

2013 IL App (1st) 110136-U

FOURTH DIVISION
June 6, 2013

No. 1-11-0136

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 2147
)	
ALONZO McCORKLE,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

- ¶ 1 *Held:* The circuit court's summary dismissal of defendant's *pro se* post-conviction petition was affirmed where the material attached to defendant's petition was not even arguably exculpatory.
- ¶ 2 Defendant Alonzo McCorkle 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). On appeal, defendant contends that the State failed to produce two witness statements and a 9-1-1 tape during discovery. Alternatively, defendant contends that his petition sufficiently raised an

ineffective assistance of counsel claim based on trial counsel's failure to present the above evidence. We affirm.

¶ 3 The evidence showed that Servando Real and his five co-workers Pedro Arellano Pena, Maria Theresa Ramirez, Maricela Sanchez, Brenda Guerrero, and Giovany Castaneda were cleaning a grocery store in Melrose Park at about 9:30 p.m. on December 23, 2001. At that time, two men entered the store even though it was closed to the public. Real chased both men outside and several gunshots were fired. Real was killed and defendant was injured during the shooting. Defendant was charged with killing Real, and was convicted of first degree murder following a 2003 jury trial. He was sentenced to 75 years' imprisonment.

¶ 4 During opening statements, defense counsel argued that both Real and defendant were victims shot by the same unidentified shooter. Counsel emphasized that the gun used to shoot both men was recovered, and that the evidence failed to connect defendant to the gun. Counsel thus maintained that the State's evidence would fail to prove beyond a reasonable doubt that defendant was the shooter in question.

¶ 5 At trial, Pena testified that he saw defendant, who was wearing a gray jacket, and a second man, who was wearing a black jacket, inside the store. He heard Real yell "what do you want," and saw him chase both men outside. Pena then heard several gunshots, and, when he looked outside, he saw Real's head bleeding and the two men fleeing. The man with the black jacket was holding a gun and helping defendant, who was being dragged. On December 26, 2001, Pena identified defendant in a line-up, and again at trial. The testimony of Ramirez, Sanchez, and Castaneda was substantially similar to Pena. Ramirez and Sanchez identified defendant from the same line-up on December 26, and again in court. Castaneda viewed the line-up and made a tentative identification of an individual other than defendant.

¶ 6 Three bystanders testified about their observations immediately following the shooting. Genevieve Kasprzyk testified that she was leaving a store in Melrose Park when she heard gunfire. Kasprzyk then noticed a man with a gray jacket walking quickly, and a second man, who she identified as defendant, wearing a black jacket and crawling. Kasprzyk assumed the man crawling had been shot and called 9-1-1. On December 26, 2001, Kasprzyk went to the police station and identified defendant from a photo of a line-up. Angela Howard and Yvonne Olive testified that they were leaving a restaurant when they heard gunshots. While they were driving away, Olive noticed a man walking without a coat. Shortly thereafter, both women noticed another man in a black coat near a fence bleeding. Olive specifically testified that the man in the black coat had a dark complexion, black hair, and facial hair. Olive noticed the man throw something over the fence before crawling over to the car and requesting assistance. At that point, the police arrived and told the women not to move.

¶ 7 Officer Leslie Shankle testified that she observed that defendant had been shot and asked him how it happened. He eventually responded that he was shot by a short black male wearing a gray coat while he was near the grocery store with his girlfriend, who left with an unknown black male. Defendant gave Shankle no information about his girlfriend. Officer Michael Recinos, who was on the scene with Shankle, also testified that he was not provided a description of the girlfriend. Shankle later overheard defendant tell medical personnel at the hospital that he paid a "crackhead" \$10 to drive him around to look for his girlfriend. He saw her get into a car, and when he approached the car, two black men walked past him and several shots were fired. Defendant indicated he was shot during the exchange of gunfire.

¶ 8 The police recovered several items from their examination of the crime scene, including a gray parka with a black ski mask inside, a black knit hat, a bullet fragment, and a gun. The black

jacket defendant was wearing when he was arrested was also recovered by police before defendant was taken to the hospital.

