2012 IL App (1st) 102849-U

SECOND DIVISION
July 31, 2012

No. 1-10-2849

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 15548
	)	
ABOLAJI F. OLAWALE,	)	Honorable
	)	Evelyn B. Clay,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE QUINN delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition was affirmed where defendant's claim that his trial counsel prevented him from testifying was rebutted by the record.

¶ 2 Defendant Abolaji F. Olawale appeals from the circuit court's order summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant asserts his petition adequately stated a constitutional claim that his trial counsel was ineffective in denying defendant his right to testify. We affirm.

¶ 3 Following a bench trial, defendant was convicted of the criminal sexual assault of 17-year-old Marjorie B. and 15-year-old Melissa B., and was sentenced to two consecutive four-year terms in prison. The trial evidence showed that in May 2004, Marjorie lived with her cousin and legal guardian, Tracie B., Tracie's two children, and defendant, Tracie's husband. On May 30, 2004, Melissa, her 14-year-old cousin Jasmen T., and 16-year-old Rashaan P. went to Marjorie's home for a sleepover. Defendant drove the four girls to a video store and then to a liquor store where, at the request of the girls, he purchased liquor. When they returned home, defendant remained in the basement with the girls and all of them drank the liquor, with Melissa and Marjorie consuming most of it. When the bottle was empty, Melissa and Rashaan accompanied defendant back to the liquor store and returned to the basement with more liquor. Marjorie and Melissa became extremely inebriated. Marjorie passed out on a futon and Melissa passed out on the floor. Jasmen lay on a couch, covered with a blanket. Rashaan, the most sober of the girls, became scared and went to an upstairs bedroom. At some point, Marjorie became aware that defendant was on top of her and she felt his penis penetrating her. Melissa became aware that her pants had been pulled down and that defendant put his penis in her vagina. Later he put Melissa on top of himself and put his penis in her vagina. Jasmen tried to pull Melissa off of him, but he pushed her away. Jasmen woke up Melissa, and Jasmen and Melissa went upstairs and reported defendant's actions to Rashaan. The girls later informed Tracie what had happened. Tracie took Marjorie and Melissa to the emergency room and subsequently all of the girls were interviewed at the police station by police officers and an assistant State's Attorney. Defendant was placed under arrest. Tracie later spoke with him by phone and demanded to know whether he did anything to the girls. Defendant initially said he could not discuss it just then. Tracie told him she needed to know and he replied, "yes and no."

¶ 4 After the State rested and the parties entered into various stipulations, the following exchange took place.

"MR. COOLEY [defendant's attorney]: At this time, your Honor, the defendant indicated he does not wish to testify; is that correct?

THE DEFENDANT: Yes.

THE COURT: Very well.

MR. COOLEY: At this time, your Honor, the defendant would rest.

THE COURT: You're aware, Mr. Olawale, that you have a right to testify if you wish?

THE DEFENDANT: Yes, ma'am.

THE COURT: You're aware. That's your choice?

THE DEFENDANT: Yes, ma'am.

THE COURT: Not your attorney's - -

THE DEFENDANT: Yes - -

THE COURT: - - choice, whether or not to testify. Do you understand?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. Defense rest[s]."

¶ 5 The circuit court observed in its findings that there was no medical corroboration in terms of trauma to the vaginal area of Marjorie and Melissa, but that the girls had made timely reports of defendant's actions and that Tracie's testimony regarding their outcry was extremely credible. The court determined that three counts of criminal sexual assault and one count of aggravated sexual abuse of Melissa merged into one count of criminal sexual assault and sentenced defendant to four years in prison. The court also found that three counts of criminal sexual

assault of Marjorie merged into one count and sentenced defendant to a consecutive four-year prison term.

¶ 6 Defendant appealed his conviction, contending, *inter alia*, that the trial evidence was insufficient to sustain his conviction because the four minor State witnesses had a motive to fabricate, and their testimony was incredible, conflicting and uncorroborated by the physical evidence. We affirmed defendant's convictions, holding that the evidence was sufficient to sustain defendant's conviction, as minor discrepancies in the testimony of the minors did not render their testimony unreliable and lack of corroborating physical evidence did not render their testimony incredible. *People v. Olawale*, No. 1-07-0781 (2010) (unpublished order under Supreme Court Rule 23).

¶ 7 On May 18, 2010, defendant filed a *pro se* petition pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.*) (West 2010). Among several claims of deprivation of constitutional rights, the petition contended that defendant's right to effective assistance of counsel was denied where his trial counsel refused to allow him to testify in his own behalf. The petition asserted that defendant told his trial counsel he wished to testify. However, defendant's counsel told him there was sufficient reasonable doubt to acquit defendant because of the lack of physical and medical evidence to corroborate the inconsistent statements of the State's witnesses. His counsel advised him that when he was asked in front of the judge whether he wanted to testify, defendant should respond "No." The petition did not state what defendant's trial testimony would have been if he had exercised his right to testify.

