

No. 1-11-2194

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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. 05 CR 18909
)	
ANGEL MERCADO,)	Honorable
)	Thomas V. Gainer,
Defendant-Appellant.)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Palmer and Taylor concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court did not err in dismissing defendant's postconviction petition where the petition did not assert a claim of an arguable basis in law and fact that defendant's constitutional right to effective assistance of appellate counsel was violated. Defendant did not demonstrate he was arguably prejudiced by appellate counsel's failure to argue on direct appeal that defendant's trial counsel failed to ensure that every prospective juror was questioned about potential gang violence during *voir dire*. We affirm.
- ¶ 2 Defendant Angel Mercado appeals 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 the trial court erred in dismissing the petition because it presented an

arguable claim of ineffective assistance of counsel based on appellate counsel's failure to argue defendant's trial counsel was ineffective for failing to ensure that the trial court questioned the entire jury venire about potential gang bias.

¶ 3 Following a joint jury trial, defendant was convicted of aggravated discharge of a firearm and unlawful use of a weapon by a felon and sentenced to a total of 20 years' imprisonment, while his codefendant, Robert Cantoral, was acquitted of aggravated discharge of a firearm. Defendant's convictions arose from a July 2005 shooting incident in which the State's evidence showed defendant, while a passenger in a sport utility vehicle ("SUV"), fired multiple shots at four men in a vehicle after a verbal confrontation involving street gang affiliation. Throughout the trial, defendant advanced a theory of self-defense, contending that he only fired at the four men after an altercation over gang affiliation and after observing the front-seat passenger reaching for what defendant believed to be a gun in the car's dashboard. Defendant's convictions were affirmed on direct appeal. *People v. Mercado*, 397 Ill. App. 3d 622 (2009).

¶ 4 Prior to trial and in anticipation of jury selection, the trial court asked the parties whether they wanted the court to ask the prospective jurors about gangs, and codefendant Cantoral's counsel confirmed that gangs would be an issue in the case, but stated he did not have any questions. Defendant's counsel did not respond to the court's inquiry. The trial court ruled that it would inform the prospective jurors that both parties' witnesses may testify to street gang involvement. The trial court then informed the first set of 14 prospective jurors that "there may be some evidence that people on both sides of this case may be involved with street gangs." The court asked whether this fact would interfere with the prospective jurors' ability to give both sides a fair trial. No prospective juror raised his or her hand. The parties selected 10 jurors from this panel. The court did not make a similar inquiry during the second panel, and the parties selected

two jurors and two alternates from this group. Each prospective juror told the trial court that he or she would be able to decide the case fairly by applying the law to the evidence presented.

¶ 5 Luis Avilez, Manuel Torres, Santiago Torres and Ivan Villanueva testified they were occupants in Avilez's car during the early morning hours of July 30, 2005. Avilez was driving. They had just exited the expressway onto Ohio Street and were stopped at a red light when a black sport utility vehicle (SUV) pulled up next to their car. Avilez, Manuel, and Santiago testified that while at the stoplight the driver of the SUV flashed a Satan Disciples gang sign. They identified codefendant Cantoral as the driver. Avilez denied being in a gang, but Manuel and Santiago were former Latin Kings. In response to the Satan Disciples gang sign, Santiago testified he extended his middle finger at the driver.

¶ 6 When the light turned green, the SUV accelerated and moved in front of Avilez's car. Avilez testified that the passenger of the SUV leaned out of the window and fired two to three gunshots at their car. He identified defendant as the shooter. When defendant began shooting, Avilez stopped the car and ducked down. Avilez then followed the SUV until he noticed a police car, and told the officers a person in the SUV had fired shots at them. The police began to follow the SUV and Avilez continued to follow behind the police car.

¶ 7 Sergeant William Bradley, an off-duty police officer, testified that he observed defendant hanging out of the passenger window while firing three shots behind him. Bradley called 911 and proceeded to follow the SUV when he noticed an unmarked squad car. He waved to the car and told the officers, Christopher Dingle and Jose Torres, that a passenger in the SUV had fired shots out of the car. Dingle and Torres began to follow the SUV and eventually curbed the vehicle. Bradley requested an officer return to Ohio Street with him to look for shell casings. One casing was recovered and inventoried.

¶ 8 Dingle and Torres testified that they arrested defendant and codefendant Cantoral after curbing the vehicle. Dingle searched the vehicle and found a loaded handgun inside a storage compartment in the rear passenger side of the SUV. Torres and other officers also patted down the occupants of Avilez's car and searched their car, but no weapons were found.

