2012 IL App (1st) 103354-U

THIRD DIVISION
August 1, 2012

No. 1-10-3354

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. 02 CR 6639
	)	
FRANCISCO ROMERO,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MURPHY delivered the judgment of the court.
Justices Neville and Salone concurred in the judgment.

O R D E R

¶ 1 *Held*: Where defendant's *pro se* claim of *ex parte* communication by prosecutor telling jury to arrive at a verdict while waiting for transcripts is not completely contradicted by record, defendant raised an arguable legal claim of a violation of his constitutional rights; the summary dismissal of defendant's petition was reversed.

¶ 2 Defendant Francisco Romero appeals the circuit court's summary dismissal of his *pro se* petition seeking relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq*. (West 2008)). On appeal, defendant contends his petition presented an arguable claim that the jury in his case was improperly advised in the absence of defense counsel in response to a jury note during deliberations. Because defendant has stated an arguable claim of constitutional

deprivation not completely contradicted by the record, we reverse and remand for further post-conviction proceedings.

¶ 3 Following a 2006 jury trial, defendant was convicted of two counts of first degree murder for the shooting death of Francisco Macias in 2001. The report of proceedings establishes that on January 19, 2006, the jury began deliberating. At about 9 p.m., the trial judge stated that the jury would be instructed to return at 9 a.m. the next day to continue deliberations.

¶ 4 The report of proceedings states that at approximately 11:30 a.m. on January 20, 2006, the judge made the following remarks in open court outside the presence of the jury:

> "The jury has reached a verdict. This morning when they came back, there was a note put on the record where they asked for transcripts.
>
> In the course of trying to get transcripts, we did not respond to that note that they sent out. They have reached a verdict without it.
>
> We did reach out to the [c]ourt [r]eporters to see if we could get transcripts, and in the course of waiting to get all the attorneys back here to respond to that question from the jury, the jury reached a verdict. So that request, of course, now is moot."

¶ 5 At that point, the jury was returned to the courtroom and returned a guilty verdict against defendant.

¶ 6 On direct appeal, defendant argued: (1) the evidence was not sufficient to support the jury's verdict; (2) the trial court erred in failing to properly question the jury after a member of the jury saw defendant in the courthouse, prior to the trial, wearing shackles and a Department of Corrections jumpsuit; and (3) certain statements by the prosecution during closing arguments resulted in prejudice to his case. This court rejected those contentions and affirmed defendant's

conviction and sentence. *People v. Romero*, 384 Ill. App. 3d 125, 139 (2008). The Illinois Supreme Court denied leave to appeal. *People v. Romero*, No. 107142 (November 26, 2008).

¶ 7 On July 6, 2009, defendant filed a *pro se* post-conviction petition in which he claimed, *inter alia*, that an assistant State's Attorney in his case committed misconduct by directing the court bailiff to instruct the jury outside the presence of defense counsel. Defendant stated in the petition that on the evening of January 19, the jury sent out a note requesting transcripts and it was "agreed" by the parties and the court that "the jury would be provided those transcripts first thing in the morning due to it being so late." Defendant further stated that the next morning, his attorney was not present when the jury gave to the bailiff a second note requesting the transcripts. According to defendant, the assistant State's Attorney directed the bailiff to respond to the note.

¶ 8 In an affidavit attached to his petition, defendant stated that on the morning of January 20, 2006, his attorney was making his court rounds "and was not present when the [b]ailiff came out with another note from the [j]ury that stated that they still wanted the transcripts." Defendant stated in his affidavit that he heard the assistant State's Attorney tell the bailiff to tell the jury the court reporter was sick but one would be found to print the transcripts and "in the meantime, that they should try to come with a verdict as it may be awhile before they could get the transcripts."

¶ 9 Defendant further stated in his affidavit that defense counsel "was not informed of what was occurring" as to the jury's request until the jury already had reached a verdict. Defendant said he told counsel the jury had requested the transcripts but counsel responded the jury had arrived at a verdict and they should "see what it is."

¶ 10 In a written order on September 1, 2009, the circuit court found the claims in defendant's petition to be frivolous and patently without merit and dismissed the petition. Defendant now appeals that ruling.

¶ 11 Before reaching the substance of defendant's petition, we address the State's challenge to the validity of defendant's unnotarized affidavit appended to the petition. Pursuant to the Act, a post-conviction petition must be "verified by affidavit" (725 ILCS 5/122-1(b) (West 2008)) and

must be accompanied by affidavits to support its allegations (725 ILCS 5/122-2 (West 2008)). Here, both defendant's petition and his affidavit were not notarized.

