2015 IL App (1st) 133289-U

FIRST DIVISION
September 8, 2015

No. 1-13-3289

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. 06 CR 1996
	)	
JOSEPH PETTIS,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Justices Delort and Harris concurred in the judgment.

O R D E R

¶ 1 *Held:* Summary dismissal of defendant's post-conviction petition affirmed over contention that the circuit court failed to conduct a meaningful review of the petition and that he set forth an arguable claim of ineffective assistance of appellate counsel for failing to raise on direct appeal that the circuit court erred in failing to poll all of the jurors.

¶ 2 Defendant Joseph Pettis appeals 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)). He contends that his petition should be remanded for second-stage proceedings because he was

denied meaningful review by the circuit court, and because he stated an arguably meritorious claim of ineffective assistance of appellate counsel.

¶ 3 This court previously affirmed the judgment entered on defendant's 2010 jury conviction of first degree murder for the shooting death of Johnny Kennedy on August 25, 2005, and the sentence of 45 years' imprisonment imposed by the trial court, with a consecutive 20-year add-on for personally discharging a firearm. *People v. Pettis*, 2012 IL App (1st) 102475-U.

¶ 4 On June 18, 2013, defendant filed a *pro se* post-conviction petition, alleging, *inter alia*, that the trial court erred in failing to "thoroughly" and "completely" poll the jury when it did not query a particular juror, and that his appellate counsel was ineffective for failing to raise this issue on direct appeal. Defendant also alleged actual innocence based on a witness to the shooting, who, he claimed, has "esoteric knowledge of [defendant's] innocence." Defendant alleged that this witness is in prison and is "willing" to provide a personal affidavit notarized and attesting to the facts that occurred on August 25, 2005, which he (defendant) "will" attach to his petition.

¶ 5 In his proof of service, defendant indicated that he mailed three copies of his post-conviction petition, "complete with exhibits and personal affidavits," to the clerk of the circuit court of Cook County and the State's Attorney's office. No mailing date is indicated on the certificate, but it was sworn on June 4, 2013, and received in the clerk's office on June 18, 2013. Defendant also refers to exhibits, as well as his own personal affidavit in his petition, but the record filed on appeal does not contain such documentation.

¶ 6 The circuit court reviewed defendant's petition and summarily dismissed it as frivolous and patently without merit. In its written order, the court addressed the issues raised by defendant and stated, in relevant part, that polling a jury is not an indispensable right to a fair trial, and the

court's failure to poll all the jury members did not result in an unfair trial. The court also noted that this issue was waived because defendant could have raised it on direct appeal. The circuit court then found that defendant's claim of ineffective assistance of appellate counsel was without merit as the underlying claims were without support. As for defendant's actual innocence claim, the court noted that although defendant indicated that a fellow inmate, who was an eyewitness to the shooting, was willing to come forward and write an affidavit, no affidavit was provided, nor was there any indication of what would be specified in such an affidavit, and defendant did not even provide the name of this witness. The court thus found that defendant was asking it to speculate on the substance of the eyewitness' account and witness' credibility, which the court refused to do, and ruled that defendant's conclusory claim of actual innocence fails.

¶ 7 On appeal, defendant first contends that he was denied meaningful review of his petition where the circuit court did not receive and review the exhibits and affidavits attached to his petition, and mailed to the court. He maintains that these exhibits and affidavits were misplaced, and accordingly, that his petition should be remanded for second-stage proceedings.

¶ 8 In a footnote in his opening brief, defendant states that a paralegal at the Office of the State Appellate Defender checked his court file for the exhibits and affidavits but they were not found. However, in the appendix to his brief defendant attached portions of the trial transcripts, as well as a copy of his own affidavit and an affidavit from Antoine Sangster who avers that defendant did not shoot the victim.

¶ 9 The State responds that defendant's claim is without merit because the record confirms that the same judge, who presided at defendant's trial, thoroughly reviewed and considered defendant's post-conviction petition, including his exhibits, which were copies of pages from the trial transcript. In support of its argument, the State cites the court's references to the trial

testimony in its consideration of the matters raised by defendant in his petition, and notation of the absence of an affidavit in support of his actual innocence claim, which, the State claims, is consistent with defendant's allegation that the occurrence witness is "willing to provide" an affidavit that defendant "will" attach to his petition.

