2015 IL App (1st) 131194-U

FIRST DIVISION
June 15, 2015

No. 1-13-1194

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. 00 CR 18073
	)	
FREDERICK WALKER,	)	Honorable
	)	James M. Obbish,
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*: Defendant's *pro se* postconviction petition was properly dismissed at the first stage of proceedings under the Post-Conviction Hearing Act because he cannot establish that he was denied the effective assistance of appellate counsel.

¶ 2 Defendant Frederick Walker 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 his claim

had an arguable basis in law and fact. Specifically, defendant claims that he was denied the effective assistance of appellate counsel because counsel failed to raise the issue of defendant's fitness to stand trial on direct appeal. We affirm.

¶ 3 Following a jury trial, defendant was convicted of three counts of first degree murder, two counts of aggravated criminal sexual assault, and one count of home invasion arising out of the fatal stabbing of the victim Dorothy Shorty in June 2000. Defendant was sentenced to natural life in prison.

¶ 4 Prior to trial, in March 2008, a fitness hearing was held. At that hearing, forensic psychiatrist Dr. Roni Seltzberg testified that her review of certain medical and prison records and evaluation of defendant suggested that defendant suffered from delusional disorder, paranoid delusional disorder, or a personality disorder with paranoid and antisocial traits. Therefore, there was a *bona fide* doubt as to whether defendant was "truly" psychotic or whether he "just" suffered from a very strong personality disorder or antisocial paranoid disorder. She opined that defendant was "not likely" able to adequately assist his counsel in his defense and that defendant would be best served by being found unfit to stand trial and further evaluated in a secure forensic facility. Seltzberg concluded that with treatment, defendant would be fit for trial in a year or observation could reveal that his behavior was not a mental disorder.

¶ 5 The defense presented the testimony of forensic psychiatrist Dr. Norman Chapman who met with defendant on nine occasions. However, on four or five of the dates, defendant refused to see Chapman for more than a brief period. Chapman opined, based upon his meetings with correctional staff, review of certain records, and evaluation of defendant, that defendant had a "pretty good" understanding of the proceedings, but would get confused and jump to conclusions. Chapman concluded that defendant's ability to assist in his own defense was

"severely impaired" due to defendant's "symptoms of paranoid delusions," depression and mania, and diagnosed defendant with schizoaffective disorder. The trial court found defendant unfit for trial and remanded him to the Department of Human Services.

¶ 6 In June 2008, the trial court held another fitness hearing. There, Dr. Nishad Nadkarni testified that he evaluated defendant on May 13, 2008 to determine whether defendant was fit for trial. Before meeting with defendant, Nadkarni reviewed defendant's medical records, including an April 22, 2008 "90-day fitness evaluation" and police reports and other documents relating to the instant offense. Although defendant denied prior psychiatric treatment "of note," he admitted that he had been diagnosed with an anger problem and treated with Depakote and Thorazine. Nadkarni testified that although those medications were psychotropic, they are also prescribed to control anger. Nadkarni concluded that defendant manifested neither a "primary Access [*sic*] 1 psychiatric disorder nor debilitating cognitive impairment;" rather, he suffered from "severe anti-social personality disorder," with narcissistic or self-centered personality traits and that defendant was fit to stand trial. The trial court found defendant fit to stand trial.

¶ 7 Defendant then addressed the court and stated that the fitness issues were part of a "scam" to have him committed to a mental health center in order to silence his accusations against the court, the State, his attorneys, and the Cook County jail. He further argued that his rights were violated because he was sent to a mental health center when "nothing [was] wrong" with him.

¶ 8 The trial court held another fitness hearing in October 2008. There, Dr. Nadkarni testified that he had reviewed Dr. Chapman's report before meeting with defendant earlier that month. During the meeting, defendant was fully alert, in touch with his surroundings, conveyed a "sophisticated understanding of fitness issues," and was polite "albeit somewhat cynical."

Nadkarni did not see any evidence of mental illness or cognitive impairment and concluded that defendant was fit to stand trial.

