2015 IL App (1st) 130131-U

FIRST DIVISION
January 20, 2015

No. 1-13-0131

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 07 CR 1130
	)	
ROSCOE WOODS,	)	Honorable
	)	Stanley Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

O R D E R

¶1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition is affirmed where defendant failed to either attach factual documentation to the petition supporting his claim or explain the absence of such evidence as required by section 122-2 of the Post-Conviction Hearing Act (725 ILCS 5/122-2 (West 2012)).

¶ 2 Defendant Roscoe Woods 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 2012)). On

appeal, defendant contends the circuit court erred in dismissing his petition because he was denied the effective assistance of trial counsel by counsel's failure to present a surveillance video at trial which would have corroborated his claim of self-defense. We affirm.

¶ 3 Defendant's arrest and prosecution arose out of the December 2006 shooting of the victim, Chicago police officer Lee Trevino. Following a jury trial, defendant was convicted of one count of aggravated battery with a firearm and one count of attempted first degree murder. He was sentenced to 33 years in prison for the attempted murder conviction, which included an enhancement based upon his personal discharge of a firearm.

¶ 4 The evidence at defendant's jury trial established, through the testimony of Officer Michael Komo, that defendant, who was running away after officers attempted to break up a fight, turned around, pulled a gun from his waistband, and fired, hitting the victim in the arm. Defendant admitted that he fired a gun, but testified he acted in self-defense because a masked Hispanic man was aiming a gun at him. Although witness Torrey Davis also testified that a masked man with a silver gun was present, the jury ultimately convicted defendant of attempted murder and aggravated battery with a firearm. The jury also found that defendant personally discharged a firearm. Defendant was subsequently sentenced to 33 years in prison for attempted first degree murder. This judgment was affirmed on appeal. *People v. Woods*, 2011 IL App (1st) 091959.

¶ 5 In 2012, defendant filed the instant *pro se* postconviction petition alleging, *inter alia*, that he was denied the effective assistance of counsel when trial counsel failed to present a surveillance video at trial which would have shown an armed man running out of an alley toward a group of people. The petition alleged that the person on this video was the person that defendant testified about at trial, and that this video corroborated his testimony that he acted in

self-defense. The petition further alleged that after defendant and trial counsel discussed this video, counsel indicated that he would present this video to the jury. Once defendant testified, however, counsel told him that he would not use the video at trial because he believed that it corroborated the State's version of events. The petition finally alleged that the surveillance video was in the possession of defendant's appellate counsel. Attached to the petition in support of this claim were certain letters from defendant's appellate counsel and the "affidavit" of Adrian Gomez.

¶ 6 In his unnotarized "affidavit," Gomez stated that he was involved in the fight that preceded the shooting and that he saw a masked man armed with a silver pistol come running out of an alley and fire twice at the crowd. He also saw defendant, who was running away, fire a gun into the air. Following the shooting, Gomez was taken to a police station where he saw a video which showed the masked man with the silver pistol. In a letter accompanying the "affidavit," Gomez explained that his statement was not notarized because the correctional facility where Gomez was incarcerated had a policy that did not permit prisoner affidavits to be notarized.

¶ 7 Also attached to the petition were letters from appellate counsel to defendant. One, from October 2010, stated that although defendant believed that the surveillance video established self-defense, trial counsel told appellate counsel that in his opinion the video corroborated the State's version of events. Another, from May 2011, stated that trial counsel had provided appellate counsel with a copy of the surveillance video but because the video was not presented at trial, it could not used on direct appeal. A third, from October 2011, indicated that although appellate counsel had a copy of the video she could not prepare an affidavit regarding its contents because she had no personal knowledge of what was on the video. However, appellate

counsel did indicate that defendant could either prepare an affidavit as to the video's contents or have a family member contact her in order to set up a time to view the video.

¶ 8 The circuit court summarily dismissed defendant's petition as frivolous and patently without merit in a written order, finding, in pertinent part, that defendant had not attached a copy of the video to his petition and that his unsupported "conclusional" allegations as to the video's contents were insufficient under the Act. Specifically, the court concluded that because defendant and Davis testified regarding a man with a silver gun coming out of an alley, the tape would be cumulative of the evidence presented at trial. The court also found that if the tape contradicted defendant's testimony, it would support the State's case. In a footnote, the court noted that the tape was "apparently" in the possession of defendant's appellate counsel and "is most likely readily available to him."

