

2011 IL App (2d) 100605-U  
No. 2-10-0605  
Order filed January 25, 2012

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lake County.
	)	
Respondent-Appellee,	)	
	)	
v.	)	No. 03-CF-1812
	)	
KEWAL S. AUJLA,	)	Honorable
	)	Theodore S. Potkonjak,
Petitioner-Appellant.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices McLaren and Birkett concurred in the judgment.

**ORDER**

*Held:* The circuit court did not err in dismissing as frivolous and patently without merit defendant's *pro se* postconviction petition in which he alleged that trial counsel rendered ineffective assistance for failing to investigate and present the testimony of his mother and sister that the victim broke the arm of her maternal grandmother at some unspecified time and place before the murder.

¶ 1 The family of Narinderpal (Rani) Aujla reported her missing. Five weeks later, Rani's husband, defendant, Kewal S. Aujla, confessed to causing her death and led the police to her body.

A jury found defendant guilty of first-degree murder (see 720 ILCS 5/9-1(a)(1) (West 2006)), and

the trial court imposed a 40-year prison term. We affirmed the conviction and sentence on direct appeal. *People v. Aujla*, No. 2-06-1125 (2009) (unpublished order under Supreme Court Rule 23).

¶ 2 Defendant filed a *pro se* postconviction petition alleging that trial counsel was ineffective for failing to investigate and present evidence at trial that Rani was mentally unstable and had a history of violence. The trial court summarily dismissed the petition as frivolous and patently without merit, and defendant appeals. We affirm.

¶ 3 **FACTS**

¶ 4 On April, 9, 2003, Rani's family reported her disappearance, and the police questioned defendant three times. During the last interview, defendant admitted choking Rani to death and hiding her body in a storm sewer near his place of employment. Defendant led the police to the victim's body. Following the conclusion of evidence at the jury trial, defense counsel requested instructions on self-defense and second-degree murder based on a theory of unreasonable belief of self-defense. The trial court refused those instructions but gave an instruction on second-degree murder based on serious provocation. The serious provocation instruction was based on defendant's testimony that immediately before the fatal act, the victim kicked and hit him very hard. The jury found defendant guilty of first-degree murder (see 720 ILCS 5/9-1(a)(1) (West 2006)), and the trial court imposed a 40-year prison term.

¶ 5 On direct appeal, defendant argued that the trial court committed reversible error by admitting evidence of (1) defendant's confession to the police; (2) the translated statements defendant made at the bond hearing on the day after his confession; (3) the unsuccessful attempts of the police and the community to find the victim's body; and (4) testimony of a neighbor who witnessed an incident between defendant and the victim about two weeks before her death.

Defendant further argued that the trial court erred in restricting defense counsel's *voir dire* of the prospective jurors and barring defense counsel from arguing to the jury that the term "anger" was another way to express "passion." Defendant also contended that his prison term is excessive. We concluded that defendant was not entitled to a new trial or a reduction of his sentence.

¶ 6 On March 30, 2010, defendant filed a *pro se* postconviction petition alleging that trial counsel was ineffective for failing to investigate and present evidence at trial that Rani was mentally unstable and had a history of violence. Specifically, defendant argues that counsel should have presented the testimony of his sister and mother, who allegedly would testify to an incident in which Rani broke the arm of her maternal grandmother.

¶ 7 At trial, Jatinderpal (Jay) Sangh, Rani's brother, testified that defendant married Rani in 1999 and moved from India to the United States. At first, the couple lived with Rani's parents and Jay's family. Rani and defendant had a daughter, and they moved into their own apartment. In September 2002, Rani's parents bought them a townhouse in Round Lake Beach to be near the rest of Rani's family. In April 2003, the daughter was with defendant's parents in India. Jay testified that his family spoke Punjabi, a regional language in India, but defendant spoke English on a "couple occasions." Jay served as an interpreter when the police questioned defendant at the time Rani first was reported missing.

