

No. 1-12-2112

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 23819
	)	
RAUL LOPEZ,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE McBRIDE delivered the judgment of the court.  
Presiding Justice Gordon and Justice Taylor concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* Summary dismissal of defendant's postconviction petition was proper where it was not arguable that defendant was prejudiced by trial counsel's failure to investigate a particular potential witness.
- ¶ 2 Defendant Raul Lopez, who had been convicted of first degree murder, 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). Defendant contends that his petition presented an arguable claim of ineffective assistance of counsel based on a failure to investigate a potential

witness, Jesse Lopez, whom defendant argues would have corroborated his self-defense claim.

For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the shooting death of Alejandro Rodriguez on October 21, 2007. The underlying facts of the case are set out at length in our decision on direct appeal, *People v. Lopez*, No. 1-09-1732 (2011) (unpublished order under Supreme Court Rule 23), but will be repeated here as necessary.

¶ 4 At trial, Oscar Morales testified that about 2 a.m. on October 21, 2007, he and Alejandro Rodriguez were walking home from a liquor store when a car pulled up to them. The man in the passenger seat of the car said something to Rodriguez, who was carrying a 12-pack of beer in a bag. In court, Morales identified the passenger as defendant. Morales, who was just ahead of Rodriguez, could not hear what defendant said or what Rodriguez said in reply. After the verbal exchange, defendant got out of the car and started shooting. When the shooting started, Morales ran. After the car drove off, Morales returned to the scene of the shooting and found Rodriguez lying face down on the ground. Morales testified that neither he nor Rodriguez were members of the Latin Kings street gang.

¶ 5 Stephanie Olaguez testified that on October 21, 2007, she was casually dating defendant, whom she had met through her friend, Lucy Lopez, who was not related to defendant. At the time, she assumed defendant was a member of the Two Six street gang. That night, she and Lucy Lopez joined defendant and a man named Luis Ugalde as they went "driving around," drinking and playing music. Ugalde was in the driver's seat, defendant was in the front passenger seat, and the two women sat in the back seat. At some point, Olaguez saw two men walking on the sidewalk. One of the men was holding something, possibly beer, in his left hand. Ugalde stopped the car and defendant yelled something out the window. Olaguez could not hear whether the men on the sidewalk responded. Defendant then got out of the car. Olaguez testified that she

heard gunshots, after which defendant got back in the car and they drove away. Ugalde next stopped the car in the alley behind defendant's house. Defendant got out of the car for a few minutes. When he returned, he got in the back seat of the car and had Lucy Lopez move to the front seat. Shortly thereafter, they were stopped by the police.

¶ 6 Chicago police officer Paul Escamilla testified that he and his partner were on patrol when he heard four or five gunshots. As the officers drove toward the shots, they received a call over the radio. As a result of the call, they began looking for a particular car. Shortly thereafter, they stopped a car with four people in it: defendant, Luis Ugalde, and two women. Defendant was in the back seat. Eventually, defendant was placed under arrest.

¶ 7 Forensic investigator James Shader testified that he processed the crime scene. He stated that Rodriguez was lying dead on the sidewalk. To his right was a plastic bag of unopened beer cans. A cell phone was also found next to his body.

¶ 8 Chicago police detective Carlos Cortez testified that he recovered a cell phone near Rodriguez's body. Although the cell phone was inventoried, it was mistakenly destroyed by the police department before trial.

¶ 9 The parties stipulated that Dr. Mitra Kalelkar, the medical examiner who performed Rodriguez's autopsy, would have testified that she noted five gunshot wounds to the body. One entered the left mid back; a second entered the right buttock; a third entered the back of the right thigh; a fourth entered the front of the left thigh; and a fifth entered the left lateral chest wall. Rodriguez died as a result of multiple gunshot wounds and the manner of death was homicide.

