. She made no showing that there was an immediate threat or use of a weapon or any acts by the stepfather to justify her conduct."

In sentencing defendant, the court found that defendant was not a battered woman.

The court stated the following:

"I think you probably all recognize the fact that this has been a disturbing case for all of us. Being exposed to the facts of this case has been one of the most difficult experiences I've had on the bench.

That said, the defendant in this case has sought to be treated as a victim. There's some suggestion that she's a battered woman[—]that she is not a perpetrator in this case, and in effect is not responsible for what has happened. I don't see that.

In my criminal trial experience I represented battered women. The defendant in this case in my opinion does not qualify as a battered woman. This suggestion simply indicates to me that she is avoiding—seeking to avoid responsibility, which I don't think is appropriate."

The court continued as follows:

"In imposing a sentence in this case I can't protect K.K. at this stage of her life, as [defendant] should have done, and I can't undo what [defendant] did. In imposing

a sentence I think we have to just start by deciding what in fact occurred here—not what might be argued at this point, but what in fact the evidence in the case indicated.

This was a horrible scheme that was developed. [Defendant] says that she and her husband—or actually that her husband at the time initiated the scheme to in effect get rid of the interference of Mr. Kokuk. Frankly, I suspect that [defendant] was as involved in the development of this scheme as he was, and perhaps more so because all of her efforts in the prior divorce from Mr. Kokuk seemed to be to try to eliminate his parental input in that case.

I suspect that [defendant] initiated this whole horrible project in which the husband suggested that [K.K.] needed more actual sexual experience. That's what it led to. But [defendant] started it and then engaged in conduct to in effect seduce [K.K.] to engage in sexual contacts with her husband and with herself.

When the husband then started engaging in sexual conduct with the daughter [K.K.], and without [defendant], then [defendant] decides to turn him in. And I think that's the primary motivation [defendant] had when she went to the police. I think [defendant] was left out and apparently hurt."

Defendant filed a postconviction petition centered on the performance of her trial counsel. Defendant contends that her trial counsel failed to professionally present her defense of compulsion.

Defendant attached an affidavit of Gary Lemmon, a licensed clinical social worker. Lemmon criticized trial counsel for not contacting him prior to the trial and not conducting a more extensive examination of him at the trial. Lemmon attested as follows:

"10. I was called to testify at [defendant's] criminal trial on November 2, 2005, by *** the State's Attorney. I was asked on direct examination to give numerous professional opinions, based on the report of my evaluation with [defendant], that

were unfavorable to [defendant's] criminal defense that she acted under compulsion from Mr. Hargrave. [Defendant's attorney] did not contact me prior to trial to interview me or ask me questions about my evaluations. His cross-examination was extremely brief and consisted of three basic questions: 1) whether [defendant] had lied to me or tried to manipulate me (I answered no); 2) whether [defendant] had told me that she felt intimidated by her husband (I answered yes and briefly explained how [defendant] felt intimidated; and 3) whether [defendant] chose to engage in the abuse against [K.K.] (I answered yes).

11. If I had been asked on cross-examination, I would have testified to the following expert opinions regarding my evaluation of [defendant]:

- a. [Defendant] participated in the sexual abuse of [K.K.] because she was afraid of Mr. Hargrave. Mr. Hargrave's violent and threatening behavior, as reported by his biological daughters, [K.K.] and [defendant], included physical violence such as holding a gun to [defendant's] head, choking his younger daughter with a nightstick, threatening to slit his daughters' throats, threatening to kill [defendant] by shooting her, an excessive interest in and number of weapons openly displayed in the house, and numerous statements about his desire to kill other individuals and the means that he would use to accomplish this.
- b. The standardized risk assessment tools that were used in [defendant's] evaluation revealed that [defendant] was in the low range of likelihood to reoffend again. Many of the factors associated with sexual offending and that are predictive of recidivism are not present.
- c. [Defendant] would not have participated in the sexual abuse of [K.K.] without the influence of Mr. Hargrave. As I routinely discuss in my

trainings on child sex offenders, the research literature suggests that adult females who sexually offend fall into one of two groups: 1) lone offenders, who perpetrate sexual abuse and act alone; and 2) co-offenders, who perpetrate sexual abuse with a co-offender, usually a male. [Defendant] is a classic example of a female sex offender who is involved in abuse because of the influence of a male partner. Like other female sex offenders of this type, [defendant] wasn't working at the time of the sexual abuse against [K.K.], she was extremely dependent upon Mr. Hargrave and isolated from others by him, and she was regularly battered by him."

