

2014 IL App (2d) 130015-U
No. 2-13-0015
Order filed August 15, 2014

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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 Winnebago County.
)	
Respondent-Appellee,)	
)	
v.)	No. 08-CF-4553
)	
TOMIE M. WILLIAMS,)	Honorable
)	Joseph G. McGraw,
Petitioner-Appellant.)	Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Zenoff and Hudson concurred in the judgment.

ORDER

Held: (1) The trial court properly dismissed the defendant's postconviction petition as the defendant's allegations were not supported by the law or the record.

¶ 1 Following a bench trial in 2009, the defendant, Tomie Williams, was convicted of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(I) (West 2008)). He was sentenced to a total of 30 years' imprisonment. This court affirmed the defendant's conviction and sentence on direct appeal. See *People v. Williams*, 2011 IL App (2d) 100216-U. On November 5, 2012, the defendant filed a postconviction petition. The defendant alleged that he

was deprived of his constitutional right to the effective representation of trial counsel because his counsel failed to impeach the complaining witness. On December 6, 2012, the trial court summarily dismissed the defendant's petition. The defendant appeals from that order. We affirm.

¶ 2

BACKGROUND

¶ 3 On December 3, 2008, the defendant was charged by indictment with one count of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)) and three counts of aggravated criminal sexual abuse (720 ILCS 5/12-16(c)(1)(I) (West 2008)). Count I alleged that the defendant committed an act of sexual penetration by placing his penis in the vagina of A.M., the victim. The aggravated criminal sexual abuse counts alleged that, for purposes of sexual gratification, the defendant touched the victim's buttocks with his penis (count II), touched the victim's vagina with his hand (count III), and touched the victim's hand with his penis (count IV). All counts alleged that the defendant was 17 years of age or older and that the victim was under the age of 13 at the time the alleged acts were committed.

¶ 4 On June 29, 2009, the trial court conducted a hearing pursuant to section 115-10 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10 (West 2008)) to determine whether certain out-of court statements made by the victim would be admissible at trial. Dorothy Davis, the victim's foster mother, testified that she noticed stains in the victim's underwear about two months after the victim came to live with her. Davis asked the victim if anyone ever touched her "private parts." The victim said that the defendant (her sister's father) had put his hands on her private parts numerous times.

¶ 5 Marisol Tischman, the lead forensic interviewer at the Carrie Lynn Children's Center, testified that she conducted two interviews with the victim in reference to the sexual abuse

allegations. These interviews were video recorded on a DVD. At the close of the hearing, the trial court determined that the victim's out-of-court statements to Davis and Tischman were admissible.

¶ 6 At trial, the victim testified that the defendant had touched her on her vagina, her butt, and her chest. The defendant did this when she lived with her mother and three other siblings. Following these incidents, the victim went to live with "Miss Minnie," then went back to her mother's residence, and later went to live with "Miss Dorothy." The defendant touched her before she lived with Miss Minnie. The defendant did not touch her after she returned to live with her mother. The first time the defendant touched her, she was in her room alone. He touched her private part with his hand, under her clothes. He had her touch him on his private part with her hand. He also touched her private part with his private part. She could not remember all the times he touched her, but he did this a lot of times. He tried to put his private part inside her private part a lot. His hand also touched her chest and her butt. No other part of his body touched her butt. He asked her to touch his private part with her hand. She saw white stuff come out of his private part. He would put the white stuff in a napkin and throw it away.

¶ 7 On cross-examination, defense counsel asked the victim to clarify her living arrangements with Miss Minnie, her mom, and Miss Dorothy. Defense counsel did not cross-examine the victim about the abuse allegations.

¶ 8 The State then played the video-recorded interviews of the victim. The first interview was conducted on August 13, 2007, when the victim was nine years old. The victim stated that she no longer lived with her mother because the defendant had hit her mother and siblings. The defendant touched her private part, and she pointed to her vaginal area when asked what she meant by that. The defendant touched her on more than one occasion. The defendant touched

the inside of her private part and also touched her buttocks with his hand. No other part of the defendant's body ever touched her. No man's penis ever touched her. The defendant never showed his penis to her or asked her to do anything to his privates.