¶ 10 Defendant testified on his own behalf. He stated that at the time of the shooting, he did not know Rodriguez personally, but knew who he was, knew he was "some type of leader," and believed he was a member of the Latin Kings street gang. At times, one of Rodriguez's friends would harass people in defendant's neighborhood. Defendant testified that he thought if this

harassment continued, "someone could really get hurt." Accordingly, he decided to drive around with Ugalde, Olaguez, and Lucy Lopez, see if he could find Rodriguez, and talk to him in hopes of putting "an end to the problems." Because he knew Rodriguez was dangerous and sometimes carried a gun, defendant brought a gun with him when he went out in search of Rodriguez.

Defendant stated, "I figured he would try to get violent with me, he see I had a gun he would calm down and we could discuss the problem." When asked where he got the gun, defendant stated that he had found it. He did not have any training in firearms and had never fired a gun before.

¶ 11 Defendant testified that he spotted Rodriguez walking down the street. Ugalde pulled up next to him and defendant rolled down his window. Defendant called out to Rodriguez and stepped out of the car. Rodriguez, with his back toward defendant, answered, "[W]hat the 'f do you want?" Rodriguez turned a little toward defendant and defendant could see a "black object" in Rodriguez's right hand. Rodriguez started moving his right hand upwards. Thinking the object in Rodriguez's hand was a gun and that Rodriguez was going to shoot him, defendant pulled his own gun from his pants pocket, raised it, turned his back toward Rodriguez, and started firing. Defendant stated that he was not looking at Rodriguez while he was shooting. After firing the gun, he jumped back into the car.

¶ 12 Defendant acknowledged that when he was taken to the police department, he did not tell the police what he had testified to in court. When asked why, he said he was "really afraid, scared."

¶ 13 On cross-examination, defendant stated that he was no longer a member of the Two Six street gang at the time of the shooting. He explained that he found his gun about a month before the shooting. When asked where he found the gun, he stated, "I found it down the street from my house. \*\*\* How am I suppose[d] to remember, I don't know." When questioned further,

1-12-2112

defendant testified that he found the gun on the tire of a parked car, under the fender. He stated that he took the gun because children play in the area. He did not check to see if it was loaded, either when he found it or when he went out looking for Rodriguez. He only discovered the gun was loaded when he pulled the trigger. Defendant acknowledged that he fired the gun five times, and although he agreed that his "bullets found their mark five times," he maintained that he was not aiming the gun at Rodriguez, but rather, just got lucky. Defendant denied that he told anyone to switch spots in the car after the shooting. He stated that those who switched spots did so on their own.

¶ 14 During cross-examination, the prosecutor asked, "Did you know about a guy named Jesse Lopez who is a Two Six street gang member who got shot a day or two before you killed Alejandro Rodriguez?" Defendant said that he knew about the shooting and that Jesse Lopez was a Two Six member, but insisted that he himself was not a member of the gang at the time.

¶ 15 After defendant rested, the State, in rebuttal, presented a video recording of defendant's interview at the police station on the day of the shooting. In the video, defendant stated that he was a member of the Two Six street gang, but repeatedly stated that he knew nothing about the shooting. Defendant told the police that Olaguez and Lucy Lopez picked him up about 3 a.m. and they were pulled over by the police immediately afterwards. In answer to the question, "Hey, did one of your guys get shot last night?" defendant answered, "Jesse Lopez, sir." Defendant said he was not related to either Jesse Lopez or Lucy Lopez, and stated that he thought it was "the SD's" who shot Jesse Lopez.

¶ 16 In closing argument, the prosecutor reviewed the elements of the charges against defendant and emphasized to the jury that there was no question defendant killed Rodriguez by personally discharging a firearm. The prosecutor spoke to motive, stating that defendant and Ugalde were Two Six gang members who went into Latin King territory "because one of their

own, another Two Six gang member, Jesse Lopez, had been shot the day before; and this was all about getting some pay back." The prosecutor argued that defendant and Ugalde planned to "make somebody pay back for what had happened the day before." He urged the jury to reject defendant's position that he searched out Rodriguez in order to be a peace maker, that he felt in fear for his life due to Rodriguez's actions, and that the level of force he used was reasonable and justifiable.

