2013 IL App (1st) 111917-U

SECOND DIVISION
March 26, 2013

No. 1-11-1917

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
Plaintiff-Appellee,	)	of Cook County
	)	
v.	)	No. 06 CR 19569
	)	
ABEL SALAZAR,	)	Honorable
	)	Matthew E. Coghlan
Defendant-Appellant.	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *HELD*: Summary dismissal of defendant's *pro se* postconviction petition affirmed over his claims that he was entitled to a substitution of judge, and that he set forth cognizable claims of ineffective assistance of appellate counsel and a due process violation.

¶ 2 Defendant Abel Salazar, *pro se*, appeals from the summary dismissal of his petition for

relief under the Post-Conviction Hearing Act (Act). 725 ILCS 5/122-1 *et seq.* (West 2010). He contends, essentially, that he was entitled to a substitution of judge in his postconviction proceeding, and that he set forth cognizable claims of ineffective assistance of appellate counsel and a due process violation. For the following reasons, we affirm.

¶ 3 Following a 2007 jury trial, defendant was found guilty of possession of a controlled substance with intent to deliver (900 or more grams of cocaine) and delivery of a controlled substance (400 grams but less than 900 grams of cocaine), then sentenced to concurrent, respective terms of 25 and 20 years' imprisonment. This court modified defendant's fines and fees on direct appeal, but otherwise affirmed his conviction and sentence. *People v. Salazar*, No. 1-08-0443 (2010) (unpublished order under Supreme Court Rule 23).

¶ 4 On March 17, 2011, defendant filed a *pro se* petition for post-conviction relief. As pertinent to this appeal, defendant alleged (1) that he was denied due process where a police officer (Officer Tomalis) and assistant State's Attorney intentionally misled the grand jury by presenting false testimony; (2) that appellate counsel was ineffective for failing to argue on appeal that trial counsel provided "deficient representation in litigating [his] Fourth Amendment [*sic*] claim"; and (3) that he was entitled to a substitution of judge in his postconviction proceeding because the trial court had referred to him as a "ring leader" and "set free" a guilty co-defendant (Ignacio Ramirez).

¶ 5 On May 27, 2011, the circuit court entered a written order dismissing defendant's post-conviction petition as frivolous and patently without merit. The court found, *inter alia*, that defendant's allegation that Officer Tomalis testified falsely was "bald and conclusory" where

there was no evidence in the record that the officer misled the jury or testified untruthfully, and that defendant failed to show that appellate counsel acted unreasonably where the issues raised by defendant lacked merit. The court also denied defendant's "motion" for a substitution of judge because he failed to demonstrate substantial prejudice. This appeal follows.

¶ 6 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. Delton*, 227 Ill. 2d 247, 253 (2008). At the first stage of proceedings, defendant need only set forth the "gist" of a constitutional claim (*Delton*, 227 Ill. 2d at 254); however, the circuit court must dismiss the petition if it finds that the petition is frivolous or patently without merit (725 ILCS 5/122-2.1(a)(2) (West 2010)), *i.e.*, it has no arguable basis either in law or in fact (*People v. Hodges*, 234 Ill. 2d 1, 16 (2009)). We review the summary dismissal of a postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388 (1998).

¶ 7 Defendant first contends that he was entitled to a substitution of judge in his post-conviction proceeding because the trial court previously referred to him as the "ring leader" of a drug operation and set aside codefendant Ramirez's guilty verdict. The State responds that defendant failed to provide evidence of these rulings in accordance with section 122-2 of the Act (725 ILCS 5/122-2 (West 2010)), and, further, that he failed to demonstrate prejudice.

¶ 8 Under the Act, defendant must provide, *inter alia*, affidavits, records, or other evidence in support of his allegations, or, at a minimum, an explanation for the absence of such materials. 725 ILCS 5/122-2 (West 2010). The purpose for requiring these materials is to ensure that the allegations in the petition are capable of objective or independent corroboration. *People v.*

Collins, 202 Ill. 2d 59, 67 (2002).

¶ 9 Here, the State correctly notes that defendant failed to attach evidence of the above rulings to his post-conviction petition or provide an explanation for the absence of such. 725 ILCS 5/122-2 (West 2010). However, the record shows that the circuit court characterized defendant's request for substitution of judge as a "motion," rather than a postconviction claim, which would seem to raise a question as to whether the documentary requirement of the Act applies to his request.