¶ 9 The second interview with the victim was conducted on September 22, 2008. The victim stated that she was nine years old and in the fourth grade when the defendant last touched her. She was last touched before she was placed with her former foster parent Miss Minnie in the summer of 2007. She was not abused at her mother's house after living with Miss Minnie. She was eight years old when the abuse started and nine years old when it ended. The last time the defendant touched her, he placed her in her mother's room while her mother was at work and touched her private parts. He touched her with his private part and with his fingers. He took off her clothes before he touched her. His privates touched the outside of her privates, but never went inside her private area. "White stuff" came out of his privates, which went in a tissue but never went on her. The defendant touched her on more than one occasion. He made her touch his private part with her hand. The defendant's privates touched her buttocks, but did not go inside her buttocks.

¶ 10 Dr. Raymond Davis, a pediatrician specializing in child abuse and neglect, testified that he examined the victim on September 23, 2008. He performed a genital exam and found a hymenal cleft, which is a tear or disruption in the hymenal ring. This likely indicated that the victim had been sexually abused. The victim also tested positive for chlamydia, a sexually transmitted disease, in both vaginal and rectal cultures, which was also consistent with sexual abuse.

¶ 11 In her closing argument, defense counsel argued that the victim had a "chaotic upbringing" as a "parade" of men had walked through her home. Defense counsel noted that the

victim and her four siblings were fathered by five different men. Defense counsel suggested that this could have led the victim to being confused as to who had abused her. Defense counsel also pointed to the discrepancies and contradictions between the victim's testimony and her prior interviews and asked the trial court to consider those conflicting statements in evaluating the victim's credibility.

¶ 12 At the close of the trial, the trial court found the defendant guilty of all four counts. The trial court noted that there was "some variability" in the victim's descriptions of the defendant's actions, but found the victim to be a credible witness. The trial court further stated that "[t]here was no cross examination to impeach the complainant as to any variation or discrepancy between the in-court testimony and the 115-10 [recorded] testimony."

¶ 13 On February 16, 2010, the defendant filed a *pro se* motion alleging ineffective assistance of counsel. The defendant alleged that defense counsel was ineffective for not cross-examining the victim.

¶ 14 Prior to sentencing, the trial court conducted a hearing on the defendant's motion. In response to the allegation that she had not sufficiently cross-examined the victim, defense counsel explained that, in her judgment, any further questioning of the victim would have been detrimental to the defendant. At the close of the hearing, the trial court found that defense counsel's decisions as to cross-examination were a matter of trial strategy. The trial court therefore denied the defendant's motion to find that defense counsel was ineffective. The trial court thereafter sentenced the defendant to a total of 30 years' imprisonment.

¶ 15 Subsequently, the defendant filed a timely notice of appeal. This court affirmed the defendant's conviction and sentence. *Id.*

¶ 16 On November 5, 2012, the defendant filed a postconviction petition. The defendant alleged that he received the ineffective assistance of trial counsel. Specifically, he alleged that his counsel was ineffective for failing to impeach the victim. The defendant pointed out that there were several inconsistencies between the victim's statements in her interviews and her trial testimony. The defendant asserted that in her trial testimony the victim testified that he had her touch him on his private part, and that he touched her private part with his private part. However, in her first interview, the victim stated that the defendant's penis did not touch her. Additionally, the defendant pointed out that at trial, the victim testified that he only touched her butt with his hand, not his private part. This was inconsistent with her second interview in which she stated that his private part had touched her butt.

¶ 17 On December 6, 2012, the trial court denied the defendant's petition as frivolous and patently without merit. The defendant thereafter filed a timely notice of appeal.

¶ 18 ANALYSIS

¶ 19 On appeal, the defendant argues that the trial court erred in summarily dismissing his postconviction petition. The defendant contends that appellate counsel was ineffective in failing to argue on direct appeal that trial counsel neglected to cross-examine the complaining witness regarding inconsistencies between statements in her recorded interviews and her testimony.

