

2012 IL App (1st) 101905-U

FIRST DIVISION
DATE June 18, 2012

No. 1-10-1905

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. 05 CR 12045
)	
MAURICIO NAVARRO,)	Honorable
)	William G. Lacy,
Defendant-Appellant.)	Judge Presiding.

JUSTICE HALL delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly dismissed defendant's *pro se* postconviction petition when it lacked an arguable basis in law and fact.

¶ 2 Defendant Mauricio Navarro 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 2010)). He contends the trial court erred in dismissing his petition because his claim—that he received ineffective assistance of appellate counsel because counsel failed to argue that the introduction of gang evidence denied defendant a fair trial—had an arguable basis in law and fact. We affirm.

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¶ 3 Defendant's arrest and prosecution arose out of a March 15, 2005, incident during which the victim Israel Lucena was shot and killed. Fernando Escobedo was also shot at during the incident.

¶ 4 The State's theory of the case was that defendant, a member of the Latin Stylers gang, shot the victim and fired at Escobedo because he thought they were members of a rival gang. The State supported this theory with the testimony of Escobedo and Adam Garcia, who testified that two members of the Ashland Vikings gang were inside a cell phone store. Garcia, who was also a member of the Latin Stylers, testified that defendant's brother was on trial for the murder of an Ashland Viking, defendant was "stressed out" about the trial, and defendant wished to join his brother in prison.

¶ 5 Prior to trial, the defense filed a motion in *limine* to prevent the State from presenting evidence of defendant's gang affiliation. Specifically, the defense sought to exclude a statement made by defendant to fellow gang member Garcia several days after the shooting that defendant's brother was on trial for shooting a member of the Ashland Vikings street gang and that if the State gave defendant's brother 80 years in prison, defendant did not care if he received 180. The State responded that defendant and Garcia were members of the same gang and that members of the Ashland Vikings, a rival gang, were "present near the scene of the shooting." The State explained that defendant's statement about his brother explained why defendant shot someone in "broad daylight." The court denied the motion in *limine*, holding that the State was permitted to put forward evidence of motive to advance its theory of the case and that evidence of gang affiliation in this case was more probative than prejudicial. The court further stated that most of the individuals who were going to testify at trial were gang members, so if membership in a gang prejudiced defendant it would also prejudice the State's witnesses.

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¶ 6 At defendant's jury trial, Escobedo testified that on the day in question he drove himself and the victim to a cell phone store. Once there, he went into the store and the victim stayed in the car. Inside, he saw Garcia and two members of the Ashland Vikings. After leaving the store, Escobedo saw defendant. He watched as defendant stepped behind a van, then reemerged with a gun and fired several shots at the victim. Escobedo chased defendant, although he dropped to the ground when defendant fired at him. Escobedo later viewed a photographic array and stated that one of the pictured individuals resembled the shooter. He also identified Garcia as being present in the store. Later that night, Escobedo viewed a lineup but did not identify anyone. Escobedo subsequently identified defendant from a photographic array as the shooter.

¶ 7 Witness Daniel Datil testified that he saw defendant pointing a gun at a car. Datil admitted that when he went to a police station after the shooting, he identified a person that looked similar to the shooter from a photographic array. He later viewed a lineup which included that person, but did not identify anyone. In April, he returned to a police station to view another lineup and identified defendant as the shooter.

¶ 8 Adam Garcia testified that he and defendant belonged to the Latin Stylers gang. That day, he went into a cell phone store while defendant stayed in the car. Inside, he saw two members of the Ashland Vikings and a male customer. After conducting his business, he went back to the car and left. He then drove into an alley and parked per defendant's instructions. Defendant told him to wait and walked away. After hearing gunshots, Garcia saw defendant being chased by the male customer from the cell phone store. He watched as defendant then fired a gun at that person. When Garcia asked defendant about the shooting a few days later, defendant responded that "he didn't care" and would "rather be in prison with his brother."

¶ 9 At trial, Garcia explained that defendant's brother also belonged to the Latin Stylers and was on trial, at the time of the shooting, for the murder of an Ashland Viking. According to

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Garcia, defendant was "stressed out" about his brother's trial and "said his brother might get 80 [years in prison] and they might give [defendant] 180." Defendant also said that he would like to be in prison with his brother. During cross-examination, Garcia denied telling defendant that members of the Ashland Vikings gang were inside the store.

¶ 10 Ultimately, defendant was convicted of first degree murder, attempted first degree murder, and aggravated discharge of a firearm. Defendant was sentenced to 65 years in prison for the murder conviction, which consisted of 40 years for the offense plus an additional 25 years because the offense was committed with a firearm. He was also sentenced to a consecutive term of 15 years for the attempted murder conviction.

¶ 11 On appeal, defendant contended, *inter alia*, that the trial court erred when it permitted Garcia to testify to statements defendant made after the shooting because they did not establish motive and were more prejudicial than probative. This court rejected defendant's contentions and affirmed his convictions finding, in pertinent part, that defendant's statements were not hearsay; rather, they were admissions which provided evidence of defendant's motive, which the State demonstrated through evidence of defendant's gang affiliation and his brother's incarceration for the murder of a rival gang member. See *People v. Navarro*, No. 1-07-3309, Order at 13-14 (2009) (unpublished order under Supreme Court Rule 23).