Defendant attached a lengthy evaluation report by Dr. Mindy Mechanic, a licensed clinical psychologist. Dr. Mechanic interviewed defendant and reviewed the transcript of the trial. Dr. Mechanic described a long history of the domestic abuse of defendant. Dr. Mechanic wrote that defendant "experienced incidents of abuse far too numerous to recount." Nonetheless, Dr. Mechanic proceeded to recount numerous incidents of abuse suffered by defendant at the hand of Hargrave, including descriptions of Hargrave forcing defendant to engage in sexual acts with her sister-in-law and using vibrators in public spaces. Dr. Mechanic opined the following:

"According to my review of this case, I believe expert testimony could have been helpful in three important ways: (1) by accurately describing the nature, dynamics and consequences of the abuse [defendant] experienced and the context of control surrounding it; (2) by dispelling common myths and stereotypes about the behavior of battered women that the judge may have harbored; and (3) directly supporting [defendant's] affirmative defenses by providing the judge with an alternative framework for understanding why [defendant] made the choices that she

did, particularly with regard to her appraisal of danger to herself and [K.K.] if she attempted to resist her husband during the sexual abuse of [K.K.] or leave him. On the first point, an accurate history of the abuse is critical to establishing any affirmative defense. This is almost impossible to obtain without the use of a domestic violence evaluation by an experienced professional. In [defendant's] case, the incidents of interpersonal violence reported to me were far more extensive than those she reported to her trial attorney. In fact, [defendant's] trial attorney discouraged her from telling him about the details of the abuse, cutting her statements off by telling her that she needed to keep her testimony 'simple.' He reinforced her minimization of the domestic violence[,] and his behavior could not have been expected to bring out the abuse, either during his preparation with her or at trial.

Even without the encouragement to minimize from their attorneys, it is typical for abused women to minimize or deny the nature and severity of violence perpetrated against them, even when it is to their detriment, such as when facing criminal charges. In addition, most lay individuals, including lawyers and even mental health professionals without training with respect to psychological trauma and the nature of interpersonal violence[,] often fail to detect the extent and nature of interpersonal violence because they fail to ask sufficiently sensitive questions."

Dr. Mechanic commented on Dr. Althoff:

"I have read the report and reviewed the testimony of the psychological expert, Dr. Althoff, who testified at [defendant's] trial. The psychological testing that Dr. Althoff conducted and reported in his testimony is not considered a domestic violence evaluation. His partial assessment of the violence [defendant] experienced from Jim Hargrave was not complete like I have done here, nor were his conclusions related to how the abuse affected [defendant's] perceptions and resulted in heightened fear and

appraisal of threatened harm toward herself and [K.K.]"

The circuit court made a docket entry summarily dismissing the petition. The order read in part as follows:

"The record reveals the defendant was represented by Attorney Edward Veltman[,] who was not an attorney appointed by the court to represent the defendant, but rather was chosen by the defendant as her trial attorney[,] and[] therefore, allegations of ineffective assistance or incompetency of counsel presents [*sic*] us no constitutional question in a postconviction proceeding unless the representation is of such low caliber as to amount to no representation at all or reduces the trial court proceedings to a farce or a sham thus denying the defendant of a fair trial as contemplated by the due process requirements of the federal and state constitutions.

This court finds the attorney for the defendant represented the defendant at trial based upon an understanding of the issues, possible defense and the distinction between a jury and bench trial and employed those tactics, strategy and provided advice perceived by the attorney to procure the defendant's acquittal. The fact that a different [*sic*] or different attorneys may have undertaken different or additional investigations, offered different or additional evidence or provided different advice fails to establish the representation provided the defendant by Attorney Veltman was so incompetent as to render the trial proceeding a farce or sham or was such as to deny the defendant a fair trial as is contemplated by the United States and Illinois Constitutions. The court further finds the defendant failed to demonstrate [that] the alleged incompetence of counsel in carrying out his duties as a trial attorney resulted in substantial prejudice to the defendant without which the outcome of the trial or sentencing would probably have been different."

Defendant timely appeals.

ANALYSIS

A summary dismissal of a postconviction petition at the first stage of hearings is justified if the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). The review of a summary dismissal is *de novo*. *People v. Ligon*, 239 Ill. 2d 94, 104, 940 N.E.2d 1067, 1074 (2010).

Defendant contends that her trial counsel was ineffective. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Albanese*, 104 Ill. 2d 504, 525, 473 N.E.2d 1246, 1255 (1984). In order to succeed on a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that the deficient performance resulted in prejudice. *People v. Brown*, 236 Ill. 2d 175, 185, 923 N.E.2d 748, 754 (2010). Stated another way, a defendant must show that his attorney's performance was objectively unreasonable under prevailing professional norms and that there is a reasonable probability that, but for the errors of counsel, a different result would have been reached. *People v. Petrenko*, 237 Ill. 2d 490, 496, 931 N.E.2d 1198, 1203 (2010). A postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed at the first stage of proceedings "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." *People v. Hodges*, 234 Ill. 2d 1, 17, 912 N.E.2d 1204, 1212 (2009).