¶ 12 Decisions of this court have resulted in a split of authority as to whether the lack of notarization of a defendant's statement of the veracity of his petition or an accompanying affidavit in support of the petition's claims renders the petition a nullity at the initial stage of post-conviction review. See, *e.g.*, *People v. Terry*, 2012 IL App (4th) 100205, ¶ 23 (unnotarized petition does not justify summary dismissal); *People v. Wilborn*, 2011 IL App (1st) 092802, ¶72 (modified on denial of rehearing) (failure to notarize affidavit in support of petition does not invalidate petition at first stage of post-conviction review); *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 35 (lack of notarization of defendant's verification of his petition's claims does not warrant summary dismissal); but see *People v. McCoy*, 2011 IL App (2d) 100424, ¶ 10 (affirming dismissal of post-conviction petition at first stage of review based on defendant's unnotarized verification, deeming it "not a proper affidavit under the Act"); *People v. Carr*, 407 Ill. App. 3d 513, 516 (2011) (same).

¶ 13 The Illinois Supreme Court has granted leave to appeal in an unpublished decision addressing this issue in a different procedural posture, holding that, at the second stage of post-conviction proceedings, a defendant's unnotarized affidavit verifying his petition's claims renders the petition a nullity. *People v. Cruz*, 2011 IL App (1st) 091944-U, ¶ 22 (modified on denial of rehearing), *appeal allowed*, No. 113399 (January 25, 2012); see also *People v. Niezgoda*, 337 Ill. App. 3d 593, 597 (2003) (in second-stage post-conviction review, defendant's unnotarized affidavits have no legal effect, and dismissal of petition without an evidentiary hearing was affirmed). Given the indefinite status of the law on the validity of unnotarized affidavits, we elect to consider the substance of defendant's post-conviction claim.

¶ 14 The Act provides a remedy to criminal defendants who claim that substantial violations of their federal or state constitutional rights occurred in their original trials. 725 ILCS 5/122-1 *et seq*. (West 2008). At the first stage of a post-conviction proceeding, a defendant need only allege

enough facts to make out a claim that is arguably constitutional for purposes of invoking the Act. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). This court reviews the summary dismissal of a post-conviction petition *de novo*. *Id.* at 9.

¶ 15 The circuit court may dismiss the petition if the allegations contained therein, taken as true, render the petition "frivolous" or "patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). A petition can be dismissed as frivolous or patently without merit if it has no arguable basis either in law or in fact. *Hodges*, 234 Ill. 2d at 11-12. More precisely, a petition lacks an arguable basis in law or in fact if the claim is based on an "indisputably meritless legal theory," meaning a theory that is completely contradicted by the record, or a "fanciful factual allegation," meaning assertions that are fantastic or delusional. *Id.* at 16-17.

¶ 16 Defendant contends his petition stated an arguable constitutional claim that his right to participate in all court proceedings was violated when, during the jury's deliberations, an assistant State's Attorney directed the court bailiff to communicate with the jury without the presence or input of defense counsel. Defendant contends the attorney's statement to the jury, as set out in his affidavit, that it should "try to come with a verdict" had the effect of coercing a verdict by directing the jury to arrive at a decision.[1]

¶ 17 To survive first-stage dismissal, a post-conviction claim must not present a theory that is "completely contradicted by the record." *Id.* at 16-17. The State asserts on appeal that the record does not bear out defendant's version of events. Defendant stated in his affidavit that the bailiff advised the jury as set out in his petition on the morning of January 20. The record lacks any transcription of proceedings prior to 11:30 a.m. on January 20, and the State argues the record's silence as to any activity during that period fails to corroborate defendant's claim. The State further asserts that defendant cited an "incorrect standard" for our review of the record and that

[1] We emphasize that defendant's post-conviction claim does not accuse the trial judge of advising the jury in an *ex parte* fashion. Instead, defendant contends that an assistant State's Attorney delivered a message to the jury via a court bailiff.

any doubts arising from the incompleteness of the record must be construed against defendant as the appellant.

¶ 18 However, it is the State, not defendant, that puts forth an erroneous standard of review in this post-conviction case. The standard urged by the State is the exact opposite of the applicable law under *Hodges*. While a post-conviction petition must be accompanied by affidavits or records that are capable of objective or independent corroboration (*Id*. at 10), it is not required at the first stage of post-conviction review that the record corroborate the defendant's claim. Rather, at this stage, this court assumes the truth of all facts alleged in a post-conviction petition (*People v. Coleman*, 183 Ill. 2d 366, 385 (1998)), and a petition is not dismissed at the first stage of review unless it contains fanciful factual allegations or contains a legal theory that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17.