¶ 12 In March 2010, defendant filed a *pro se* postconviction petition alleging, among other claims, that he was denied a fair trial by the introduction of certain gang evidence and by trial counsel's failure to object to this evidence. The petition further alleged that he was denied effective assistance of appellate counsel when counsel failed to raise trial counsel's deficient performance on direct appeal. The trial court summarily dismissed the petition.

¶ 13 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction.

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725 ILCS 5/122-1 (West 2010). At the first stage of a postconviction proceeding, a defendant files a petition and the circuit court determines whether it is frivolous or patently without merit. 725 ILCS 5/122-2.1 (West 2010); *People v. Coleman*, 183 Ill. 2d 366, 379 (1998). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. We review the summary dismissal of a postconviction petition *de novo*. *Coleman*, 183 Ill. 2d at 388-89.

¶ 14 When reviewing the summary dismissal of a postconviction petition which alleges the ineffective assistance of counsel, this court must determine whether it is arguable that counsel's performance fell below an objective standard of reasonableness and whether it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. This test applies equally to claims of ineffective assistance of appellate counsel. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 37. Therefore, a defendant who contends that he was denied effective assistance of appellate counsel by counsel's failure to argue an issue on direct appeal must show that the failure to raise the issue was objectively unreasonable and that, but for this failure, defendant's conviction or sentence would have been reversed. *Dobbey*, 2011 IL App (1st) 091518, ¶ 37. Unless the underlying issue is meritorious, a defendant cannot establish that he was prejudiced by counsel's failure to raise it on direct appeal. *Dobbey*, 2011 IL App (1st) 091518, ¶ 37.

¶ 15 Here, defendant contends that the trial court erred when it dismissed his petition because appellate counsel's failure to argue on direct appeal that defendant was denied a fair trial by the

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admission of gang-related evidence constituted ineffective assistance of appellate counsel. The State responds that appellate counsel would have recognized that the trial court did not abuse its discretion when admitting the gang-related evidence, and therefore, would have concluded that it would have been "fruitless" to raise this issue on appeal.

¶ 16 Our supreme court has determined that "any evidence which tends to show that an accused had a motive for killing the deceased is relevant because it renders more probable that the accused did kill the deceased." *People v. Smith*, 141 Ill. 2d 40, 56 (1990). Generally, evidence indicating that a defendant was a member of a gang or was involved in gang-related activities is admissible to show a common purpose or design or to provide a motive for an otherwise inexplicable act. *Smith*, 141 Ill. 2d at 58. However, because there may be a strong prejudice against street gangs, the trial court should take great care when exercising its discretion to admit gang-related testimony. *People v. Weston*, 2011 IL App (1st) 092432, ¶ 22. Evidence that a defendant is a member of a gang or is involved in gang-activity is admissible only where there is sufficient proof that "membership or activity in the gang is related to the crime charged." *People v. Strain*, 194 Ill. 2d 467, 477 (2000); see also *Weston*, 2011 IL App (1st) 092432, ¶ 23. (the State must show "a clear connection" between the gang-related testimony and the offense). A trial court's evidentiary rulings regarding the admission of gang-related evidence are reviewed for an abuse of discretion. *People v. Johnson*, 208 Ill. 2d 53, 102 (2003).

¶ 17 In this case, the gang-related evidence explained why defendant engaged in a course of conduct that resulted in the victim's death. See *Smith*, 141 Ill. 2d at 58 (evidence indicating that defendant was involved in gang-related activities is admissible to show a motive for an otherwise inexplicable act). As Garcia testified, defendant's brother was on trial for the murder of a rival gang member, defendant was upset about his brother's trial, and defendant wished to be in prison with his brother. The evidence regarding the gang affiliation of defendant, his brother and Garcia

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explained why defendant would return to the cell phone store and shoot at the victim, *i.e.* defendant's brother was in jail because of the death of a rival gang member and members of that rival gang were inside the store. See *Strain*, 194 Ill. 2d at 477 (evidence that a defendant is involved in gang-activity is admissible only when there is sufficient proof that the gang-related activity is itself related to offense at issue). Here, the trial court did not abuse its discretion in admitting evidence of defendant's gang affiliation (*Johnson*, 208 Ill. 2d at 102), as the testimony at trial established a connection between defendant's membership in the Latin Stylers and the victim's death. See *Weston*, 2011 IL App (1st) 092432, ¶ 23 (the State must demonstrate a clear connection between the crime and the gang-related testimony).

¶ 18 Consequently, as the trial court did not err in the exercise of its discretion when admitting evidence of defendant's gang affiliation, defendant is unable to show prejudice when, had appellate counsel raised this issue on appeal, defendant's conviction would not have been reversed. See *Dobbey*, 2011 IL App (1st) 091518, ¶ 37 (unless the underlying issue is meritorious, a defendant cannot establish that he was prejudiced by counsel's failure to raise it on direct appeal). Therefore, defendant has failed to establish that his claim has an arguable basis in fact or law (*Hodges*, 234 Ill. 2d at 11-12), and the summary dismissal of defendant's postconviction petition was proper.

¶ 19 The judgment of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.