¶ 9 On appeal, defendant contends that his petition was dismissed in error because it stated a legally and factually non-frivolous claim of ineffective assistance of trial counsel based upon counsel's failure to present evidence that would have corroborated his self-defense claim.

¶ 10 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2012). At the first stage of a postconviction proceeding, the circuit court independently reviews the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). A petition should be summarily dismissed as frivolous or patently without merit only when it has no arguable basis in either fact or law. *Hodges*, 234 Ill. 2d at 11-12. Our supreme court has held that a petition lacks an arguable basis in fact or law when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Fanciful factual allegations are those

which are "fantastic or delusional" and an example of an indisputably meritless legal theory is one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16-17. This court reviews the summary dismissal of a postconviction petition *de novo*. *People v. Tate*, 2012 IL 112214, ¶ 10.

¶ 11 To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate that counsel's representation was both objectively unreasonable and that it prejudiced him. *Hodges*, 234 Ill. 2d at 17, citing *Strickland v. Washington*, 466 U.S. 668 (1984). A postconviction petition alleging ineffective assistance of counsel may not be dismissed at the first stage of the proceedings "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.

¶ 12 Initially, the State contends that defendant's failure to attach a copy of the video to his petition or to sufficiently explain the video's absence is fatal to defendant's petition. Defendant responds that his failure to attach the video to his petition does not preclude further proceedings under the Act because appellate counsel has the video and Gomez averred that he had viewed the video. In other words, defendant has provided "an arguable factual basis" for his claim.

¶ 13 Section 122-2 of the Act requires a defendant to support the allegations in his *pro se* postconviction petition by either attaching "affidavits, records, or other evidence" to the petition or explaining the absence of such evidence. 725 ILCS 5/122-2 (West 2012); *People v. Delton*, 227 Ill. 2d 247, 253 (2008). The purpose of requiring such materials is to ensure the allegations in the petition are capable of objective or independent corroboration. *Delton*, 227 Ill. 2d at 254. The failure to meet either of these requirements justifies the petition's summary dismissal. 725 ILCS 5/122-2 (West 2010); *Delton*, 227 Ill. 2d at 255.

¶ 14 Here, although defendant bases his claim of ineffective assistance of counsel upon the surveillance video, he has not attached a copy of the video to his petition or explained its absence. This failure "by *itself* justifies the petition's summary dismissal." (Emphasis added.) *People v. Collins*, 202 Ill. 2d 59, 66 (2002). Although defendant argues that the letters from appellate counsel and other evidence establish the existence of the video, the mere existence of a video is insufficient to establish ineffective assistance of counsel. Rather, the allegedly defective performance can only be evaluated after considering whether the contents of the video contradict trial counsel's determination that it would not be useful at trial.

¶ 15 We reject defendant's argument on appeal that he is excused from attaching the video to his petition because appellate counsel was "unwilling to either send it to him or prepare an affidavit as to its contents." Defendant's *pro se* postconviction petition does not contain any allegations that he attempted to obtain the video from appellate counsel for use in this proceeding. Although the October 2011 letter indicates that appellate counsel had possession of the video, it also indicates that she could not prepare an affidavit explaining the video's contents because she has no personal knowledge of the contents. She suggested that defendant either prepare his own affidavit as to the video's contents or arrange to have a family member view it. The petition also fails to allege that appellate counsel refused to supply defendant with a copy of the video. Regardless of the justifications defendant presents on appeal for his failure to attach the video to his petition, including a reliance on Supreme Court Rule 415(c) (eff. Oct. 1, 1971) ("[a]ny materials furnished to an attorney pursuant to these rules shall remain in his exclusive custody"), defendant does not adequately explain his apparent failure to even attempt to obtain a copy of the video. See *People v. Titone*, 151 Ill. 2d 19, 24-25 (1992) (there must be a sufficient explanation for the absence of supporting affidavits).

¶ 16 We are unpersuaded by defendant's reliance on *People v. Parker*, 2012 IL App (1st) 101809, ¶ ¶ 74-76 for the proposition that the circuit court could not summarily dismiss his *pro se* postconviction petition based upon the mere technicality that Gomez's "affidavit" was not notarized. In fact, this court has declined to follow *Parker* where notarization of the purported section 122-2 affidavits was lacking because *Parker* based its analysis on *People v. Henderson*, 2011 IL App (1st) 090923, ¶ 36, which held that the lack of notarization of a section 122-1(b) verification affidavit could not be the basis of a summary dismissal. See *People v. Brown*, 2014 IL App (1st) 122549, ¶¶ 54-55 (finding that section 122-1(b) verification affidavits are readily distinguishable from section 122-2 affidavits). Ultimately, the circuit court has the authority, under *Collins* and *Delton*, to summarily dismiss petitions that fail to comply with section 122-2 of the Act.