¶ 9 Dr. Chapman testified that his review of certain medical and correctional records and interviews with defendant led him to conclude that defendant's ability to understand court proceedings and assist his attorneys was impaired by ongoing paranoia and episodically by schizoaffective mood disorder. Chapman opined that defendant suffered from schizoaffective bipolar disorder. During cross-examination, Chapman admitted that defendant had a good factual understanding of courtroom procedures and denied having a mental illness.

¶ 10 Defendant then testified that he had been placed on medication while in custody, but did not know why. He agreed to be medicated for an "anger problem" because staff indicated that, if he did not, a court order would be obtained to medicate him. He did not know if the medication helped him because as far as he was concerned, he did not have any problems. Defendant did not think that anyone involved in the fitness hearings was "really concerned" about his fitness; rather, these proceedings were being used to discredit him as it related to a class action lawsuit against the Cook County jail. Defendant asserted that he had been accused of things by jail officials which were false, had been subjected to "unlawful actions" while in jail, and believed that his attorneys were working with the court and the State to "wrongfully convict" him. Ultimately, the trial court found defendant fit to stand trial.

¶ 11 The matter proceeded to a jury trial where the evidence established, in part through defendant's inculpatory statement, that defendant fatally stabbed the victim after she refused to give him information about her daughter, the mother of defendant's child. Defendant was found guilty of three counts of first degree murder, two counts of aggravated criminal sexual assault, and one count of home invasion. He was sentenced to natural life in prison.

¶ 12 On appeal, this court vacated two of defendant's murder convictions and one of his aggravated criminal sexual assault convictions pursuant to the one-act, one-crime rule, while affirming the judgment of the circuit court in all other aspects. See *People v. Walker*, 2012 IL App (1st) 083655, ¶ 65.

¶ 13 In December 2012, defendant filed the instant *pro se* postconviction petition alleging, *inter alia*, that he was denied the effective assistance of trial counsel by counsel's failure to, in pertinent part, investigate and establish that he was unfit for trial. The petition also alleged that appellate counsel was ineffective because he failed to amend defendant's brief per defendant's instructions and to challenge trial counsel's effectiveness. The circuit court summarily dismissed the petition as frivolous and patently without merit.

¶ 14 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; see also *People v. Tate*, 2012 IL 112214, ¶ 9 ("the threshold for survival [is] low"). 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. This court reviews the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 112214, ¶ 10.

¶ 15 Here, defendant contends that his petition was improperly dismissed because it made an arguable claim of ineffective assistance of appellate counsel based upon appellate counsel's

failure to raise the issue of defendant's fitness to stand trial on direct appeal. The State responds that defendant has waived consideration of this issue on appeal because he failed to include it in his postconviction petition. See *People v. Jones*, 213 Ill. 2d 498, 505 (2004) (generally claims not raised in a postconviction petition may not be argued for the first time on appeal).

¶ 16 Although the State is correct that defendant's petition never explicitly states that he was denied the effective assistance of appellate counsel due to appellate counsel's failure to raise the issue of his fitness to stand trial on direct appeal, our supreme court has held that at the first stage of proceedings under the Act, this court is to review *pro se* petitions " 'with a lenient eye, allowing borderline cases to proceed.' " See *Hodges*, 234 Ill. 2d at 21, quoting *Williams v. Kullman*, 722 F.2d 1048, 1050 (2d Cir. 1983). Here, a review of defendant's petition reveals that the petition first challenges the performance of appellate counsel, then jumps to "factual background for ineffective assistance of counsel" which alleges trial counsel failed to investigate how defendant was "cured" between fitness hearings, as well as issues surrounding defendant's competency, medication and mental status and asserts that defendant was not fit for trial. The petition further alleges that this failure, combined with appellate counsel's failure to investigate, permitted certain information to be "brought" to the appellate court and rendered counsel ineffective. Thus, looking at defendant's petition with a "lenient eye" we cannot say that he forfeited his ineffective assistance of appellate counsel claim and we will address the merits of defendant's contention on appeal.