The circuit court stated that because defendant had retained private counsel, a reversal was warranted only if the trial was a farce or a sham. This distinction is no longer viable. See *People v. Royse*, 99 Ill. 2d 163, 169, 457 N.E.2d 1217, 1220 (1983), *overruling People v. Torres*, 54 Ill. 2d 384, 297 N.E.2d 142 (1973). The test for effectiveness is the same whether counsel is retained or appointed.

Nonetheless, as long as a dismissal was procedurally proper, an appellate court may affirm on any ground. *People v. Dominguez*, 366 Ill. App. 3d 468, 473, 851 N.E.2d 894, 900

(2006); *People v. Quigley*, 365 Ill. App. 3d 617, 620, 850 N.E.2d 903, 907 (2006). Although it drew a faulty distinction between appointed counsel and retained counsel, the court proceeded to find that the decisions of trial counsel were matters of strategy and that defendant had failed to demonstrate how counsel's actions resulted in substantial prejudice. A summary dismissal on these grounds was appropriate.

Defendant asserts that her counsel was ineffective for several reasons. Defendant argues that trial counsel unprofessionally failed to investigate and present evidence of domestic violence, failed to elicit opinion testimony from a social worker, Gary Lemmon, and failed to introduce evidence of improper influence on, and prior inconsistent statements by, K.K. Throughout her argument on appeal, defendant alludes to the 40-page length of her petition as indication of its merit. This allusion is dubious. Although the volume of defendant's petition invited a prolonged statement of facts on appeal, it is not an indication of merit.

Trial counsel's approach to the statements of K.K. displayed professional tact. Defendant contends that her defense counsel erred by failing to present inconsistent statements by K.K. as substantive evidence. At the trial, K.K.'s prior statement to Sergeant Burton that she and defendant had simulated oral sex, and did not have contact, was only presented as impeachment. As a corollary, defendant asserts that her trial counsel failed to present evidence from Lemmon and from a previous therapist, Elizabeth Tharp, critical of caseworkers for manipulating K.K. Aside from the trial court's awareness of the inconsistent statements, defendant ignores both the potential ramifications of a strategy focusing on the veracity of K.K. and the trial court's explanation of why it found that defendant was "a joint perpetrator." The trial court explained as follows:

"I thought it was interesting to note that Mr. Lemmon concluded, as I did, that it does not seem reasonable to believe that [defendant] was involved so extensively

over several months in sexual behavior with [K.K.] present without experiencing sexual arousal and gratification."

The focus of defendant's petition, and her arguments on appeal, is an asserted failure of her counsel to present additional evidence of her status as a victim of domestic abuse. The decision to not present additional evidence of Hargrave's abuse of defendant was tactical. As defense counsel stated in his affidavit, the trial court was aware that defendant was a victim of domestic abuse and that Hargrave was a "monster."

Defendant contends that her compulsion defense would have been bolstered by additional opinion testimony. There is no indication that the presentation of additional opinion testimony either from Lemmon or from an expert such as Dr. Mechanic would have been of benefit to defendant at the trial or at the sentencing. Defendant complains that her counsel failed to pursue a domestic violence evaluation from Dr. Althoff and points to Dr. Mechanic's conclusion that Dr. Althoff's assessment was "not complete" like hers. This asserted lack of completeness is essentially a criticism that Dr. Althoff and trial counsel did not present evidence of additional episodes of defendant's abuse at the hand of Hargrave. Defendant's trial counsel presented extensive testimony from Dr. Althoff on defendant's mental condition. Dr. Althoff performed an exhaustive battery of tests and diagnosed defendant with disorders stemming from her relationships with Hargrave and her previous husbands.

Defendant's postconviction petition lacks an arguable basis in law or fact. Defense counsel's actions fell well within the realm of sound trial strategy. There is no arguable basis for the asserted persuasion of additional evidence regarding domestic abuse, either in the form of evidence of prior instances of abuse or in the form of opinion evidence. As the trial court stated in its order, it was well aware of the fact of defendant being a victim of domestic violence. As a matter of law, trial counsel presented a theory of compulsion to the trial court

that was supported by the extensive opinion testimony of Dr. Althoff. The trial court rejected this theory based not on a lack of opinion testimony or description of domestic abuse, but on defendant's participation in developing a devious scheme and her willingness to suborn perjury.

Accordingly, the order of the circuit court of Saline County dismissing defendant's postconviction petition is hereby affirmed.

Affirmed.