¶ 20 The Act provides a three-step process for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). At the first stage of postconviction review, the circuit court independently reviews the petition to determine whether it is "frivolous or is patently without merit" and dismisses the petition if it finds that is the case. 725 ILCS 5/122-2.1(a)(2) (West 2010). A defendant need only present a limited amount of detail at the first stage and need

not set forth a claim in its entirety, include legal argument, or cite legal authority. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). A court must take as true all well-pleaded facts unless positively rebutted by the record. *Id.* at 189. The petition need only present the “gist” of a constitutional claim. *Id.* at 184. A petition may be dismissed under this standard only if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id.* at 16. An indisputably meritless legal theory is one which is completely contradicted by the record and fanciful factual allegations include those which are fantastic or delusional. *Id.* at 16-17.

¶ 21 To state the “gist” of a constitutional claim the defendant must meet a “low threshold.” *Brown*, 236 Ill. 2d at 184. However, the “low threshold” at the first stage “does not mean that a *pro se* petitioner is excused from providing any factual detail at all surrounding the alleged constitutional violation.” *Hodges*, 234 Ill. 2d at 10. “ ‘Thus, while a *pro se* petition is not expected to set forth a complete and detailed factual recitation, it must set forth some facts which can be corroborated and are objective in nature or contain some explanation as to why those facts are absent.’ ” *Id.*, (quoting *People v. Delton*, 227 Ill. 2d 247, 254-55 (2008)). “[N]onfactual and nonspecific assertions which merely amount to conclusions are insufficient to require a hearing under the * * * Act.” *People v. Burt*, 205 Ill. 2d 28, 35-36 (2001) (citing *People v. Coleman*, 183 Ill. 2d 366, 381 (1998)).

¶ 22 If a petition survives to the second stage, counsel will be appointed to an indigent defendant, and the State will be allowed to file responsive pleadings. 725 ILCS 5/122-4 (West 2010); *Hodges*, 234 Ill. 2d at 10-11. If the defendant makes a “substantial showing” of a constitutional violation, the petition will proceed to the third stage, at which the trial court will

conduct an evidentiary hearing. 725 ILCS 5/122-6 (West 2010); *People v. Edwards*, 197 Ill. 2d 239, 246 (2001). The summary dismissal of a postconviction petition at the first stage is reviewed *de novo*. *Brown*, 236 Ill. 2d at 184.

¶ 23 As the defendant's claim alleges the ineffective assistance of counsel, the standards set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), apply. *People v. Albanese*, 104 Ill. 2d 504, 526-27 (1984). To succeed on such a claim, a defendant must show both that his counsel's performance "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688) and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 694). To satisfy the first portion of the *Strickland* test, a defendant must show that his attorney's performance fell below an objective standard as measured by prevailing professional norms. *People v. Spann*, 332 Ill. App. 3d 425, 430 (2002). There is a strong presumption, which a defendant must overcome, that counsel's performance "falls within the wide range of reasonable professional assistance." *People v. Miller*, 346 Ill. App. 3d 972, 982 (2004). Decisions involving judgment, strategy, or trial tactics will not support a claim of ineffective assistance. *People v. Lindsey*, 324 Ill. App. 3d 193, 197 (2001).

¶ 24 We note that, although the defendant argues on appeal that he was deprived of the effective assistance of both appellate counsel and trial counsel, in his postconviction petition, he did not raise any allegations as to the effectiveness of his appellate counsel. Thus, we cannot consider that argument for the first time on appeal. See *People v. Cole*, 2012 IL App (1st) 102499, ¶ 16 (defendant is precluded from asserting for the first time on appeal claims of ineffective assistance of appellate counsel never ruled upon by the trial court). Furthermore, since the defendant does not argue that his appellate counsel was ineffective, his claims that trial

counsel was ineffective are waived. See *People v. White*, 322 Ill. App. 3d 982, 988 (2001) (issue of whether trial counsel provided ineffective assistance of counsel is waived if not raised by appellate counsel on direct appeal).