¶ 9 An evidence technician later recovered a bullet above the rear wheel of the SUV, and a forensic scientist testified that the bullet and shell casing were fired from the weapon found inside the SUV.

¶ 10 Defendant testified that he was on parole from a 14-year sentence for residential burglary. He explained that he had known codefendant Cantoral for about three months because defendant was dating Cantoral's sister. On the night of July 30, 2005, defendant was a passenger in Cantoral's SUV. When they exited the expressway on Ohio Street, they were stopped at a red light when defendant noticed codefendant Cantoral "exchanging words" with the other car. Defendant testified that all of the occupants of the car were flashing Latin King gang signs. When the light changed, the car "jumped behind" the SUV and defendant observed a passenger make movements under the dashboard. Defendant thought the passenger was going to get a gun. At this point, defendant crawled to the back of the SUV and retrieved a gun from a compartment in Cantoral's SUV. The weapon was wrapped in a towel. Defendant testified that he returned to the passenger seat and tried to calm down, but then he saw the car "speeding up on his side of the truck." He again observed the passenger motioning under the dashboard and he observed the driver gesturing to the passenger. He did not see a gun in the other car, but he feared the occupants would shoot at him. Defendant checked his weapon to ensure it was loaded. He leaned the upper half of his body out of the window, "stuck [his] right hand out the back of the truck downwards and [he] fired two rounds off at the ground." After firing the shots, defendant thought the car left and he returned the gun to the rear compartment. He admitted that he was a

member of the Latin Disciples gang, but testified he was no longer a member at the time of the shooting.

¶ 11 Codefendant Cantoral testified in his own defense. He denied any prior or current gang affiliation and denied having a gun in his car or on his person. He denied seeing the car with the four men in it after exiting the expressway and denied flashing gang signs. He testified that while driving on Ohio Street, he heard shots but he did not see anything. Codefendant Cantoral did not observe defendant slide out of the passenger window, but saw defendant get back into the vehicle with a gun in his hand. Cantoral was shocked and asked defendant, "what the f*** is going on?" Defendant went to the back of the SUV and then returned to the passenger seat. Cantoral kept driving until he was pulled over by police.

¶ 12 The jury found defendant guilty of aggravated discharge of a firearm and unlawful use of a weapon by a felon. He was sentenced to concurrent terms of 20 years' imprisonment for aggravated discharge of a firearm and 12 years for unlawful use of a weapon by a felon. Codefendant Cantoral was found not guilty of aggravated discharge of a firearm. On direct appeal, defendant contended the trial court erred in failing to sever his trial from codefendant Cantoral's and that his attorney was ineffective for failing to ensure the severance. *Mercado*, 397 Ill. App. 3d at 623-24. This court affirmed defendant's convictions. *Id.* at 632.

¶ 13 On March 30, 2011, defendant filed the instant *pro se* postconviction petition, contending *inter alia* that his appellate counsel rendered ineffective assistance when counsel failed to argue in his direct appeal that defendant's trial attorney was ineffective for failing to ensure that the trial court questioned the entire venire about gang bias. The trial court dismissed the petition as frivolous and patently without merit. This appeal follows.

¶ 14 At the first stage of postconviction proceedings, summary dismissal is allowed only if the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *People v.*

Brown, 236 Ill. 2d 175, 184 (2010). Taking the allegations in the petition as true and liberally construed (*Brown*, 236 Ill. 2d at 184), a petition is considered frivolous or without merit only if it "has no arguable basis either in law or in fact," meaning it is "based on an indisputably meritless legal theory or a fanciful factual allegation" (*People v. Hodges*, 234 Ill. 2d 1, 11-12, 16 (2009); see also *People v. Tate*, 2012 IL 112214, ¶¶ 9, 12 (explaining that the threshold for survival at the first stage is low and that the "petition cannot be said to be at issue")). "The allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Brown*, 236 Ill. 2d at 184. Petitions based on meritless legal theories or fanciful factual allegations will be dismissed. *Hodges*, 234 Ill. 2d at 16. We review *de novo* the trial court's dismissal of a postconviction petition at the first stage. *People v. Williams*, 186 Ill. 2d 55, 59-60 (1999); *People v. Coleman*, 183 Ill. 2d 366, 378 (1998).