¶ 9 Defendant did not present any evidence at trial. During closing argument, defense counsel argued that the witnesses misidentified defendant as the shooter. At the close of evidence, the jury found defendant guilty of burglary, attempted armed robbery, and three counts of first degree murder. At sentencing, the trial court merged all of the guilty counts and sentenced defendant to 75 years' imprisonment. We affirmed that judgment on direct appeal. *People v. McCorkle*, No. 1-04-1677 (2005).

¶ 10 On October 19, 2010, defendant filed a 20-page *pro se* post-conviction petition, along with a 20-page memo, alleging, in pertinent part, that his due process rights were violated where the State, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to provide to the defense exculpatory witness statements and a 9-1-1 tape containing impeachment evidence. According to defendant, this material showed that he was actually innocent of the murder. Alternatively, defendant asserted that if defense counsel had been tendered any of this material, counsel was ineffective for failing to use this evidence for impeachment purposes or as evidence of his innocence. Defendant attached over 80 pages of supporting documentation, including statements that Brenda Guerrero and Maricela Sanchez made to police, a transcript of the 9-1-1 emergency dispatch, and an affidavit of Nakita Fox, who attested that she was defendant's fiancé.

¶ 11 On November 5, 2010, the circuit court summarily dismissed defendant's petition. In doing so, the court noted that defendant failed to support his allegations with affidavits. Additionally, the court ruled that defendant failed to show that his counsel was ineffective and dismissed his claim as frivolous and patently without merit.

¶ 12 Defendant subsequently filed a motion to reconsider the court's summary dismissal of his petition, which included his affidavit explaining why he was unable to provide an affidavit from

trial counsel. In particular, defendant attested that he previously sent a letter to his trial counsel requesting evidence that he was ineffective, but his attorney failed to respond. Defendant believed a second attempt to obtain a response from counsel would be fruitless. The circuit court denied this motion on December 17, 2010, and this appeal follows.

¶ 13 On appeal, defendant first asserts trial court error by challenging the reason it summarily dismissed his due process claim based on an alleged *Brady* violation. The trial court dismissed the petition based, in relevant part, on the absence of an affidavit from trial counsel stating that the police reports were not available to him at the time of trial.

¶ 14 We review *de novo* the summary dismissal of a post-conviction petition. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). Our *de novo* review applies to the judgment on appeal, regardless of the trial court's rationale for ordering summary dismissal. *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 35. Accordingly, we can affirm the judgment on any basis supported by the record even if the trial court reasoned incorrectly. *People v. Lee*, 344 Ill. App. 3d 851, 853 (2003).

¶ 15 Here, we agree with defendant that the trial court incorrectly relied on the lack of trial counsel's affidavit to dismiss defendant's *Brady* allegation. The basic pleading requirements of the Act require a defendant to support the allegations in his petition with affidavits, records, or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2010). However, the attachment of a counsel's affidavit declaring his or her own error is excused due to the self-evident difficulty or impossibility of obtaining such an affidavit. See *e.g.*, *People v. Hall*, 217 Ill. 2d 324, 333-34 (2005). An affidavit to support his *Brady* violation would have to come from either the State admitting that it did not disclose the allegedly exculpatory discovery materials to the defense, or trial counsel declaring he did not receive these designated materials, which, in turn, would cause an ineffective assistance of counsel claim for failing to investigate or request

the information. In light of the recognized difficulty in obtaining affidavits from counsel, we cannot find that their absence alone is determinative of this claim.

¶ 16 As defendant submits in his brief, the trial court's reason for summarily dismissing this claim had nothing to do with the substance of the claim itself. Although we agree with defendant that affidavits from counsel were not needed to satisfy the pleading requirement, defendant on appeal does not advance any arguments for us to consider the substance of his claim, *i.e.*, whether the alleged non-disclosure of the purported exculpatory information (two witness statements and the 9-1-1 call) was "based on an indisputably meritless legal theory or fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Accordingly, any further consideration of defendant's *Brady* claim on appeal could be deemed waived. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008); *People v. Franklin*, 167 Ill. 2d 1, 20 (1995), citing *People v. Patterson*, 154 Ill. 2d 414, 455 (1992).