¶ 25 Nonetheless, even if we were to consider the defendant's allegation that his trial counsel was ineffective for not impeaching the victim with inconsistent statements that she made in her recorded statements, we would find his allegation to be without merit. We note that in *People v. Oats*, 2013 IL App (5th) 110556, the Illinois Appellate Court, Fifth District, recently considered and rejected this identical argument. The *Oats* court stated:

“[D]efendant contends that trial counsel failed to use the prior videotaped interviews for impeachment during cross-examination of the minors. On appeal, defendant contends that a simple comparison between trial testimony and the interviews reveals a number of inconsistencies that were not explored. Although defendant does not list the inconsistencies, his trial counsel argued that the courtroom testimony was inconsistent with the videotaped interviews in closing argument. The merits of cross-examining the minors regarding any discrepancy are, at best, questionable. Moreover, the approach defendant advocates on appeal would have given the minors a chance to explain away the inconsistencies. See, e.g., *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶ 10. Trial counsel's handling of the cross-examinations was a matter of trial strategy and well within the range of professional assistance. *People v. Pecoraro*, 175 Ill.2d 294, 326, (1997).” *Oats*, 2013 IL App (5th) 110556, ¶35.

¶ 26 Here, as in *Oats*, there were inconsistencies between what the victim said in her earlier statements and what she said at trial. As in *Oats*, defense counsel chose not to highlight those inconsistencies through cross-examination of the victim. Rather, as in *Oats*, defense counsel

emphasized those inconsistencies in her closing argument instead. Defense counsel adequately put forth this shortcoming in the victim's testimony before the trial court. This is apparent because the trial court specifically noted that, in finding the victim's testimony credible, it was aware that there were inconsistencies between her testimony and her previous interviews. Accordingly, we find that defense counsel's handling of cross-examination was a matter of sound trial strategy and was well within the range of professional assistance. See *id.* As such, the defendant's allegations in his postconviction petition did not raise the gist of a constitutional claim and the trial court properly dismissed the petition. See *Hodges*, 234 Ill. 2d at 11-12.

¶ 27 In so ruling, we find the defendant's reliance on *People v. Salgado*, 263 Ill. App. 3d 238, (1994), and *People v. Watson*, 2012 IL App (2d) 091328, to be misplaced. In *Salgado*, at issue was a gang-related shooting that resulted in separate trials for the defendant and his three codefendants. The codefendants were tried together first. At that trial, Robert Saltijeral testified that he did not see anyone shoot the victim. At the defendant's trial, Saltijeral testified that he saw the defendant shoot the victim. Defense counsel did not impeach Saltijeral with his inconsistent testimony from the first trial. *Salgado*, 263 Ill. App. 3d at 240-44. On review, this court found that defense counsel's failure to impeach Saltijeral constituted ineffective assistance. We explained that "the complete failure to impeach the sole eyewitness when significant impeachment is available is not trial strategy." *Id.* at 246-47.

¶ 28 In *Watson*, the only evidence connecting the defendant to the scene of a burglary was a partial DNA match. Defense counsel asked the State's DNA expert only three questions through cross-examination. Defense counsel did not point out through either cross-examination or argument to the jury that the lack of a complete DNA sample was critical because that missing DNA evidence could exclude the defendant as being the one who committed the crime. *Watson*,

2012 IL App (2d) 091328, ¶ 26. This court found that defense counsel’s representation of the defendant constituted ineffective assistance of counsel because “it was objectively unreasonable for counsel to refrain from pursuing, *in any regard*, a challenge to the *significance*, if any, of the alleged [partial DNA match].” *Id.*, ¶ 31 (Emphasis in original).

¶ 29 Here, unlike in *Salgado* and *Watson*, the evidence that was inconsistent with the primary witness’s trial testimony was brought to trier of fact’s attention. Indeed, in determining that the victim was credible, the trial court specifically noted that it was aware that there were inconsistencies between the victim’s statements in her interviews and her trial testimony. Accordingly, neither *Salgado* nor *Watson* is applicable to case at bar.

¶ 30

CONCLUSION

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Winnebago County.

¶ 32 Affirmed.