

2013 IL App (2d) 110933-U
No. 2-11-0933
Order filed June 4, 2013

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of Kane County.
Plaintiff-Appellee,)	
)	
v.)	No. 95-CF-902
)	
EDWARD L. TENNEY,)	Honorable
)	Karen M. Simpson,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

- ¶1 *Held:* The trial court erred in summarily dismissing the defendant's postconviction petition at the first stage of postconviction proceedings.
- ¶2 Following a retrial, the defendant, Edward Tenney, was convicted of first degree murder and sentenced to natural life in prison. On direct appeal, this court affirmed the defendant's conviction and sentence. *People v. Tenney*, No. 2-08-0280 (2010) (unpublished order under Supreme Court Rule 23). On June 15, 2011, the defendant filed a *pro se* postconviction petition. On September 1,

2011, the trial court dismissed the petition as frivolous and patently without merit. The defendant appeals from that order. We reverse and remand for additional proceedings.

¶ 3 BACKGROUND

¶ 4 As the parties are familiar with facts of this case, we set forth only those facts relevant to this appeal. This case involves the 1993 murder of Virginia Johannessen. In 1995, Lionel Lane was convicted of the murder. At Lane's trial, his ex-girlfriend, Lori Mohle, testified, in part, that in 1993 Lane told her that Lester Salter had shot Mrs. Johannessen during a burglary. However, at about the same time as Lane's conviction, the Kane County Sheriff's Office received additional information about the murder. Based on the information it received, the State ultimately moved to vacate Lane's conviction and in 1995 charged the defendant with the murder of Mrs. Johannessen.

¶ 5 Following a jury trial in 1998, the defendant was convicted of first degree murder and a jury imposed the death penalty. At that trial, Mohle was not available to testify. The parties thus read into the record portions of her testimony from the Lane trial. However, the trial court excluded, as hearsay, Mohle's testimony that Lane had told her that Salter had shot Mrs. Johannessen during a burglary. Upon the defendant's direct appeal to the supreme court, the defendant's conviction was reversed. The supreme court determined that the exclusion of Mohle's testimony that Lane had implicated Salter in the murder denied the defendant a fair trial. The supreme court granted the defendant a new trial. *People v. Tenney*, 205 Ill. 2d 411, 422 (2002).

¶ 6 The defendant's retrial for the murder of Mrs. Johannessen commenced in 2007. At the retrial, both the State and the defendant presented much of the same evidence that was presented at the first trial. Most of Mohle's testimony from the Lane trial was read into the record, including Mohle's testimony about Lane's statement that Salter shot Mrs. Johannessen. The trial court prohibited any testimony that Lane had previously been convicted of Mrs. Johannessen's murder.

On September 27, 2007, the jury returned a verdict finding the defendant guilty of first degree murder. On January 2, 2008, the trial court denied the defendant's posttrial motion and sentenced the defendant to natural life in prison. On direct appeal, this court affirmed the defendant's conviction and sentence. *Tenney*, No. 2-08-0280.

¶ 7 On June 15, 2011, the defendant filed a *pro se* petition for postconviction relief, pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 (West 2010)). In his petition, the defendant alleged claims based on ineffective assistance of counsel, prosecutorial misconduct, and erroneous evidentiary rulings by the trial court. On September 1, 2011, the trial court dismissed the defendant's *pro se* postconviction petition as frivolous and patently without merit. In his petition, the defendant had argued, in relevant part, that appellate counsel was ineffective for failing to argue, on direct appeal, that the trial court erred when it prohibited testimony about Lane's prior charge and conviction for the murder of Mrs. Johannessen. The trial court found the defendant's claims for ineffective assistance of appellate counsel had not met the *Strickland* standard (see *Strickland v. Washington*, 466 U.S. 668 (1984)), because the defendant had not shown that counsel's actions or inactions would have changed the result on appeal. The trial court noted that Lane's conviction was based on Mohle's testimony and that her credibility was doubtful. The trial court found that in light of Mohle's lack of credibility, later-discovered evidence found in a storage locker, and the fact that Lane's conviction was vacated, there was no error in prohibiting testimony concerning Lane's conviction. The trial court further found that if there was any error, it would be harmless error. The trial court commented that since Lane's conviction for Johannessen's murder was vacated, it was "highly unlikely" that the admission of Lane's conviction would have changed the outcome of his trial. Thereafter, the defendant filed a timely notice of appeal from the dismissal of his *pro se* postconviction petition.

¶ 8

ANALYSIS

¶ 9 On appeal, the defendant argues that the trial court erred in summarily dismissing his petition because he alleged sufficient facts to support a claim for ineffective assistance of appellate counsel, based on counsel's failure to argue, on direct appeal, that the defendant's right to a fair trial was violated by the trial court's preclusion of evidence regarding Lane's conviction for the Johannessen murder.

¶ 10 The Act (725 ILCS 5/122-1 *et seq.* (West 2010)) provides a remedy for defendants who have suffered a substantial violation of their constitutional rights at trial. Under the Act, a postconviction proceeding not involving the death penalty contains three stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). At the first stage, the trial court must independently review the postconviction petition and determine whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2010); *Edwards*, 197 Ill. 2d at 244. If the petition is frivolous or patently without merit, the court must dismiss the petition in a written order. *Id.* "A petition may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact." *People v. Tate*, 2012 IL 112214, ¶ 9. "A petition which lacks an arguable basis either in law or in fact is one which is based on an indisputably meritless legal theory or a fanciful factual allegation." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). An indisputably meritless legal theory is one which is completely contradicted by the record and fanciful factual allegations include those that are fantastic or delusional. *Id.* At the first-stage, the threshold for survival is low because most petitions are drafted by *pro se* defendants, who generally have little legal knowledge or training. *Tate*, 2012 IL 112214 at ¶ 9.