¶ 10 Defendant replies that it is evident that the court did not have the supporting documentation because it did not reference any of the supporting documents in its order, and specifically noted that it was not provided an affidavit in support of his actual innocence claim when he had indicated in his petition that he provided such an affidavit.

¶ 11 We initially observe that exhibits and affidavits attached to a defendant's brief that are not part of the record on appeal, cannot be considered. *People v. Gacho*, 122 Ill. 2d 221, 254 (1988). This would include the affidavits, letters and other documentation in the appendix, but not the trial testimony which defendant cited in his post-conviction petition, and were part of the record on appeal. As for the affidavit of Sangster, it is questionable as to whether this affidavit was in the record reviewed by the circuit court where, as the State points out, defendant indicated in his petition that this witness was "willing to provide" an affidavit, which suggests defendant would attach an affidavit some time in the future. In any event, defendant has raised no issue regarding the actual innocence claim for which this affidavit was attached to support, and he has thus forfeited that claim for review. *People v. Pendleton*, 223 Ill. 2d 458, 476 (2006). Given the totality of these circumstances, we find no basis for defendant's claim that he was denied meaningful review of his petition, and turn to the substantive merits of his claims.

¶ 12 At the first stage of post-conviction proceedings, defendant need only present the gist of a meritorious constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). The gist standard is a low threshold, requiring only that defendant plead sufficient facts to assert an

arguable constitutional claim. *People v. Brown*, 236 Ill. 2d 175, 184 (2010). If a petition has no arguable basis in law or in fact, it is frivolous and patently without merit, and the trial court must summarily dismiss it. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). Our review of the dismissal of a post-conviction petition is *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 13 Here, defendant contends that he raised an arguable claim that he was denied his absolute right to ensure that the guilty verdict was unanimous when the trial court failed to poll 1 juror out of the 12. In its written order dismissing defendant's petition, the circuit court observed that this matter appears in the trial record and, as such, could have been raised on direct appeal. Since defendant did not raise it, the issue is waived. *People v. Blair*, 215 Ill. 2d 427, 445 (2005). We agree.

¶ 14 Anticipating this outcome, defendant further asserts that his appellate counsel was ineffective for failing to raise this issue on direct appeal. The State responds that no such ineffective assistance of appellate counsel claim was raised in defendant's petition, and, therefore, he has waived it. The State further notes that because defendant failed to object at the time the jury was polled and did not include the issue in his motion for a new trial, his appellate counsel could have only raised the issue on direct appeal under plain error.

¶ 15 Defendant replies that the record shows that he alleged in his petition that appellate counsel was ineffective for failing to thoroughly search the record and address the meritorious issues alleged with in his petition and address the ineffective assistance of trial counsel issue. We observe that defendant waives those issues he failed to raise in his post-conviction petition (*People v. Jones*, 211 Ill. 2d 140, 146 (2004)), and find that the general language used by defendant in his petition is, in effect, a general savings clause, which is insufficient to preserve the issue for appeal. Nonetheless, we will address the issue.

¶ 16 At the first stage of post-conviction proceedings, a petition alleging ineffective assistance of counsel may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that he was prejudiced thereby. *People v. Tate*, 2012 IL 112214, ¶19. The test is essentially the same for ineffective assistance of appellate counsel, in which defendant must show both that appellate counsel's performance was deficient and that but for his errors, there is a reasonable probability that the appeal would have been successful. *People v. McGhee*, 2012 IL App (1st) 093404, ¶11. Under the two-pronged standard for stating a claim of ineffective assistance of appellate counsel, defendant cannot demonstrate prejudice from defense counsel's alleged deficiency unless the underlying claim is meritorious. *People v. Childress*, 191 Ill. 2d 168, 174 (2000).

¶ 17 It is undisputed that defendant has the right to have the jury individually polled as one method of safeguarding his right to be tried by an impartial jury. *People v. Cabrera*, 134 Ill. App. 3d 526, 528 (1985). Here, the record shows that one juror was omitted and thus the trial court did not completely poll the jurors. The State concedes this point, but claims that the omission was inadvertent. *People v. Sharp*, 2015 IL App (1st) 130438, ¶111.