¶ 8 On August 13, 2010, the circuit court summarily dismissed defendant's petition. As to defendant's claim that his trial counsel refused to permit him to testify, the court's written order ruled: "Nowhere does petitioner allege or is there any evidence that trial counsel refused to let petitioner testify upon a contemporaneous assertion by petitioner of that right. Even assuming

trial counsel directed petitioner to tell the court that he did not want to testify, petitioner had the opportunity to inform the court that he indeed did want to testify. Petitioner failed to do so. Therefore, petitioner's claim, as presented, is not cognizable under the Act."

¶ 9 On appeal from dismissal of his petition, defendant asserts that trial counsel was ineffective because he denied defendant his right to testify and that counsel's error arguably prejudiced defendant. The State contends that defendant's petition failed to show either that his counsel's representation was objectively unreasonable or that he suffered prejudice.

¶ 10 A petition brought pursuant to the Act may be dismissed summarily at the first stage as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacks an arguable basis in law when it is grounded in "an indisputably meritless legal theory," for example, a legal theory which is completely contradicted by the record. *Id.* A petition lacks an arguable basis in fact when it is based on a "fanciful factual allegation." *Id.* at 16-17. We review *de novo* the circuit court's summary dismissal of a postconviction petition at the first stage. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). We review the circuit court's judgment, not the reasons cited, and we may affirm on any basis supported by the record if the judgment is correct. *People v. Anderson*, 401 Ill. App. 3d 134, 138 (2010).

¶ 11 A defendant’s claim of ineffective assistance of counsel is guided by the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984), which requires a showing of deficient performance by counsel and prejudice to the defendant from the deficient performance. *Hodges*, 234 Ill. 2d at 17. At the first stage of postconviction proceedings, a petition may not be summarily dismissed if it is arguable that (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was prejudiced. *Id.*

¶ 12 A defendant's right to testify at trial is a fundamental constitutional right, as is his right to choose not to testify. *People v. Weatherspoon*, 394 Ill. App. 3d 839, 855 (2009), citing *People v. Madej*, 177 Ill. 2d 116, 145-46 (1997). Undue interference with an accused's right to testify may constitute ineffective assistance of counsel. *People v. Seaberg*, 262 Ill. App. 3d 79, 82-83 (1994). The decision whether or not to testify rests ultimately with the defendant alone and is not merely a matter of trial tactics to be left to counsel. *People v. Brown*, 336 Ill. App. 3d 711, 719 (2002). However, merely advising a defendant not to testify is a matter of trial strategy and does not constitute ineffective assistance of counsel absent evidence that counsel refused to allow the defendant to testify. *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009).

¶ 13 We find that defendant's postconviction claim was based on an indisputably meritless legal theory. Our supreme court "has consistently upheld the dismissal of a postconviction petition when the allegations are contradicted by the record from the original trial proceedings." *People v. Torres*, 228 Ill. 2d 382, 394 (2008). We will not credit allegations which are positively rebutted by the record. *People v. Barnslater*, 373 Ill. App. 3d 512, 519 (2007). Here, the record reveals that defendant's decision not to testify was his own choice, not that of his trial counsel. Before resting defendant's case in chief, defense counsel informed the court: "At this time, your Honor, the defendant indicated he does not wish to testify; is that correct?" Defendant replied, "Yes." Thereupon, the court asked defendant if he was aware he had a right to testify if he wished, and he replied, "Yes, ma'am." The court stated: "You're aware. That's your choice?" Defendant again replied, "Yes, ma'am." The court continued, "Not your attorney's *** choice, whether or not to testify. Do you understand?" Once again, defendant replied, "Yes, ma'am." It is clear defendant's legal theory is completely refuted by the record. We conclude, therefore, that defendant's claim is based on an indisputably meritless legal theory.

¶ 14 Moreover, we find under the facts of this case that it is not arguable defendant was prejudiced. A first-stage postconviction petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that the defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17. To establish prejudice, there must be a "reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. On direct appeal, we determined that the evidence, including defendant's own equivocal statement to his wife, was sufficient to establish his guilt beyond a reasonable doubt. Critically, defendant's postconviction petition did not indicate what his trial testimony might have been nor even allege that his testimony might have changed the outcome of the trial. We conclude the petition failed to allege sufficient facts to demonstrate it was arguable that, but for defendant's trial counsel's unprofessional error, the results of the trial would have been different. Consequently, the circuit court did not err in summarily dismissing the petition.

¶ 15 For the reasons stated above, we affirm the judgment of the circuit court.

¶ 16 Affirmed.