¶ 8 Jay admitted that Rani was "persistent about things" and that he might have told the police she could be "difficult" if she did not get her way. Rani was under a doctor's care and took prescribed medication for anxiety and to "calm her down," and her family usually spoke with her on the phone several times a day. Jay told defendant that, if Rani ever got upset, he could call her family; and defendant called a couple times. Rani would get "verbally out of control" and could be

difficult to calm, but she had been weakened from polio as a child and Jay denied seeing Rani get physical when she was agitated. Rani did not hold a driver's license, and Jay estimated that Rani was 5-feet tall and weighed 100 pounds. By comparison, a police sergeant described defendant as 5-feet 11-inches tall and weighing 190 pounds. Jay last saw Rani on April 8, 2003.

¶ 9 When no one could contact Rani on April 9, 2003, Jay's mother and sister went to the townhouse that evening. They filed a missing person's report the next day, and returned to the townhouse with the police. Defendant was there, and Jay translated English to Punjabi, the language he always used with defendant. Defendant consented to a search and went to the police station with Jay. Jay also translated for defendant and the police on April 17, 2003, at which time Rani had not yet been found.

¶ 10 On cross-examination of Jay, defense counsel asked about a previous incident in which the victim broke the arm of her grandmother. The trial court sustained the prosecution's objection on foundational grounds. Defense counsel did not follow up on the line of questioning.

¶ 11 In the *pro se* petition, defendant points out that, at trial, the State presented evidence that the victim was not physically aggressive, was only 5-feet tall and 100 pounds, and was physically weaker on her right side due to suffering from polio in childhood. Defendant alleges that, before trial, he told defense counsel to contact certain witnesses who could have offered testimony about the victim's history of physical violence. However, counsel did not contact the potential witnesses, and therefore, was unable to refute the prosecution's claim that the victim was small and defenseless.

¶ 12 To his postconviction petition defendant attached his affidavit attesting to having told defense counsel about the victim's alleged attack of her maternal grandmother, Nasib Kaur. Defendant also attested that he told counsel to contact Daljit Kaur, defendant's sister, and Jasbir Kaur, defendant's

mother, because they had witnessed the alleged attack. Defendant also attached the affidavits of Daljit and Jasbir in which they attested to the alleged attack and that counsel never contacted them. Daljit and Jasbir reside in India.

¶ 13 The trial court summarily dismissed the petition as frivolous and patently without merit because it failed to state the gist of a meritorious constitutional claim of ineffective assistance of counsel. Defendant filed a timely notice of appeal from the summary dismissal of the postconviction petition.

¶ 14 ANALYSIS

¶ 15 Defendant contends that his *pro se* postconviction petition and accompanying affidavits gave rise to the gist of a meritorious constitutional claim of ineffective assistance of counsel, and therefore, he is entitled to advancement of the petition beyond the first-stage of postconviction proceedings. Defendant argues that defense counsel should have contacted two witnesses who allegedly had “first-hand knowledge about Rani’s breaking her grandmother’s arm” and could have testified about “Rani’s true character and propensity for physical violence.” According to defendant, the testimony would have supported his defense of serious provocation and refuted the State’s theory that Rani was “a small, disabled and defenseless woman.” Defendant concludes that, at worst, the jury would have found him guilty of second-degree murder.

¶ 16 The Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a procedural mechanism by which any person imprisoned in the penitentiary may assert that there was a substantial denial of a federal or state constitutional right in the proceeding which resulted in his or her conviction. 725 ILCS 5/122-1(a) (West 2010); *People v. Harris*, 224 Ill. 2d 115, 124 (2007). Proceedings are commenced by the filing of a petition, verified by affidavit, in the circuit court in

which the conviction took place. 725 ILCS 5/122-1(b) (West 2010). A postconviction proceeding is limited to constitutional issues that have not been, nor could they have been, previously adjudicated. *Harris*, 224 Ill. 2d at 124.