¶ 17 Defense counsel argued that there was no evidence defendant planned to kill a Latin King gang member on the night in question. Counsel also challenged the State's motive theory, pointing out that when the police asked defendant about Jesse Lopez being shot, defendant related that Jesse had been shot by Satan Disciples gang members. Counsel stated, "So if that's their motive, then he's probably in the wrong neighborhood." Counsel further argued that defendant made a "stupid" decision and a "mistake," but nevertheless acted out of a belief that the circumstances justified the use of deadly force.

¶ 18 The jury found defendant guilty of first degree murder and found that defendant discharged a firearm that caused Rodriguez's death. The trial court entered judgment on the verdict and subsequently imposed a term of 20 years' imprisonment for first degree murder and a consecutive term of 25 years' imprisonment for discharging a firearm. We affirmed the conviction and sentence on direct appeal. *People v. Lopez*, No. 1-09-1732 (2011) (unpublished order under Supreme Court Rule 23).

¶ 19 In 2012, defendant filed a *pro se* petition for postconviction relief which included a claim that "trial counsel was ineffective for failure to conduct any pre-trial investigation into the shooting of Jesse Lopez which the State asserted as the catalyst for the murder of Alejandro Rodriguez." Defendant asserted that had counsel investigated Jesse Lopez, as he had requested, counsel would have discovered that Jesse had been shot by Satan Disciples gang members, rather

than Latin Kings, and that Jesse was willing to testify as to this fact. According to defendant, Jesse also would have confirmed that defendant was no longer a member of the Two Six street gang. Defendant attached to his petition a self-executed but unnotarized affidavit in which he stated that "Jesse is willing to provide an affidavit and testimony directly to an attorney but is leery of providing one to petitioner directly there[fore] a reason exist for why such document may not be attached." The trial court summarily dismissed the petition.

¶ 20 On appeal, defendant contends that the trial court erred in summarily dismissing his petition because it presented an arguable claim of ineffective assistance of trial counsel for failing to investigate Jesse Lopez, an available witness "whose testimony would have corroborated [defendant's] self-defense claim."<sup>1</sup> Defendant argues that Jesse Lopez's testimony that he was shot by Satan Disciples gang members, as opposed to Latin Kings, as well as his testimony that defendant was not a Two Six member at the time of the shooting, would have supported defendant's position that he did not shoot Rodriguez in retaliation for Jesse's shooting and would have made defendant's trial testimony more plausible. Defendant asserts that counsel's failure to investigate Jesse cannot be deemed a strategic decision at first stage postconviction proceedings. Defendant further argues that it is arguable he was prejudiced by counsel's failure, as the State's evidence was not overwhelming.

¶ 21 As an initial matter, we address the State's argument that summary dismissal of defendant's petition was warranted because defendant failed to attach a supporting affidavit executed by Jesse Lopez and failed to submit a notarized verification affidavit. Section 122-2 of the Act provides that a petition "shall have attached thereto affidavits, records, or other evidence

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<sup>1</sup>We note that in our decision on direct appeal, we characterized Jesse Lopez's shooting as having killed him. This characterization was the one advanced in defendant's direct appeal brief, but was in error. The trial record indicates that Jesse was only wounded when he was shot a day or two preceding the events at issue in the instant case.

supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2010). Here, defendant averred that he had not obtained an affidavit from Jesse Lopez because Jesse was "leery of providing one to petitioner directly," but stated that Jesse would be willing to provide an affidavit directly to an attorney. In our view, defendant's explanation is weak.

However, the Act requires only that a petitioner state why supporting affidavits are not attached. Given the low pleading threshold at first stage proceedings, we disagree with the State that the absence of an affidavit from Jesse Lopez justifies summary dismissal.

