SIXTH DIVISION
July 24, 2015

No. 1-13-1293



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 88 CR 8605 |
| | ) | |
| ARTHUR BROWN, | ) | Honorable |
| | ) | Joseph M. Claps, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**O R D E R**

¶ 1 *Held*: Court erred in summarily dismissing post-conviction petition claiming ineffective assistance of trial counsel, where it is at least arguable that counsel was ineffective for not presenting a trial witness's affidavit recanting his earlier testimony.

¶ 2 Following a jury trial, defendant Arthur Brown was convicted of two counts of first degree murder and sentenced to natural life imprisonment. We affirmed on direct appeal. *People v. Brown*, No. 1-08-3102 (2011)(unpublished order under Supreme Court Rule 23). Defendant now appeals from the summary dismissal of his December 2012 *pro se* post-conviction petition,

contending that it stated the gist of meritorious claims that (1) the State presented, and counsel was ineffective for not objecting to, perjurious testimony, and (2) counsel rendered ineffective assistance by not (a) challenging the admission of a witness's prior testimony as an unavailable witness, or (b) presenting that witness's affidavit recanting his testimony. The State concedes that remand for further post-conviction proceedings is appropriate and, upon review, we agree.

¶ 3 Defendant and codefendant Michael Harper were charged with arson and multiple counts of first degree murder for, in 1988, allegedly setting a fire in codefendant's video store that spread to the neighboring restaurant occupied by Kiert Phophairat and Pismai Panichkarn.

¶ 4 Defendant and codefendant were initially convicted in simultaneous jury trials in 1990. At trial, police officers David Brown and Hester Scott testified that they were patrolling at about 5 a.m. on May 28, 1988, when they saw smoke coming from the video store and called for firefighters and checked the store for occupants. Codefendant approached the officers and asked if the Asian people got out; he identified himself as the owner of the video store and agreed to answer questions at the police station. Sid Malone told Officer Scott that he saw two men exit a van with license plate GAS 403, with one man carrying a gasoline can; when Sid Malone pointed out a passing van as the one in question, Officer Scott glimpsed a white van.

¶ 5 Firefighter Kevin Brannigan testified that, when he arrived at the video store, smoke was pouring out and the front door was locked with burglar bars. When he cut open the lock and broke the glass door behind the bars, an explosion knocked him back several feet. Brannigan attributed this to a back-draft, which he explained occurs when a fire is deprived of oxygen. After the fire was extinguished, Brannigan saw that burglar bars had been pried off the video store's back door; he testified that "we had to tear the bars and [lock] off." Brannigan noted that

the video store smelled of gasoline and opined that the fire originated in the video store. Brannigan entered the restaurant next door and found two dead bodies with their noses and mouths covered with soot; he explained that this showed they died of smoke inhalation. Forensic pathologist Dr. Yuksel Konakci testified that Phophairat and Panichkarn died from smoke inhalation as they had soot deposits on their bodies and in their nostrils, mouths, and airways.

¶ 6 Detective Joseph Campbell testified that he smelled gasoline in the video store and determined that the fire's point of origin was the video store and that an accelerant had been used. He thus opined that the fire had been intentionally set in the rear of the video store with gasoline. Detective Campbell executed a search warrant on a white Ford Bronco with license plate GAS 403 and recovered several videotapes inside the truck. After defendant was arrested, Detective Campbell returned to the scene and, upon advice from an occupant of the building, recovered at the corner of the building by an alley a two-gallon gasoline can wrapped in a green vest and white towel. While defendant eventually mentioned the gasoline can, he had not mentioned it before Detective Campbell returned to the scene in search of it. Detective Joseph Fine testified that codefendant assisted in defendant's arrest and that defendant insisted upon meeting codefendant upon being confronted with alleged inculpatory statements by codefendant; after defendants met, defendant gave an inculpatory statement. However, Detective Fine's report did not mention the meeting or that defendant denied involvement in the fire until after the meeting.

¶ 7 Forensic chemist Alan Osaba concluded that an accelerant was found in debris from the fire scene, and forensic chemist William Tyrell testified by stipulation that gasoline was used to start the fire and that the liquid in the gasoline can from the scene was indeed gasoline.

¶ 8 Sid Malone testified that, at about 5 a.m., he saw a light-colored van with license plate GAS 403 park in front of the video store and restaurant. Two men went across the front of the van and toward the video store; one man had a gasoline can. A few minutes later, Malone saw smoke coming from the video store and the neighboring restaurant. Malone was unable to identify in court the people he saw in front of the video store. Marshall Levin, landlord of the building containing the video store, testified that he leased the store to codefendant, who was essentially current on his rent; he was unaware if codefendant had any insurance on the store other than Levin's liability insurance. Levin knew that defendant did repair work for various tenants in the building. Cecil Hingston, attendant at a gasoline station in the neighborhood, testified that he sold a can of gasoline to two men in a white Ford truck at about 5 a.m.; they spilled gasoline in filling the can and had a rag wrapped around the can.