¶ 17 Postconviction proceedings may consist of up to three stages in cases that do not involve the death penalty. *People v. Pendleton*, 223 Ill. 2d 458, 471-72 (2006). At the first stage, the circuit court reviews the petition to determine whether the petition is frivolous and patently without merit. *Harris*, 224 Ill. 2d at 125-26. A petition must present “the gist of a constitutional claim” to survive beyond the first stage. *Harris*, 224 Ill. 2d at 126. The circuit court is required to dismiss petitions that are frivolous and patently without merit, and such dismissals are final orders. *Harris*, 224 Ill. 2d at 126. At stage two, the circuit court may appoint counsel for the defendant and the State may move to dismiss the petition. At the second stage, the relevant inquiry is whether the petition establishes a substantial showing of a constitutional violation. *Harris*, 224 Ill. 2d at 126 (citing 725 ILCS 5/122-6 (West 2010)). A petition that is not dismissed at the second stage proceeds to the third stage where the circuit court conducts an evidentiary hearing. *Harris*, 224 Ill. 2d at 126. In this case, the trial court dismissed the petition at the first stage as frivolous and patently without merit.

¶ 18 Our supreme court in *People v. Hodges*, 234 Ill. 2d 1, 16 (2009), stated that a petition is frivolous or patently without merit if it “has no arguable basis either in law or in fact.” A petition has no basis in law when it is based on an “indisputably meritless legal theory.” *Hodges*, 234 Ill. 2d at 16. “An example of an indisputably meritless legal theory is one which is completely contradicted by the record.” *Hodges*, 234 Ill. 2d at 16. A petition has no basis in fact if it is based on a “fanciful factual allegation.” *Hodges*, 234 Ill. 2d at 16. “Fanciful factual allegations include those which are fantastic or delusional.” *Hodges*, 234 Ill. 2d at 17.

¶ 19 Defendant contends that his postconviction petition sets forth an arguable claim of ineffective assistance of counsel. The law is clear that a defendant in any criminal case is constitutionally guaranteed effective assistance of counsel under the sixth amendment to the United States Constitution. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, §8; *Strickland v. Washington*, 466 U.S. 668 (1984), (adopted by *People v. Albanese*, 104 Ill. 2d 504 (1984)). Under the two-prong test set forth in *Strickland*, a defendant claiming ineffective assistance of counsel must show that his counsel’s performance “fell below an objective standard of reasonableness” and that the deficient performance was prejudicial in that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694. A court need not decide whether counsel’s performance was deficient before analyzing whether the defendant was prejudiced. *People v. Pineda*, 373 Ill. App. 3d 113, 117 (2007). “At the first stage of postconviction proceedings under the Act, a petition alleging ineffective assistance may not be summarily dismissed if (1) it is arguable that counsel’s performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced.” *Hodges*, 234 Ill. 2d at 17.

¶ 20 A *pro se* petition need not be construed so strictly during the first stage of postconviction proceedings. To survive summary dismissal, a *pro se* postconviction petitioner is not required to allege facts supporting all elements of a constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 188 (2010). In *Hodges*, the supreme court noted its concern that petitions filed *pro se* should be given a liberal construction and are to be reviewed “ ‘with a lenient eye, allowing borderline cases to proceed.’ ” *Hodges*, 234 Ill. 2d at 21 (quoting *Williams v. Kullman*, 722 F. 2d 1048, 1050 (2d Cir.1983)). “While in a given case the *pro se* defendant may be aware of all the facts pertaining to

his claim, he will, in all likelihood, be unaware of the precise legal basis for his claim or all the legal elements of that claim.” *People v. Edwards*, 197 Ill. 2d 239, 245 (2001). It is for this reason that a petitioner need only present the “gist” of a constitutional claim, which is “something less than a completely pled or fully stated claim.” *Edwards*, 197 Ill. 2d at 245.

¶ 21 We agree with the trial court that defendant’s postconviction petition failed to state the gist of a meritorious claim, and therefore, the petition must be dismissed as frivolous and patently without merit. The petition did not establish that defendant was prejudiced by the omission of the evidence regarding the incident in which Rani allegedly broke her grandmother’s arm.