¶ 15 "Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence of counsel to refrain from raising issues which, in his or her judgment, are without merit, unless counsel's appraisal of the merits is patently wrong." *People v. Easley*, 192 Ill. 2d 307, 329 (2000). Therefore, a defendant suffers no prejudice from appellate counsel's failure to raise issues on appeal unless the underlying issues are meritorious. *Id.* To warrant remand for second-stage consideration of defendant's postconviction petition alleging ineffectiveness of appellate counsel for failure to raise the issue of trial counsel's ineffectiveness, defendant must demonstrate that (1) it is arguable appellate counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that defendant was prejudiced. *Hodges*, 234 Ill. 2d at 17; see also *Strickland v. Washington*, 466 U.S. 668, 687 (1984). With regard to the first prong, we will not review counsel's strategy here, as such a review is inappropriate for first stage proceedings. See *Tate*, 2012 IL 112214, ¶ 22. To demonstrate arguable prejudice, defendant must demonstrate that but for appellate counsel's unprofessional

errors, "there is a reasonable probability the result of the proceedings would have been different." *Strickland*, 466 U.S. at 694. Defendant cannot meet that standard here.

¶ 16 We are unconvinced that defendant's claim in his postconviction petition had a better chance of success than those actually pursued on direct appeal, and therefore conclude that defendant has not presented an arguable claim of prejudice. Defendant has not alleged that any juror displayed a gang bias. See *People v. Benford*, 349 Ill. App. 3d 721, 733-34 (2004). Further, both the State and defendant chose to utilize gang evidence. While the State used this evidence to show defendant's motives in firing at the four men, defense counsel relied upon it to support defendant's self-defense claim. Defendant testified that all four occupants of the car flashed Latin King gang signs, that a verbal altercation ensued between them and codefendant Cantoral, and that he observed the front passenger make movements under the dashboard. At this point, defendant testified, he thought the passenger was going to get a gun. Because both sides utilized gang evidence, it is reasonable to conclude that "any prejudice against gang members would have also operated against the State." See *People v. Powell*, 355 Ill. App. 3d 124, 142 (2004); quoting *People v. Furdge*, 332 Ill. App. 3d 1019, 1026 (2002).

¶ 17 Moreover, as this court explained when considering defendant's claim of ineffectiveness on direct appeal, the "evidence presented was overwhelming" against defendant. *Mercado*, 397 Ill. App. 3d at 634. All four occupants of the car testified about the shooting and Avilez, the driver, identified defendant as the shooter. Sergeant Bradley also observed the shooting and identified defendant as the shooter. When police officers curbed the SUV, they recovered a handgun from a rear passenger-side compartment in the vehicle. Forensic evidence matched the recovered bullet and shell casing to the handgun that police recovered. Most importantly, defendant admitted to the shooting. The jury rejected defendant's testimony that he feared for his life and acted in self-defense. We note that the same jury found codefendant Cantoral not guilty

of aggravated discharge of a firearm, despite the four occupants' testimony that Cantoral flashed a gang sign. Based on this evidence, defendant cannot show that it is arguable that the outcome of his trial would have been different had his trial counsel ensured that the trial court questioned the entire venire about gang bias. Accordingly, defendant cannot show that it is arguable that the outcome of his direct appeal would have been different had appellate counsel briefed this issue.

¶ 18 Defendant relies on *People v. Strain*, 194 Ill. 2d 467 (2001), to argue that we should presume prejudice as a result of the failure to question the entire venire about gang bias.

Defendant's reliance is misplaced because in *Strain*, our supreme court held that "when testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors, either directly or through questions submitted to the trial court, concerning gang bias." *Id.* at 477.

Defense counsel in *Strain* twice submitted gang bias questions to the trial court and requested they be asked of the venire, yet the trial court refused to permit those inquiries, despite gang evidence permeating the trial. *Id.* at 478-79. That case is inapposite from the present case because it did not address whether defense counsel was *ineffective* for failing to request that the trial court question the venire regarding gang bias or whether the failure to do so resulted in prejudice as a matter of law. Although defendant is correct in citing *Strain* to assert that he had a right to ask the trial court to question the venire about gang bias, this does not, in turn, imply that defendant's trial counsel was ineffective for failing to make such a request, which the *Strain* court did not address. As explained *supra*, counsel's failure to ensure that the trial court inquired into the matter did not arguably prejudice defendant.

¶ 19 Based on the foregoing, the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition at the first stage of proceedings is affirmed.

¶ 20 Affirmed.

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