¶ 17 *People v. Hemingway*, 2014 IL App (4th) 121039, is instructive. In that case, the defendant alleged that he was denied the effective assistance of trial counsel by counsel's failure to present the testimony of a certain alibi witness at trial. Although defendant attached the witness's written statement to his *pro se* postconviction petition, the statement was not notarized, and, consequently, the State argued that it did not qualify as a supporting affidavit under section 122-2.

¶ 18 On appeal, the court first reiterated that the factual allegations in a postconviction petition must be supported by evidence, *i.e.*, record and affidavits, when the trial record does not corroborate the allegations in the petition, or the petition has to state why that supporting evidence is not attached. *Hemingway*, 2014 IL App (4th) 121039, ¶ 17. The court then concluded that because affidavits are listed as acceptable evidence under section 122-2 (see 725 ILCS 5/122-2 (West 2012)), the "implication" was that unsworn statements are not. *Id.*, ¶ 17. Relying

on our supreme court's decision in *Roth v. Illinois Farmers Insurance Co*., 202 Ill. 2d 490, 493 (2002), the court determined that an affidavit was a declaration in writing sworn by a party before some person who has the authority under the law to administer oaths. *Id*., ¶ 20. Therefore, if a document is not a " 'a statement sworn to before a person who has authority under the law to administer oaths,' it is not an affidavit." *Hemingway*, 2014 IL App (4th) 121039, ¶ 21, quoting *Roth*, 202 Ill. 2d at 494. In other words, a written statement that does not include "the obligation of an oath" is not a defective affidavit; rather, it is not an affidavit at all. *Hemingway*, 2014 IL App (4th) 121039, ¶ 21; see also *People v. Tlatenchi*, 391 Ill. App. 3d 705, 714 (2009) ("a writing that has not been sworn to before an authorized person does not constitute an affidavit").

¶ 19 The court then turned to those circumstances in which a supporting affidavit is necessary pursuant to section 122-2, and, in lieu of a supporting affidavit, the defendant submits an unnotarized statement. Although the court recognized the holding of *Parker*, it found the reasoning of *People v. Gardner*, 2013 IL App (2d) 110598, ¶ 17, which held that the lack of a notarization on a witness's statement can be grounds for summary dismissal, more persuasive.

¶ 20 The court relied on *Gardner*'s finding that a witness's unnotarized statement cannot qualify as a "supporting affidavit" pursuant to section 122-2, and concluded that the witness's unnotarized statement at issue was not an affidavit since it lacked the obligation of an oath. *Hemingway*, 2014 IL App (4th) 121039, ¶ ¶ 25-26, citing *Gardner*, 2013 IL App (2d) 110598, ¶¶ 16-17. The court further reasoned that it would be a "contradiction" to find that the court may not summarily dismiss a petition at the first stage of post-conviction proceedings when a supporting affidavit lacks notarization, since an unsworn statement is not an affidavit. *Id.*, at ¶ 26, citing *Roth*, 202 Ill. 2d at 494. The court held that if a postconviction petition must be supported by a section 122-2 affidavit, and no such affidavit is attached to the petition, the circuit court may

summarily dismiss the petition. *Id*, at ¶26, citing *Delton*, 227 Ill. 2d at 258; *Collins*, 202 Ill. 2d at 66.

¶ 21 In the case at bar, the circuit court did not dismiss defendant's petition solely because Gomez's statement was not notarized. Rather, it dismissed the petition because defendant failed to support his claims of constitutional deprivation pursuant to section 122-2 of the Act by either attaching the video or adequately explaining its absence. Defendant cannot rely upon Gomez's statement to satisfy his burden under section 122-2 of the Act because it is not an "affidavit," *i.e.*, it is not notarized and does not contain the obligation of an oath. *Hemingway*, 2014 IL App (4th) 121039, ¶ ¶ 25-26.

¶ 22 Defendant's failure to comply with section 122-2's "affidavits, records, or other evidence" requirement (see 725 ILCS 5/122-2 (West 2012)), "by itself" justified the circuit court's summary dismissal of his petition (*Collins*, 202 Ill. 2d at 66).

¶ 23 Accordingly, the judgment of the circuit court of Cook County is affirmed.

¶ 24 Affirmed.