¶ 22 Defendant attached to the *pro se* petition his unverified affidavit in which he asserted that, prior to trial, he told counsel to contact Daljit, his sister, and Jasbir, his mother, who allegedly observed Rani “on a prior occasion” act in a “rage” and “bipolar attack” to break the arm of her maternal grandmother. Defendant also attached the affidavits of Jasbir and Daljit, who are residents of India. Both affiants indicated that, at some unspecified location and time, Rani broke her grandmother’s arm. Neither affidavit provides details of the alleged incident or describes the grandmother, such as her age, size, or physical condition. According to defendant, if the jury had been able to consider the testimony about Rani’s alleged propensity for violence, the jury would have found that defendant’s conduct was justified as self-defense or that he was only guilty of second-degree murder based on either serious provocation or an unreasonable belief that self-defense was warranted.

¶ 23 We agree with the State that, taking as true all well-pleaded facts in the petition and its accompanying affidavits and considering those facts in light of the record, defendant has failed to meet his burden of showing that counsel’s alleged omission prejudiced defendant at trial. Defendant

was charged with first-degree murder. The jury also was instructed on the offense of second-degree murder based on serious provocation in that defendant committed first-degree murder but acted under a sudden and intense passion resulting from serious provocation by the individual killed. See 720 ILCS 5/9-2(a)(2) (West 2006). Serious provocation can arise only from substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, or adultery with the offender's spouse. *People v. Garcia*, 165 Ill. 2d 409, 429 (1995).

¶ 24 The trial court likely would have found that evidence of Rani's unrelated battery of her grandmother would have been irrelevant and inadmissible in this prosecution, where the case turned on whether defendant acted under a serious provocation arising from a physical assault by Rani. Regardless, even if the jury had heard evidence that Rani broke her grandmother's arm at some unspecified time in the past, a defense of serious provocation would not have been established because defendant's own account of the events undermines his defense theory.

¶ 25 Defendant's statements to the police and his testimony at trial showed that, just before the strangling and even during the fatal act, Rani was not hitting, kicking, or making any physical contact with defendant. In fact, according to defendant himself, Rani brought the plastic bag to defendant and offered to allow him to tie her up so that she could not leave in the car. Had defendant's relatives testified as defendant asserts they would, the testimony would not have supported defendant's contention that Rani's hitting and kicking him and attempts to leave the house amounted to serious provocation that was reasonable and adequate. There is not a reasonable probability that the jury would have found a serious provocation sufficient to reduce defendant's crime to second-degree murder. The outcome of the trial would not have been different if the jury had heard the omitted testimony.

¶ 26 Construing the *pro se* petition broadly, we further reject defendant's notion that evidence of Rani's alleged attack of her grandmother would have been relevant to a claim of self-defense or a claim that defendant committed only second-degree murder based on an unreasonable belief that self-defense was warranted. Defendant's trial testimony was consistent with his prior statements to the police. He indicated that Rani had been aggressive toward him before he strangled her and that she had begun hitting him very hard and tried to kick him. However, defendant testified that, after the altercation moved into the living room, he held down Rani on the couch. Rani then struck defendant, ran to the kitchen, and returned to kick him. Defendant admitted that he got very upset, held Rani's arms, and slapped her face twice. Defendant stated that, while "very, very angry," he grabbed a garbage bag that Rani was holding, put it around her neck, and squeezed with both hands for 5 to 10 seconds. When defendant released her, she fell and hit her head. A pathologist testified that strangulation was the cause of death.

¶ 27 Defense counsel requested but was denied instructions on self-defense and on second-degree murder based on imperfect self-defense. However, defendant's own testimony at trial and his prior statements to the police describing the homicide completely refute any possible self-defense or imperfect self-defense claim. A review of the evidence presented to the jury shows that the postconviction court was correct in determining that the instructions on self-defense and on second-degree murder based on imperfect self-defense were not justified. Moreover, defendant did not claim on direct review that the court's refusal of the two instructions was erroneous.

¶ 28 Defendant has failed to allege facts to show that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. Defendant's postconviction allegation and accompanying affidavits do not present an arguable basis

to conclude that defense counsel's failure to investigate and call the Kaurs as witnesses at trial prejudiced defendant. Accordingly, we affirm the postconviction court's summary dismissal of the petition as frivolous and patently without merit.

¶ 29 For the preceding reasons, the summary dismissal of defendant's *pro se* postconviction petition in the circuit court of Lake County is affirmed.

¶ 30 Affirmed.