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2013 IL App (3d) 120464-U

Order filed December 4, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-12-0464
)	Circuit No. 08-CF-2120
)	
FERLIMO L. MORRIS,)	Honorable
)	Carla Alessio-Policandriotes,
Defendant-Appellant.)	Judge, Presiding.

PRESIDING JUSTICE WRIGHT delivered the judgment of the court.
Justices McDade and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's postconviction petition presented the gist of a meritorious claim. Therefore, the petition is remanded to the trial court for further proceedings.

¶ 2 Defendant, Ferlimo L. Morris, appeals the summary dismissal of his postconviction petition. On appeal, defendant argues the trial court erred by dismissing his petition because it presented meritorious claims that his right to a fair trial had been violated and his aggravated criminal sexual assault conviction was the result of a double enhancement. We reverse and

remand for further postconviction proceedings.

¶ 3

FACTS

¶ 4 Defendant was charged by indictment with aggravated criminal sexual assault (720 ILCS 5/12-14(a)(4) (West 2008)), criminal sexual assault (720 ILCS 5/12-13(a)(1) (West 2008)), and unlawful restraint (720 ILCS 5/10-3(a) (West 2008)). The case proceeded to a jury trial.

¶ 5 During jury selection, the trial court asked the venire "[i]s there anything about the nature of any of the charges or this particular charge that would affect your ability to be a fair and to be an impartial juror?" Venirepersons Richard Schrishuhn, Esther Stewart, Holly Cravens, and Richard Garcia answered affirmatively. Outside of the presence of the venire, defense counsel moved to exclude, for cause, the venirepersons who said "based on the nature of the charge they would have a problem." Counsel believed those venirepersons were seated in seat numbers 6, 26, 33, and 34.

¶ 6 The trial court agreed with counsel that those four venirepersons answered with a response indicating the nature of the charge would affect their ability to be impartial and should be excused by the court for cause. The State responded that its notes indicated the venirepersons in seat numbers 6, 34, and "Ms. Stewart, 26" reported they might have problems being impartial. The State did not "have anything for 33" but trusted the court's notes and did not object. The court granted defendant's motion for cause to excuse the venirepersons number 6, 26, 33, and 34.

¶ 7 The juror challenges form contained in the common law record submitted to this court documents the court excused three venirepersons for cause, rather than four. It is undisputed that after juror Schrishuhn advised the court the nature of the charges would affect his impartiality, he remained on the jury.

¶ 8 At the conclusion of the trial, Schrishuhn and eleven other jurors signed guilty verdicts for aggravated criminal sexual assault, criminal sexual assault, and unlawful restraint. The trial court sentenced defendant to a total of 60 years' imprisonment. On direct appeal, this court vacated defendant's convictions for criminal sexual assault and unlawful restraint under the one-act, one-crime doctrine. *People v. Morris*, 2011 IL App (3d) 100096-U.

¶ 9 On March 14, 2012, defendant filed a *pro se* postconviction petition. The petition asserted, in part, he received ineffective assistance of trial counsel since defense counsel did not object to the inclusion of Schrishuhn on the jury and his conviction for aggravated criminal sexual assault resulted from improper double enhancement. On April 27, 2012, the trial court summarily dismissed the petition.

¶ 10 ANALYSIS

¶ 11 Defendant argues the trial court erred by summarily dismissing his postconviction petition at the first stage. Arguing forfeiture applies, the State claims defendant could have raised this issue on direct appeal but failed to do so. Further, the State points out defendant's postconviction petition does not allege appellate counsel was ineffective for failing to raise the juror issue on direct appeal.

¶ 12 Since defendant's *pro se* postconviction petition was dismissed before defendant received the assistance of postconviction counsel, we liberally view the ineffective assistance of trial counsel arguments with some degree of leniency in a defendant's favor. See *People v. Mars*, 2012 IL App (2d) 110695 (*pro se* postconviction petitions must be given a liberal construction and are to be viewed with a lenient eye, allowing borderline cases to proceed).

¶ 13 Here, defendant's *pro se* petition alleges he received ineffective assistance from trial

counsel due to counsel's failure to detect the juror issue during trial. In addition, defendant claims appellate counsel was also ineffective and failed to raise several other issues on direct appeal. After generously construing the allegations contained in this *pro se* postconviction petition, we reject the State's contention that forfeiture should apply since, taken as a whole, defendant challenges the effectiveness of trial counsel for purportedly allowing an excused juror to remain on the jury and the effectiveness of appellate counsel for missing several other issues for purposes of defendant's direct appeal.

¶ 14 The Post-Conviction Hearing Act provides a three-stage process for the adjudication of postconviction petitions. *People v. Hodges*, 234 Ill. 2d 1 (2009). At the first stage, the trial court must independently determine whether the petition is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2008). We review the first-stage dismissal of a postconviction petition *de novo*. *People v. Morris*, 236 Ill. 2d 345 (2010).

¶ 15 The petition's allegations, liberally construed and taken as true, need only present the gist of a constitutional claim to avoid a first stage dismissal by the court. *People v. Harris*, 224 Ill. 2d 115 (2007). However, a petition summarily dismissed by the court at this stage will be upheld if the contentions have no arguable basis either in law or in fact. *People v. Tate*, 2012 IL 112214.

¶ 16 In this case, defendant alleges a juror, excused by the court for cause, remained on the jury and eventually signed the guilty verdict forms after deliberating the evidence with the other jurors. The State's suggests the juror in question, Schrishuhn, identified by the State as juror number 2, was neither the subject of a challenge by the defense nor excused by the court for cause. In support of this contention, the State submits defense counsel challenged only prospective jurors 6, 26, 33, and 34, rather than juror number 2.

¶ 17 It is unclear from the record whether defense counsel challenged the prospective jurors

based on their assigned juror number or by their seat location in the jury box during *voir dire*. However, it is clear from the record that a prospective juror named Schrishuhn was one of four jurors that clearly stated he could not be fair and impartial due to the nature of the charges filed against this defendant. The report of proceedings also documents that the court intended to excuse all four of the potential jurors who advised the court that the very nature of the charges would affect that their ability to be fair and impartial. Since Schrishuhn remained on the jury in spite of his undisputed disclosure of bias, we conclude the defendant's contention of error is not factually inconsistent with the record.

¶ 18 Next, we consider whether defendant has identified a violation of a constitutional right recognized by law. It is well-settled that a defendant has the constitutional right to a trial before an impartial and unbiased jury, that is, one "capable and willing to decide the case solely on the evidence before it[.]" *Smith v. Phillips*, 455 U.S. 209, 217 (1982); see also *Runge*, 234 Ill. 2d 68. Consequently, defendant's *pro se* postconviction petition states the gist of a constitutional claim and should not have been summarily dismissed by the court. Therefore, we reverse the trial court's summary dismissal of defendant's postconviction petition and remand the cause.

¶ 19 Defendant also argues he raised a nonfrivolous claim alleging his conviction resulted from impermissible double enhancement. However, our resolution of defendant's first argument renders this argument moot. Summary partial dismissals are not permitted at the first stage of a postconviction proceeding. *Hodges*, 234 Ill. 2d 1. Therefore, the entire petition must go back for further proceedings.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the judgment of the circuit court of Will County is reversed, and the cause is remanded for further postconviction proceedings.

¶ 22 Reversed and remanded.