¶ 19 In the case at bar, the record does not clearly contradict defendant's claim that the jury received an *ex parte* communication shortly before returning its verdict. Defendant represents that the bailiff communicated with the jury after being told to so do by a prosecutor on the morning of January 20. The record lacks any transcription of proceedings prior to 11:30 a.m. that day, when the jury reached its verdict. Defendant's description of events suggests the remarks he overheard were made in an informal setting in which a verbal exchange would not have been recorded.

¶ 20 The record of the trial court's remarks in open court at approximately 11:30 a.m. also does not contradict defendant's post-conviction claim. The trial judge stated that the jury reached a verdict "in the course of waiting to get all the attorneys back here to respond to that question from the jury." The court's statement suggests that no "official" response had been made to the jury's request for transcripts because all of the attorneys had not arrived in court. The court's remark that "we did not respond" to the note requesting transcripts does not contradict defendant's claim because as described by defendant, the court was not involved in the exchange during which the assistant State's Attorney directed the bailiff to address the deliberating jury.

The court's remarks on the record also do not contradict defendant's assertions that the court reporter was unavailable prior to 11:30 a.m. and that transcripts therefore were not immediately available to the jury; in fact, the record supports those contentions. Accordingly, the facts as set out by defendant in his petition and affidavit are not completely contradicted by the record.

¶ 21 The circuit court is not permitted to engage in any fact-finding or credibility determinations and is required to accept defendant's well-pleaded facts that are not positively rebutted by the original trial record as true. *Coleman*, 183 Ill. 2d at 385; see also *People v. Scott*, 2011 IL App (1st) 100122, ¶ 23. As the supreme court has noted, the Act "contemplates that such determinations will be made at the evidentiary stage, not the dismissal stage of the litigation." *Coleman*, 183 Ill. 2d at 385; see also, *e.g.*, *People v. Trujillo*, 2012 IL App (1st) 103212, ¶ 14 (whether counsel informed the defendant of the State's plea offer requires a credibility determination and thus cannot be resolved at the first stage of post-conviction proceedings).

¶ 22 We thus consider whether defendant's contentions, taken as true, present an arguable constitutional claim. A post-conviction petition based on a meritless legal theory will be dismissed at the first stage of review. *Hodges*, 234 Ill. 2d at 16.

¶ 23 A criminal defendant has a constitutional right to a public trial and to appear and participate in person and by counsel at all proceedings that involve his substantial rights. *People v. McDonald*, 168 Ill. 2d 420, 459 (1995); see also *People v. Phillips*, 383 Ill. App. 3d 521, 550-51 (2008). Jury deliberations are a critical stage of a trial which triggers the defendant's right to be present and participate. *People v. Kliner*, 185 Ill. 2d 81, 162 (1998); see also *People v. Belknap*, 396 Ill. App. 3d 183, 212-13 (2009). "This end is not adequately served by the mere presence of the defendant himself, who may or may not have any experience with, let alone expertise in, legal matters." *People v. Ross*, 303 Ill. App. 3d 966, 976 (1999). When a note, request or question is received from a jury, the proper procedure is for the trial judge to discuss

the jury's communication with the defendant's counsel and the prosecutor before responding to the jury. *People v. Tansil*, 137 Ill. App. 3d 498, 501 (1985).

¶ 24 According to defendant, an assistant State's Attorney, told the bailiff to instruct the jury that a court reporter would be located to print the requested transcripts but "in the meantime," the jury "should try to come with a verdict" because it could take some time to secure the transcripts. Defendant raises a claim of an *ex parte* instruction to the jury without the knowledge of the trial judge. When either the trial court or a third person communicates with the jury outside the presence of the defendant and defense counsel, a jury verdict will be set aside if it is apparent that injury or prejudice resulted from the communication. *People v. Childs*, 159 Ill. 2d 217, 227-28 (1994); see also *People v. Cotton*, 393 Ill. App. 3d 237, 262 (2009). Defendant thus has raised an arguable claim of a deprivation of his constitutional rights that, as we have set out above, is not completely contradicted by the record. We make no statement as to the fate of defendant's claim in further post-conviction proceedings.

¶ 25 Accordingly, the circuit court's dismissal of defendant's post-conviction petition is reversed and this case is remanded for second-stage proceedings under the Act.

¶ 26 Reversed and remanded.