¶ 9 Assistant State's Attorney (ASA) Joel Whitehouse testified to defendant's confession. Codefendant called defendant to the video store on the early morning of May 28, 1988, and told him that codefendant was going to burn down the video store because he could not pay his bills and asked defendant to make the store appear to have been burglarized. While defendant bent the burglar bars, codefendant warned him not to make noise lest he wake the Asian man next door. Defendants piled mattresses on the videotapes and poured gasoline (from a gasoline can wrapped in a white towel) over the mattresses and surrounding area. Defendant left before the fire was set.

¶ 10 Defendant testified that he did "odd jobs" and maintenance work for stores in the neighborhood and had installed new front and back doors with burglar bars at the video store. At about 3 a.m. on May 28, 1988, codefendant phoned to tell him that somebody had tried to burglarize the video store and he wanted defendant to fix the door. Defendant went to the video

store, saw that the lock had been broken, secured the door with planks, and told codefendant that he would return the next day to fix the lock. When defendant was arrested later that day, police denied his request for counsel and physically abused him, forcing him to confess. Roberta Holmes, codefendant's mother, testified that there was no insurance covering the video store, to the value of the videotapes, and that the tapes were removed from the store for inventorying.

¶ 11 On direct appeal, we affirmed defendant's conviction while remanding codefendant's case for a new trial. *People v. Brown*, 253 Ill. App. 3d 165 (1993).[1] We also affirmed the dismissal of defendant's first post-conviction petition. *People v. Brown*, No. 1-98-1410 (2000)(unpublished order under Supreme Court Rule 23). However, defendant was granted a new trial upon his successive post-conviction petition presenting the evidentiary-hearing testimony of James Bell to the effect that Bell rather than defendants set the fire. See *People v. Brown*, No. 1-03-2735 (2005)(unpublished order under Supreme Court Rule 23).

¶ 12 At the 2008 jury trial, the State witnesses from the initial trial testified, with Malone and Hingston testifying by stipulation because they had died since the first trial. Another medical examiner testified to the Phophairat and Panichkarn autopsies. Firefighter Brannigan's testimony was consistent with his trial testimony. He further testified that a back-draft cannot occur with an open door or window and that he had not pried the burglar bars from the video store's back door. Detective Campbell did not expressly testify (as in the first trial) that he recovered the gasoline can before defendant mentioned the can. Detective Fine did not testify (as in the first trial) that

[1] Codefendant was convicted in a 1994 jury trial, and we affirmed the judgment on direct appeal. *People v. Harper*, 279 Ill. App. 3d 801 (1996). We also affirmed the summary dismissal of codefendant's two post-conviction petitions and the dismissal of his motion to vacate a void judgment. *People v. Harper*, No. 1-01-3468 (2002); No. 1-97-3023 (1999); No. 1-97-3735 (1998)(unpublished orders under Supreme Court Rule 23).

his report did not mention defendants' meeting before defendant confessed, and Detective Fine now expressly testified that defendant gave his inculpatory statement mentioning the gasoline can before Detective Campbell returned to the scene to recover it. James Bell was the sole defense witness, as defendant did not testify. Bell testified that defendant owed him money for drugs and, believing defendant owned the video store, Bell set fire to the video store after breaking in but finding only a few dollars. He drove to the store in his brown Audi car, and he bent the burglar bars on the back door before kicking in the locked back door. Bell admitted to prior convictions for armed robbery and that he was serving a sentence of life imprisonment at the time of trial. The jury found defendant guilty of arson and two counts of first degree murder, and the court sentenced him on the murder counts alone.

¶ 13 On direct appeal, defendant contended in relevant part that (1) Detective Fine's testimony that defendants met and then defendant confessed was inadmissible hearsay because it implied that codefendant made a statement implicating defendant, and (2) testimony regarding the condition of the video store's back door was hearsay. We found that the former was not hearsay because it concerned defendant's own inculpatory statement, and the latter was not hearsay because Brannigan and Detective Campbell could infer from the back-draft that the back door had been closed before the explosion rather than pried open and kicked in as Bell testified. In relation to another contention, we found the evidence of defendant's guilt to be overwhelming because details of his confession were corroborated by the testimony of Malone and Hingston. We particularly noted that "the police recovered a gas can at the scene that matched the description given by both Hingston and defendant." *Brown*, No. 1-08-3102, ¶ 40.

¶ 14 Defendant filed this *pro se* post-conviction petition in December 2012. He alleged that the State presented the false testimony of Detectives Fine and Campbell that defendant told the police where to find the gasoline can used in the arson; in the first trial, these witnesses testified and the State argued that the can was found using information from codefendant. Defendant also alleged that counsel rendered ineffective assistance by not presenting Hingston's affidavit recanting his trial testimony. Attached to the petition was codefendant's 2012 affidavit that he did not meet with defendant at the police station. Also attached was Hingston's 2002 affidavit that he repeatedly denied selling gasoline to men in a van or truck on the morning in question but officers told him that he would be reported to his employer and fined for not documenting the alleged gasoline sale, so he identified someone in two lineups after being told by a detective who to select.

