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2014 IL App (3d) 120399-U

Order filed January 13, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF
ILLINOIS,

Plaintiff-Appellee,

v.

ANTONY OLVERA,

Defendant-Appellant.

) Appeal from the Circuit Court
) of the 14th Judicial Circuit,
) Rock Island County, Illinois,
)
) Appeal No. 3-12-0399
) Circuit No. 00-CF-158
)
) Honorable
) Walter D. Braud,
) Judge, Presiding.

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

ORDER

¶ 1 *Held:* The trial court did not err when it dismissed defendant's postconviction petition at the second stage.

¶ 2 Defendant, Antony Olvera, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2000)) and aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2000)). He was sentenced to an aggregate term of 60 years in prison. On appeal, this court affirmed defendant's murder conviction but vacated his conviction for aggravated discharge of a firearm. *People v.*

Olvera, No. 3-00-0910 (2002) (unpublished order under Supreme Court Rule 23). Thereafter, defendant filed a postconviction petition, which the trial court dismissed at the second stage. Defendant appeals, arguing that the trial court's second stage dismissal was error because he had made a substantial showing of ineffective assistance of counsel. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with two counts of first degree murder (720 ILCS 5/9-1(a)(2) (West 2000)) and one count of aggravated discharge of a firearm (720 ILCS 5/24-1.2 (West 2000)). The cause proceeded to a jury trial.

¶ 5 At trial, evidence established that the victim, Stephen Stropes, was killed as a result of a single bullet. His body was found in a grassy area in East Moline. Nearby, police discovered a number of shell casings. As part of their investigation, police searched Daniel Mendoza's residence. During the search, Mendoza and Kristian Delgado were apprehended. A .45-caliber handgun was recovered from Delgado. The rifling in the barrel of the gun had been mutilated by some sort of grinding tool. An expert subsequently examined the handgun and the shell casings found at the scene, and she determined that the shell casings had been fired from the handgun recovered from Delgado.

¶ 6 Guadalupe Raya testified that she was defendant's girlfriend. She stated that defendant and Delgado were affiliated with a street gang known as the Bishops. On the night of the shooting, Raya was at a party when she noticed that her camera was being used to take pictures of members of the Latin Kings gang. She became upset and called defendant and asked him to pick her up. While she was waiting, she saw the same Latin Kings members walking outside. She heard a loud noise and then saw defendant drive up in his car. Delgado was with defendant.

When Raya got into the back seat, defendant told her to duck. She felt the car turn, heard loud noises, and smelled a little smoke. Defendant drove to his house, where the group switched cars. Raya saw Delgado holding a white towel with something in it; however, she never saw a gun. Raya also testified that she had not heard defendant order Delgado to shoot.

¶ 7 Gabino Gutierrez, John Rigsby, and Leo Reyes testified that on the night of the shooting, they saw a car pull up near them. They saw a gun produced from the passenger window. The gun was pointed in their direction. Reyes testified that he heard someone from the car make a statement disrespectful to the Latin Kings. All three testified that they heard gunshots soon after seeing the car.

¶ 8 Jolene Montalvo testified that she overheard a conversation between defendant and Rob Espinoza regarding the shooting a few days after it had occurred. She stated that defendant indicated he had driven his car to a party after his girlfriend called for a ride. Defendant said that when he arrived, members of the Latin Kings had rushed his car. He ordered Delgado to shoot a warning shot, which he did. Thereafter, the Latin Kings again rushed his car, and Delgado shot at them. According to Montalvo, defendant said he told Delgado to shoot.

¶ 9 Darrin Rhodes testified that he was in jail with defendant after the shooting. According to Rhodes, defendant asked him for legal advice. Pursuant to that request, defendant and Rhodes discussed the case approximately 10 times. Defendant told Rhodes that he was the leader of the Bishops gang. He stated that he had ordered Delgado to shoot a warning shot before picking up his girlfriend from the party. After picking up his girlfriend, he told Delgado to shoot the Latin Kings members. After the second round of gunshots, defendant saw someone fall to the ground. Defendant told Rhodes that they tried to scratch the inside of the barrel of the .45-caliber

handgun they used so it could not be connected to the shooting.

¶ 10 At the close of the trial, the jury found defendant guilty of all counts. Defendant was sentenced to 60 years' imprisonment for murder and a concurrent sentence of 15 years' imprisonment for aggravated discharge of a firearm. On appeal, this court affirmed defendant's murder conviction but vacated his conviction for aggravated discharge of a firearm. *Olvera*, No. 3-00-0910.

¶ 11 Thereafter, defendant filed a postconviction petition. The petition alleged, among other things, that defendant's constitutional rights were violated because he had received ineffective assistance of counsel. In order to make this claim, defendant attached nine affidavits to the petition.