¶ 17 The *Strickland* test applies to claims of ineffective assistance of appellate counsel. *People v. Rogers*, 197 Ill. 2d 216, 223 (2001). A defendant who claims that appellate counsel was ineffective for failing to raise an issue on appeal must allege facts demonstrating that such failure was objectively unreasonable and that counsel's decision prejudiced him. *Rogers*, 197 Ill. 2d at

223. Appellate counsel is not obligated to brief every conceivable issue on appeal, and it is not incompetence to refrain from raising issues that are without merit in counsel's judgment, unless counsel's judgment is patently wrong. *People v. Simms*, 192 Ill. 2d 348, 362 (2000). This court therefore reviews the merits of the underlying issue or claim in order to determine whether a defendant was prejudiced because a defendant suffers no prejudice when appellate counsel fails to raise a nonmeritorious claim on appeal. See *Simms*, 192 Ill. 2d at 362.

¶ 18 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.

¶ 19 In those cases where a *bona fide* doubt exists as to a defendant's fitness to stand trial he is entitled to a fitness hearing. See *People v. McCallister*, 193 Ill. 2d 63, 110 (2000). A defendant is presumed to be fit to stand trial, and would be considered unfit only if, because of his mental or physical condition, he was unable to understand the nature and purpose of the proceedings against him, or was unable to assist in his defense. See *People v. Griffin*, 178 Ill. 2d 65, 79 (1997). A defendant can be fit to stand trial even where his mind is otherwise unsound. *People v. Coleman*, 168 Ill. 2d 509, 524 (1995). "[T]he ultimate issue of fitness is for the trial court, not the experts, to decide." *Coleman*, 168 Ill. 2d at 525. In other words, the fact that a psychiatrist opines that a defendant is unfit does not require a similar finding by the trial court; rather, it is the trial court's function to assess the credibility and weight to be given to psychiatric expert testimony. *Id.* We will not disturb a trial court's decision regarding fitness absent an abuse of discretion. *People v. Cook*, 2014 IL App (2d) 130545, ¶ 13.

¶ 20 Here, the record reveals that a lengthy fitness hearing was held in October 2008, at which two mental health experts and defendant testified. Dr. Nadkarni testified that he did not observe any evidence of a mental illness or cognitive impairment in defendant, that defendant exhibited a "sophisticated understanding of fitness issues" and that defendant was fit for trial. Although Dr. Chapman opined that defendant suffered from schizoaffective bipolar disorder which impacted defendant's ability to understand courtroom procedure and assist his attorneys, Chapman also admitted that defendant had a good factual understanding of courtroom procedures. We reject defendant's contention that Nadkarni's conclusions were questionable because he interviewed defendant fewer times than Chapman did and never observed defendant's interactions with defense counsel in a non-courtroom settings, as Nadkarni was clear in his testimony regarding the scope of his interaction with defendant. Likewise, the simple fact that Nadkarni's opinion regarding defendant's intelligence varied from the other expert's does not render his opinion so clearly unreliable that accepting his testimony constituted an abuse of discretion. Rather the fact that Nadkarni reached his opinion without a formal IQ test affects only the weight to be given his opinion. Here, the trial court gave more weight to Nadkarni's testimony than that of Chapman, as evidenced by its determination that defendant was fit to stand trial; there is no requirement that the trial court had to find defendant unfit merely because Chapman did. See *Coleman*, 168 Ill. 2d at 525 (it is the trial court's function to assess the credibility and weight to be given to psychiatric expert testimony, and the fact that a psychiatrist expresses the opinion that the defendant was unfit does not require that the trial court make a similar finding).

¶ 21 Accordingly, this court cannot say that the trial court abused its discretion when it credited Nadkarni's opinion over that of Chapman and determined that defendant was fit to stand trial (*Cook*, 2014 IL App (2d) 130545, ¶ 13), as the ultimate decision regarding defendant's

fitness was for the court, rather than either Nadkarni or Chapman (see *Coleman*, 168 Ill. 2d at 525). Therefore, defendant cannot show that he was prejudiced by appellate counsel's failure to challenge the trial court's fitness determination on direct review. See *Rogers*, 197 Ill. 2d at 223 (a defendant is not prejudiced by appellate counsel's failure to raise an issue on direct appeal when that underlying issue was nonmeritorious). Accordingly, defendant's *pro se* postconviction petition was properly dismissed because it failed to establish that defendant was arguably prejudiced by appellate counsel's failure to challenge the trial court's fitness determination on direct appeal. See *Hodges*, 234 Ill. 2d at 17.

¶ 22 For the forgoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 23 Affirmed.