¶ 22 As for defendant's failure to attach his own notarized verification affidavit, it is true that section 122-1(b) of the Act provides that a postconviction proceeding "shall be commenced by filing with the clerk of the court in which the conviction took place a petition (together with a copy thereof) verified by affidavit." 725 ILCS 5/122-1(b) (West 2010). However, this court has held repeatedly that the mere fact a verification affidavit is not notarized does not justify dismissal at the first stage of postconviction proceedings. See, e.g., *People v. Cage*, 2013 IL App (2d) 111264, ¶ 14; *People v. Stephens*, 2012 IL App (1st) 110296, ¶¶ 84-85; *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 34. Accordingly, we reject the State's position.

¶ 23 In cases not involving the death penalty, the Act provides a three-stage process for adjudication. 725 ILCS 5/122-1 (West 2008); *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The instant case involves the first stage of the process, during which the trial court independently assesses the petition, taking the allegations as true. *Hodges*, 234 Ill. 2d at 10. Based on this review, the trial court must determine whether the petition "is frivolous or is patently without merit," and, if it so finds, dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2010).

¶ 24 A *pro se* petition may be dismissed as frivolous or patently without merit "only if the petition has no arguable basis either in law or in fact." *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in law when it is founded in "an indisputably meritless legal theory," for

example, a legal theory that is completely belied by the record. *Hodges*, 234 Ill. 2d at 16. A petition has no arguable basis in fact when it is based on a "fanciful factual allegation," which includes allegations that are "fantastic or delusional" or contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17; *People v. Morris*, 236 Ill. 2d 345, 354 (2010). Our review of a first-stage dismissal is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 25 Traditionally, to establish ineffective assistance of counsel, a defendant must show (1) that his counsel's representation fell below an objective standard of reasonableness; and (2) but for counsel's errors, there is a reasonable probability that the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). However, our supreme court has indicated that in the context of first-stage postconviction proceedings, a defendant need not conclusively establish these factors; in *Hodges*, our supreme court held that "a petition alleging ineffective assistance may not be summarily dismissed if (i) it is arguable that counsel's performance fell below an objective standard of reasonableness and (ii) it is arguable that the defendant was prejudiced." *Hodges*, 234 Ill. 2d at 17.

¶ 26 After a thorough review of the record, we cannot find that it is arguable defendant was prejudiced by counsel's failure to investigate Jesse Lopez. The potential testimony of this witness would have been that he was shot by members of a gang with which defendant had no affiliation. We fail to see how this testimony would have been beneficial to defendant.

¶ 27 While Jesse's potential testimony may have poked holes in the State's theory that defendant's motive for shooting Rodriguez was revenge, motive was not an element the State was required to prove at trial. Even if there had been a complete absence of evidence of motive, the State still presented ample evidence at trial for the jury to find defendant guilty of first degree murder. Moreover, Jesse's potential testimony would not have spoken to whether defendant reasonably or unreasonably acted in self-defense. A person is justified in the use of force which

is intended or likely to cause death or great bodily harm if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony. 720 ILCS 5/7-1(a) (West 2010). If the person's belief is unreasonable, he is not justified in killing another but commits the offense of second degree murder. 720 ILCS 5/9-2(a)(2) (West 2010). Here, Jesse was not a witness to the shooting and would not have been able to testify as to defendant's state of mind when he shot Rodriguez.

¶ 28 Evidence of defendant's state of mind was provided by defendant's own testimony at trial. Defendant testified that after he called out to Rodriguez, Rodriguez turned a little and began to raise his right hand, which was holding an object. Defendant testified that he thought Rodriguez had a gun, so he pulled out his own gun and fired in Rodriguez's direction five times. All five of the bullets hit Rodriguez. Jesse's potential testimony would not have addressed these circumstances and therefore, would not have been exculpatory for defendant. Jesse's testimony would not have supported a theory of self-defense or "unreasonable belief" second degree murder. Accordingly, the legal theory that counsel was ineffective for failing to investigate Jesse is contradicted by the record. See *Hodges*, 234 Ill. 2d at 20. Summary dismissal of defendant's petition was proper.

¶ 29 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 30 Affirmed.