¶ 10 The record submitted by defendant in this court consists solely of the one-volume common law record from his postconviction proceeding. It contains neither the transcript where the court allegedly referred to him as the "ring leader" of a drug operation, nor evidence that the court set aside the guilty verdict of codefendant Ramirez. In their brief, the State points out that defendant clearly possesses the entire trial record, including all transcripts from both the motion to suppress and the trial of defendant, as defendant refers to the record many times in his opening brief. The State urges us to find that it is defendant's burden, as the appellant, to provide this court with a sufficiently complete record to support his claims of error, and that we may resolve any doubts that arise from the incompleteness of the record against him. *People v. Lopez*, 229 Ill. 2d 322, 344 (2008). The State also offered to provide this court with the record, including all transcripts from co-defendant Jose Seka's trial held simultaneously with defendant's. Sixty days after the State filed their appellee brief, defendant filed his reply brief, objecting to the use of the record in Seka's trial. Defendant also "prays that this court will order the defendant to mail the necessary exhibits, affidavits, transcripts and common law record." We decline defendant's

request that we order him to file a complete record, something which he is required to do. See *Delton*, 227 Ill. 2d at 255; *People v. Steward*, 406 Ill. App. 3d 82, 87 (2010).

¶ 11 However, as defendant's postconviction petition was summarily dismissed, we will accept as true defendant's allegations that the trial court referred to him as the "ring leader" of the drug operation and that the trial court set aside the guilty verdict of his other codefendant Ramirez. *Delton*, 227 Ill. 2d at 254. Having said this, we reject defendant's argument that the judge who considered defendant's post-conviction petition erroneously denied defendant's request for a substitution of judge. It is well-settled that,

> "the Illinois statutory provisions relating to substitutions of judges do not apply in postconviction proceedings. [Citation.] Our supreme court has recognized some circumstances in which trial judges should recuse themselves because of bias or prejudice in postconviction proceedings. [Citations.] '[O]nly under the most extreme cases is disqualification on the basis of bias or prejudice constitutionally required.' [Citation.]" *Gibson v. People*, 377 Ill. App. 3d 748, 751 (2007).

The actions of the trial judge in referring to defendant as the "ring leader" of the drug operation and in setting aside Ramirez' verdict do not support defendant's contention that the trial judge was biased or prejudiced toward defendant.

¶ 12 Defendant next contends that appellate counsel was ineffective for failing to argue on

appeal that trial counsel[1] provided deficient performance at the suppression hearing. He claims that trial counsel argued a theory unsupported by testimonial evidence, *i.e.*, that defendant was asleep in his apartment when police entered, and should have called Diane Sanchez and Narco Reyes to testify. He also claims that counsel failed to investigate his allegations of police misconduct, and failed to impeach Officer Tomalis with a police report and the arrest reports of his codefendants.

¶ 13 The State responds that defendant did not allege in his petition that trial counsel was ineffective for failing to call Sanchez or Reyes, or that appellate counsel was ineffective for failing to raise this issue, and that defendant may not raise the issue for the first time on appeal. The State also responds that defendant has not identified the allegations of police misconduct that counsel failed to investigate.

¶ 14 We observe that any issues to be reviewed must first be presented in the postconviction petition filed in the circuit court, and that defendant may not raise an issue for the first time on appeal. *People v. Jones*, 211 Ill. 2d 140, 148 (2004). Here, defendant did not allege in his post-conviction petition that appellate counsel was ineffective for failing to argue that trial counsel should have called Sanchez or Reyes at the suppression hearing. He also did not allege that appellate counsel was ineffective for failing to argue that trial counsel should have impeached Officer Tomalis with a police report and the arrest reports of his codefendants. These claims are thus forfeited. *Jones*, 211 Ill. 2d at 149-50. Additionally, defendant has failed to identify in this court which allegations of police misconduct trial counsel neglected to investigate, resulting in

[1] The record shows that defendant was represented by a different attorney at trial.

the waiver of this claim on appeal. *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005), citing *Pecora v. Szabo*, 109 Ill. App. 3d 824, 826 (1982). We therefore find that defendant's ineffective assistance of appellate counsel claims have no arguable basis in law. *Hodges*, 234 Ill. 2d at 16.

¶ 15 Defendant lastly contends that the State knowingly presented the false testimony of Officer Tomalis during pretrial and trial proceedings. The State responds that defendant has failed to demonstrate that Officer Tomalis committed perjury, or that the State knowingly presented perjured testimony.

¶ 16 Here, defendant has made a conclusory, and mostly incoherent, argument that Officer Tomalis gave false testimony, specifically that he created a "dropsy" claim. Defendant's argument appears to be based on a perceived discrepancy between the officer's testimony to the grand jury that a bag of suspected cocaine was recovered from Seka, and his testimony at the suppression hearing that he saw Seka drop a brick of suspected cocaine which he subsequently recovered. Clearly, this testimony, alone, does not indicate that Officer Tomalis created a "dropsy" claim. We thus find that defendant's claim has no arguable basis in fact. *Hodges*, 234 Ill. 2d at 16.

¶ 17 For the reasons stated, we affirm the summary dismissal of defendant's postconviction petition.

¶ 18 Affirmed.