¶ 15 The court summarily dismissed the petition on March 15, 2013. The court found that defendant challenged Detective Campbell's testimony on direct appeal so that *res judicata* applies. As to Detective Fine, the court acknowledged codefendant's affidavit that he never conversed with defendant at the police station (as Detective Fine testified) but found no arguable prejudice because the evidence of defendant's guilt was overwhelming as this court found on direct appeal. As to Hingston, he averred in 2002 that the police coerced him into identifying the men who bought gasoline from him, but the court noted that Hingston did not identify defendant at trial. This appeal timely followed.

¶ 16 Shortly after dismissal of the instant petition, this court issued an opinion reversing the denial of codefendant's post-conviction petition, raising a claim of newly-discovered evidence of actual innocence, and remanding for an evidentiary hearing. *People v. Harper*, 2013 IL App (1st)

102181. We held that the evidence – the recantations by Bell and Hingston – indeed constituted newly-discovered evidence of actual innocence as to codefendant. Finding that "the reliability of Hingston's affidavit should not be determined at this stage of the proceeding," we rejected the State's argument that the Hingston affidavit was not conclusive "where Hingston did not witness the crime and Hingston's recanted testimony did not refute the fact that the [co]defendant committed the crime." *Id.*, ¶¶ 51-52. Codefendant argued that his confession – "the State's strongest direct evidence" as no witness identified him as the perpetrator – was the result of coercion, and we found that Hingston's affidavit would corroborate or lend credence to that claim. *Id.*, ¶ 52.

¶ 17 On appeal, defendant contends that summary dismissal of his petition was erroneous because he stated arguably meritorious claims that (1) the State presented perjurious testimony by Detectives Campbell and Fine, and (2) counsel was ineffective for not (a) challenging the admission at the second trial of Hingston's testimony at the first trial, or (b) presenting Hingston's affidavit recanting his testimony. The State concedes that the point regarding Hingston's affidavit is meritorious in light of this court's remand on codefendant's post-conviction appeal based in relevant part on Hingston's affidavit.

¶ 18 A post-conviction petition may be summarily dismissed within 90 days of filing and docketing if the court finds that the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit if it fails to present the gist of a meritorious claim because it has no arguable basis in law or fact. *People v. Allen*, 2015 IL 113135, ¶ 25. At this stage, all well-pled facts must be taken as true unless positively rebutted by the record. *People v. Brown*, 236 Ill. 2d 175, 189 (2010). A petition has no arguable

basis in law or fact when based on an indisputably meritless legal theory or fanciful factual allegation. *Allen*, 2015 IL 113135, ¶ 25. A claim completely contradicted by the record is an example of an indisputably meritless legal theory, while fanciful factual allegations include those that are fantastic or delusional. *Id*. Our review of a summary dismissal is *de novo. Id.*, ¶ 19. Partial summary dismissals are not permitted; if any claim of arguable merit is found in a petition, the entire petition proceeds to the second stage of post-conviction proceedings. *People v. White*, 2014 IL App (1st) 130007, ¶ 33, citing *People v. Rivera*, 198 Ill. 2d 364, 374 (2001).

¶ 19 To state a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient – objectively unreasonable – and that the defendant was prejudiced by the deficient performance. *People v. Tate*, 2012 IL 112214, ¶ 18. Generally, a post-conviction petition alleging ineffective assistance may not be summarily dismissed if counsel's performance arguably fell below an objective standard of reasonableness and the defendant was arguably prejudiced. *Id*., ¶ 19.

¶ 20 Here, the State concedes that defendant has made a substantial showing that counsel was ineffective for not presenting Hingston's affidavit, based on our latest opinion in codefendant's case. We see no reason not to follow that opinion. As in codefendant's case, we must presume the truth of well-pled facts not positively refuted by the record. As in codefendant's case, no witness identified defendant as the perpetrator but instead defendant's confession was the keystone of the State's case with corroboration in part from Hingston. (Notably, the Hingston claim and defendant's other contendedly-meritorious claim – that Detectives Campbell and Fine gave false or misleading testimony on whether defendant provided information leading police to the gasoline can – both concern evidence linking the can to defendant as we stated on direct

appeal.) While defendant did not expressly testify or argue in his second trial that his confession was coerced, he argued that his statement should be discounted under the circumstances including that he was in police custody when he gave it. Lastly, though our opinion had not been issued when the circuit court summarily dismissed the instant petition so that the circuit court could not have erred in not following it, a remand for further proceedings will avoid the eventuality of defendant filing a successive petition relying upon that opinion.

¶ 21 We therefore reverse the summary dismissal of defendant's petition and remand for further post-conviction proceedings. While an evidentiary hearing seems appropriate on the Hingston affidavit claim, consistent with our latest opinion in codefendant's case, it is a point of distinction that codefendant argued that his confession was coerced while defendant did not expressly argue coercion in his second trial. Nonetheless, our opinion in codefendant's case makes it at least arguable that not introducing Hingston's affidavit constituted ineffective assistance of counsel. We need not address the merits of the Campbell-Fine claim because vacatur of a summary dismissal opens the entire petition for further post-conviction proceedings.

¶ 22 Reversed and remanded.