¶ 11 If the petition is not summarily dismissed at the first stage, the petition advances to the second stage. *Id.* at ¶ 10. At the second stage, counsel may be appointed to an indigent defendant

(725 ILCS 5/122-4 (West 2010)), and the State, as respondent, enters the litigation (725 ILCS 5/122-5 (West 2010)). *Id.* At this stage, the trial court must determine whether the petition, and any attached documents, make a “substantial showing of a constitutional violation.” *Id.* If such a showing is made, the petition advances to the third stage for an evidentiary hearing. *Id.* A first-stage summary dismissal of a postconviction petition is reviewed *de novo*. *Id.*

¶ 12 We judge a claim that appellate counsel was ineffective for failing to argue a particular issue, under the standard set forth in *Strickland*. See *Strickland*, 466 U.S. 687. Under that standard, to prevail on a claim of ineffective assistance of appellate counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for this failure, the defendant’s conviction or sentence would have been reversed on direct appeal. *People v. Richardson*, 189 Ill. 2d 401, 412 (2000). However, at the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is *arguable* that counsel’s performance fell below an objective standard of reasonableness and it is *arguable* that the defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19. “This ‘arguable’ *Strickland* test demonstrates that first-stage postconviction petitions alleging ineffective assistance of counsel are judged by a lower pleading standard than are such petitions at the second stage of the proceeding.” *Id.* at ¶ 20.

¶ 13 Prior to the defendant’s first trial, the trial judge had relied in *People v. Cummings*, 850 P.2d 1, 40 (Cal. 1993), as reflecting a view that a jury’s verdict in an adjacent case was not admissible for the purpose of proving any issue in a case on trial. Prior to the defendant’s retrial, the trial judge persisted in its former ruling. The trial judge noted that there did not appear to be any Illinois case law on point but that the California Supreme Court had held, in *Cummings*, that a jury verdict in a different case was not admissible to prove an issue in someone else’s trial. The trial judge noted that

in the absence of any legal authority in Illinois, it would “follow the authority of the highest court in the adjacent state.” Accordingly, the defendant was precluded from presenting to the jury, at both trials, that Lane had been previously charged, tried and convicted of murdering Mrs. Johannessen. In its appellee brief, the State asserts that if defense counsel had called Lane to testify, the trial court would have allowed Lane to testify that he had been convicted of murdering Mrs. Johannessen. It further asserts that counsel simply chose not to elicit any testimony from Lane. However, the State’s citations to the record do not support this assertion. Rather, the record indicates that Lane was not called to testify because the trial court would not have allowed him to testify that he had been charged, tried, and previously convicted of the murder at issue.

¶ 14 The defendant’s *pro se* petition meets the arguable “*Strickland*” test for first-stage petitions. As recognized by the trial judge that presided over the defendant’s two trials, there is no Illinois authority, directly on point, as to whether Lane’s prior conviction for the same crime was admissible. In the absence of any such Illinois authority, it is at least arguable that appellate counsel was unreasonable in failing to raise, on direct appeal, the propriety of excluding testimony as to Lane’s prior conviction for Johannessen’s murder. Even though Mohle’s testimony implicating Lane and others was admitted at the defendant’s retrial, it is still at least arguable that the defendant was prejudiced by the failure to admit testimony about Lane’s prior conviction for the Johannessen murder. The State argues only that trial counsel was not unreasonable and that the defendant suffered no prejudice. Similarly, the trial court found that there was no error in prohibiting testimony concerning Lane’s conviction and that, even if there were error, it was “highly unlikely” that admission of Lane’s conviction would have changed the outcome of the trial. However, such argument and analysis is more appropriate at the second stage of postconviction proceedings, where the defendant is required to make a substantial showing of a constitutional violation. *Tate*, 2012 IL

112214, ¶ 22. The issue at the first stage of postconviction proceedings is only whether the petition has any arguable basis either in law or in fact. We conclude that it does.

¶ 15 In light of the foregoing, the defendant has presented the gist of a constitutional claim that he was denied the effective assistance of appellate counsel. Accordingly, while we express no opinion as to whether defendant's ineffective-assistance-of-counsel claim will ultimately prevail, we reverse the trial court's summary dismissal of defendant's petition. Therefore, the cause is remanded and the matter advances to the second stage. See *Hodges*, 234 Ill. 2d at 22-23. In so ruling, we note that, on appeal, the defendant filed a motion for substitution of appellate counsel. As we have resolved the issue on appeal in his favor, we deny the motion as moot and remand for second-stage proceedings, at which the defendant will be represented by either court-appointed counsel, should he be indigent (725 ILCS 5/122-4 (West 2010)), or counsel of his choice.

¶ 16

CONCLUSION

¶ 17 For the foregoing reasons, we reverse the trial court's summary dismissal of defendant's postconviction petition and remand for further proceedings consistent with this order.

¶ 18 Reversed and remanded.