¶ 12 The affidavits stated as follows: (1) an affidavit from Espinoza stated that, despite what Montalvo testified to, he had not had a conversation with defendant regarding his role in the shooting. (2) Rose Garza's affidavit stated, without explanation, that she could have contradicted Montalvo's testimony regarding the conversation. (3) Delgado stated that defendant did not order him to shoot. He had lied at his sentencing hearing and stated that defendant had directed his actions because his attorney told him to do so. (4) Mendoza stated he was with Delgado and defendant before the shooting and he did not witness defendant tell Delgado to get in the car with him. Additionally, defendant did not know that Delgado had a gun. (5) John Teague's affidavit stated that he bought defendant's car from him after the shooting but they had discussed the purchase beforehand. (6) Damian Olvera stated that she overheard Espinoza tell Montalvo to testify against defendant. However, the affidavit stated that she did not come forward with this information until after the trial. (7) Jose Perez stated that he witnessed members of the Latin

Kings rush defendant's car in a threatening manner. However, he noted that he was out of state at the time of trial and could not have testified. (8) Michael Olvera's affidavit stated that he had a conversation with Perez, Reyes, and Gutierrez after the shooting, and they told him Reyes ran toward defendant's car in a threatening manner. (9) Finally, Tara Ramos stated that a portion of her trial testimony was inaccurate. She indicated that her testimony that the driver of the car bent down as if he were getting something under his seat was mistaken. Instead, the driver was leaning as if he were opening the door.

¶ 13 The trial court held a hearing on the petition in which defendant and the State presented arguments. At the conclusion of the hearing, the trial court noted that in light of Raya becoming upset over the use of her camera, it was "kind of standard behavior for the Latino guys to get their macho suit on." The court ultimately dismissed defendant's petition. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues that the trial court erred when it rejected his postconviction petition at the second stage because he had made a substantial showing of ineffective assistance of counsel. A postconviction petition is a collateral attack on a prior conviction and sentence. *People v. Rissley*, 206 Ill. 2d 403 (2003). The Post-Conviction Hearing Act provides a three-step procedure for the adjudication of petitions for postconviction relief. 725 ILCS 5/122-1 *et seq.* (West 2010). During the second stage, the defendant bears the burden of making a substantial showing of a constitutional violation. *People v. Coleman*, 206 Ill. 2d 261 (2002). In doing so, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true. *People v. Childress*, 191 Ill. 2d 168 (2000). We review a trial court's decision to dismiss a postconviction petition at the second stage *de novo*. *Id.*

¶ 16 In this case, defendant's postconviction petition stated that he had received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *People v. Albanese*, 104 Ill. 2d 504 (1984).

¶ 17 In order to prove his allegations, defendant attached nine affidavits to his petition. We find that, even when taken as true, the affidavits do not provide enough support to establish a substantial showing of ineffective assistance of counsel. Eight of the petitions fail to establish a substantial showing of deficient performance. Garza and Delgado's affidavits relate to appropriate trial strategy. Mendoza's affidavit is speculative and only suggests that he did not witness defendant tell Delgado to get into the car. Teague's affidavit had no relevance to the commission of the crime. Damian Olvera's affidavit relates to information that was not known at the time of trial. Michael Olvera's affidavit relied on inadmissible hearsay. Perez stated that he was out of the state during the trial, and therefore counsel could not have called him to testify. Finally, Ramos recanted a portion of her testimony that was of little consequence.

¶ 18 The only affidavit that added any relevant evidence was Espinoza's. He stated that he did not have a conversation with defendant regarding his role in the shooting. This evidence contradicted the trial testimony of Montalvo. However, even if we were to take his allegation as true and determine that defendant did not tell him that he ordered the shootings, the other evidence, including defendant's comments to a fellow inmate, was so substantial that we cannot find this new evidence would have resulted in an acquittal. Therefore, we find that defendant was not prejudiced and counsel was not ineffective. See *People v. Thompson*, 359 Ill. App. 3d

947 (2005) (a defendant must show prejudice to succeed on the second prong of the ineffective assistance test).

¶ 19 We note that defendant also argues that the trial court relied on matters outside of the record when it made the "macho suit" comment before it dismissed defendant's postconviction petition. Defendant cites case law which establishes that reliance on private knowledge outside of the record constitutes reversible error. See *People v. Dameron*, 196 Ill. 2d 156 (2001).

Importantly, the case defendant cites deals with the court's reliance on information at a sentencing hearing. Here, the court's alleged reliance on outside information occurred in the context of a hearing on a postconviction petition. As noted above, our review of a trial court's dismissal of a postconviction petition is *de novo*. *Childress*, 191 Ill. 2d 168. Under that standard, we perform the same analysis a trial court would perform and confine ourselves to (1) the allegations in the petition; and (2) matters of which we may take judicial notice. See *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564 (2011). Because of the standard of review, we are not focused on the trial court's reasoning as such, but only with the correctness of its result.

Therefore, even if we were to find that the court relied on outside knowledge, reversal would not be warranted.

¶ 20 Having found that defendant's postconviction petition and the attached affidavits fail to make a substantial showing of ineffective assistance of counsel, we conclude that the trial court did not err when it dismissed defendant's petition at the second stage.

¶ 21 CONCLUSION

¶ 22 The judgment of the circuit court of Rock Island County is affirmed.

¶ 23 Affirmed.