¶ 18 The record also shows that defendant did not object at trial or raise this issue in his post-trial motion to preserve the issue for direct appeal (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)); and thus appellate counsel could only have raised the issue under the plain error doctrine (see *e.g. Sharp*, 2015 IL App (1st) 130438, ¶111; *McGhee*, 2012 IL App (1st) 093404, ¶¶18-19).

¶ 19 Under this narrow and limited exception to the general waiver rule, a reviewing court may consider forfeited errors where the evidence was closely balanced or where the error was so egregious that defendant was deprived of a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). Defendant does not argue that the evidence was closely

balanced, and thus, he could only have succeeded on this issue on direct appeal if it falls under the second prong of the plain error doctrine. *McGhee*, 2012 IL App (1st) 093404, ¶¶19-20.

¶ 20 In support of his argument that it does, defendant argues that polling the jurors affects a substantial and absolute right because there is no other way to ensure that each juror's signature on the verdict form represented a free expression unhampered by fears, errors or coercive influences that may have dominated private deliberations in the jury room. Although this common-law rule is designed to help ensure that the jury's verdict is unanimous, it is not the sole means of ensuring that it is so, nor is it an indispensable right to a fair trial. *McGhee*, 2012 IL App (1st) 093404, ¶25. Other procedural requirements exist such as the requirement that the jurors individually sign the verdict form. *McGhee*, 2012 IL App (1st) 093404, ¶25. This court has determined that the polling of a jury on request is mandatory, but that it is not so fundamental that the trial court's failure to do so affects the fairness of defendant's trial and challenges the integrity of the judicial process. *McGhee*, 2012 IL App (1st) 093404, ¶26; accord *People v. Sharp*, 2015 IL App (1st) 130438, ¶112.

¶ 21 Although some evidence that the verdict was not unanimous could satisfy the second prong of the plain-error doctrine, defendant has not offered any evidence of that in this case. *McGhee*, 2012 IL App (1st) 093404, ¶26. Here, two separate guilty verdict forms were signed by all 12 jurors, and without some further indicator that the verdict was not unanimous, defendant cannot satisfy the second prong of plain error review to excuse his failure to preserve this issue, and his ineffective assistance of counsel claim based on jury polling fails. *Sharp*, 2015 IL App (1st) 130438, ¶113; *McGhee*, 2012 IL App (1st) 093404, ¶33.

¶ 22 In reaching that conclusion, we have examined *People v. DeStefano*, 64 Ill. App. 2d 389, 408-09 (1965) and *People v. Kellogg*, 77 Ill. 2d 524, 528, 530-31 (1979), relied on by defendant

for a contrary result, but find them factually inapposite to the case at bar. In *Destefano,* 64 Ill. App. 2d at 402-05, the jury declared it was deadlocked, then mingled with members of the gallery before they were recalled, and a written signed jury verdict was found unattended in the jury room. The trial court's failure to poll the jury on request in addition to these other facts, presented serious questions about the unanimity of the verdict, calling for reversal. *DeStefano*, 64 Ill. App. 2d at 407-09. Here, unlike *DeStefano*, unanimous verdict forms were signed by the 12 jurors, and the court's failure to poll one juror on request does not call into question the unanimity of the decision.

¶ 23 In *Kellogg,* 77 Ill. 2d at 529, a juror, when polled, stated that she agreed with the verdict, but then asked if she could change her mind. The trial judge then repeated the prior polling question twice until she gave an affirmative answer. The supreme court held it could not ascertain from the juror's answer whether she adhered to the verdict, and, therefore, the record did not reflect an unanimous verdict. *Kellogg,* 77 Ill. 2d at 529-30. Here, unlike *Kellogg,* the record did not reflect that the unpolled juror did not agree with the verdict, where she signed the verdict forms and voiced no objection to the verdict when it was announced. *McGhee*, 2012 IL App (1st) 093404, ¶26.

¶ 24 In sum, defendant has failed to state an arguably meritorious claim of ineffective assistance of appellate counsel, and we, therefore, affirm the order of the circuit court of Cook County summarily dismissing defendant's post-conviction petition.

¶ 25 Affirmed.