

2013 IL App (1st) 110228-U

THIRD DIVISION  
February 6, 2013

No. 1-11-0228

**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. 03 CR 14309
	)	
SAMUEL QUINN,	)	Honorable
	)	Diane Gordon Cannon,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE HYMAN delivered the judgment of the court.  
Presiding Justice Neville and Justice Sterba concurred in the judgment.

**ORDER**

¶ 1 *Held:* Summary dismissal of *pro se* post-conviction petition affirmed where defendant failed to set forth an arguable claim of ineffective assistance of trial and appellate counsel.

¶ 2 Defendant Samuel Quinn appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2010)). He contends that the circuit court erred in dismissing his petition at the first stage of proceedings because he set forth a claim of ineffective assistance of trial and appellate counsel that had an arguable basis in law and in fact.

¶ 3 The record shows that after a jury trial in 2007, defendant was convicted of aggravated criminal sexual assault against T.G. and sentenced to natural life imprisonment based on an earlier conviction for sexual assault. We affirmed that judgment on direct appeal over defendant's multiple claims, including ineffective assistance of pretrial and trial counsel for failing to discover evidence of the victim's mental illness and use it to impeach her testimony. *People v. Quinn*, No. 1-07-2515 (2009) (unpublished order under Supreme Court Rule 23).

¶ 4 This *pro se* post-conviction petition alleges, *inter alia*, ineffective assistance of trial counsel for failing to investigate or prepare for trial and ineffective assistance of appellate counsel for failing to raise the issue of trial counsel's incompetence. These assertions were based on the medical report of Dr. Nussbaum, the emergency room physician, which defendant attached in support of his petition. The circuit court summarily dismissed the petition as frivolous and patently without merit in a written order entered on December 14, 2010. In doing so, the court noted that defendant failed to present any facts demonstrating prejudice as a result of counsels' alleged omissions given the overwhelming evidence against him. This appeal follows.

¶ 5 Defendant contends that we must vacate the dismissal order and remand the cause for further proceedings under the Act because he has set out an arguable claim of ineffective assistance of trial counsel based on his trial counsel's failure (i) to investigate and use Dr. Nussbaum's medical report for impeachment purposes and (ii) to call the doctor to testify at trial. He argues that the medical report would have provided trial counsel an opportunity to question whether T.G.'s narrative of the events was consistent with the nature of the injuries described in the medical report, and, correspondingly, appellate counsel was ineffective for failing to raise the incompetence of trial counsel on appeal.

¶ 6 At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed where (i) it is *arguable* that counsel's performance fell below an objective standard of reasonableness, and (ii) it is *arguable* that defendant was thereby prejudiced. *People v. Hodges*, 234 Ill. 2d 1, 17 (2009) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). Our review of the dismissal order entered by the circuit court is *de novo* (*Hodges*, 234 Ill. 2d at 9), and we may affirm a summary dismissal of a post-conviction petition on any proper ground, notwithstanding the rationale provided by the circuit court (*People v. Lee*, 344 Ill. App. 3d 851, 853 (2003)).

¶ 7 The State asserts that the petition's dismissal was proper since, on direct appeal, appellate counsel argued that trial counsel was ineffective for not making use of Dr. Nussbaum's medical report, albeit for different reasons than those presented in the petition. The State further asserts that Dr. Nussbaum's medical report could not have been used to impeach T.G. without having the doctor testify, and that the record indicates trial counsel had sound strategic reasons for not presenting the testimony. Moreover, given the overwhelming evidence of his guilt, the State claims that defendant could not make an arguable showing of prejudice.

¶ 8 Although the State devotes a significant portion of its brief to the issue of counsel's trial strategy, we observe that in *People v. Tate*, 2012 IL 112214, ¶¶ 20-22, our supreme court stated that the State's strategy argument was inappropriate for the first stage of post-conviction proceedings and applied the " 'arguable' *Strickland* test," as the proper measure. Under that standard, we may proceed directly to the question of prejudice (*People v. Scott*, 2011 IL App (1st) 100122, ¶ 27), to determine whether defendant has presented a constitutional claim of "arguable merit" that his right to the effective assistance of counsel was violated (*People v. Douglas*, 2011 IL App (1st) 093188, ¶ 40).

¶ 9 An error at trial of constitutional dimension necessarily implicates the effectiveness of assistance rendered by trial counsel, which, if deficient, appellate counsel should raise. *People v. Cole*, 2012 IL App (1st) 102499, ¶ 18. "Only claims that rise to the level of violations of the defendant's constitutional rights are cognizable under the Act." *Cole*, 2012 IL App (1st) 102499, ¶ 20. We do not find this to be a case rising to the level of violating defendant's constitutional rights.

¶ 10 On direct appeal, defendant asserted ineffective assistance of pretrial and trial counsel for failing to discover and use for impeachment purposes "evidence" in Dr. Nussbaum's medical report, that T.G. was mentally ill on the date of the incident. *Quinn*, No. 1-07-2512, order at 15-17. We found no evidence of this in the medical report and thus the failure of pretrial and trial counsel to so argue was not prejudicial. *Quinn*, No. 1-07-2512, order at 16-17.

¶ 11 In his post-conviction petition, defendant again asserts ineffective assistance of counsel related to the medical report and the failure to call the doctor to testify. He maintains that he presented an arguable claim that trial counsel should have invoked Dr. Nussbaum's medical report to "further undermine" T.G.'s credibility and should have called the doctor to testify, despite DNA evidence matching semen collected from T.G. to defendant.

¶ 12 Defendant insists that the medical report "would have discredited T.G. with her prior inconsistent statements to the doctor." Also, defendant argues that because the jury was left to decide whether the sex was consensual given the matching DNA evidence, the jury could have found that Dr. Nussbaum's assessments of the injuries to be "inconsistent with T.G.'s testimony regarding the force that [he] allegedly used against her." Defendant cites the "additional inconsistencies" contained in the medical report regarding T.G.'s injuries, her drug use, and her level of consciousness during the incident as "available evidence" that trial counsel failed to

advantageously create even more doubt in the minds of the jurors, notwithstanding the State's position that trial counsel "impeached" T.G.'s testimony through other sources.

¶ 13 If, as defendant asserts in his brief, "the issue for the jury was whether the State proved beyond a reasonable doubt that the sex between T.G. and [him] was non-consensual," and "the jury's resolution of the disputed issue depended on whether it believed the testimony of T.G. that [he] beat her when she refused [his] demands for sex," additional impeachment would not have provided any evidence of this theory because impeachment is not evidence; it merely challenges the credibility of the witnesses. *Douglas*, 2011 IL App (1st) 093188, ¶ 47. As a court of review, we will not disturb a jury verdict on the possibility, not probability, that the jury would have found T.G. totally incredible with a little bit more impeachment. *Douglas*, 2011 IL App (1st) 093188, ¶ 47.

¶ 14 Moreover, in this appeal from the summary dismissal of defendant's post-conviction petition, the inadequate impeachment claim does not rise to the level of a constitutional violation of defendant's right to effective assistance of counsel. *Douglas*, 2011 IL App (1st) 093188, ¶ 48. On the record before us, defendant failed to demonstrate that he was arguably prejudiced by trial counsel's failure to present further impeachment through the doctor's medical report or the doctor's perceived testimony (*Douglas*, 2011 IL App (1st) 093188, ¶ 49), and, in turn, by appellate counsel's failure to raise trial counsel's incompetence in that regard (*People v. Flores*, 153 Ill. 2d 264, 283 (1992)). Accordingly, we affirm the summary dismissal of defendant's post-conviction petition by the circuit court of Cook County.

¶ 15 Affirmed.