¶ 17 Waiver aside, defendant argues the claim in the alternative by contending on appeal that his trial counsel was ineffective for failing to properly use the subject information to impeach key State witnesses and show that he was misidentified as an offender. In particular, defendant points to statements Brenda Guerrero and Maricela Sanchez made to police, and the transcripts of a 9-1-1 recording. In making this argument, defendant assumes that his trial counsel knew or should have known of this material at trial.

¶ 18 The Act provides a mechanism by which a criminal defendant may assert that his conviction was the result of a substantial denial of his constitutional rights. *People v. Jones*, 399 Ill. App. 3d 341, 356 (2010). The dismissal of a petition is appropriate at the first stage of post-conviction review where the circuit court finds that it is frivolous and patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, the petition has no arguable basis in either law or fact. *Hodges*, 234 Ill. 2d at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 (the threshold for

survival at this stage is low). To have no arguable basis, the petition must be based on an "indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16.

¶ 19 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, 687-88 (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 post-conviction 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. *Hodges*, 234 Ill. 2d at 17.

¶ 20 Here, defendant contends that counsel was ineffective for failing to present evidence that would have raised a reasonable doubt of his guilt. He first calls our attention to a police report containing a statement made by Brenda Guerrero, who did not testify at trial but was present at the time of the robbery. According to Guerrero, on two occasions shortly before the robbery, two black men entered the store and attempted to cash bad checks. After the second occurrence, one of the individual's identification cards was discovered on the table. Defendant maintains that the fact that the same two black men tried to cash bad checks shortly before the robbery was highly significant where this evidence could support an argument that someone other than defendant committed the murder.

¶ 21 Defendant next points to a police report containing statements made by Maricela Sanchez. In that report, Sanchez, who did testify at trial, described the man in the gray coat as not tall, *i.e.*, about five feet, two inches tall, with a thin face, light skin, and no facial hair. Defendant states that Sanchez' description was in contrast to the arrest report and Olive's testimony where she described defendant as a dark-skinned male with facial hair. Defendant maintains that counsel could have shown that Sanchez' identification of defendant as one of the offenders was questionable by using her prior description of him.

¶ 22 Defendant finally highlights the transcripts of the Melrose Park 9-1-1 dispatch, which referred to an individual named Nakita Fox and provided part of her address. Fox averred in her affidavit that she was defendant's fiancé at the time of the murder. Defendant asserts that the fact that Fox's name and address appear in this transcript shows that police had information about her, in contrast to the testimony of Officers Shankle and Recinos. Defendant thus maintains that counsel was ineffective for failing to use the contents of this transcript to impeach the testimony of these two police officers.

¶ 23 Even assuming that counsel erred in failing to call attention to the statements of Guerrero and Sanchez, as well as the 9-1-1 transcripts, defendant has failed to show that it was arguable that the result of the trial would have been different had this evidence been admitted. Defense counsel's strategy at trial was to show that defendant was misidentified as the shooter. The statements and 9-1-1 transcript attached to defendant's petition do not support counsel's theory at trial.

¶ 24 Guerrero's statement that shortly before the robbery two black men attempted to cash bad checks at the store offers nothing in support of an argument that an individual other than defendant committed the crime in question. This is particularly true where the evidence at trial established that Pena, Ramirez, and Sanchez each identified defendant as one of the two men who were in the store just prior to the murder. Likewise, Sanchez' prior description of one of the offenders would not change the result at trial where there was no indication in the statement which of the two offenders she described. Thus, the description Sanchez provided did not exclude defendant as one of the offenders. Finally, the 9-1-1 transcripts did not show that police had any information regarding the identity of defendant's girlfriend. Instead, the transcript merely stated that Fox was a victim of the crime. Therefore, the transcript would not have impeached the officers' testimony as indicated by defendant.

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¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 26 Affirmed.