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2015 IL App (3d) 130407-U

Order filed April 22, 2015

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2015

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-13-0407
	)	Circuit No. 08-CF-732
REGINALD D. CHANDLER-MARTIN,	)	Honorable
Defendant-Appellant.	)	Robert P. Livas, Judge, Presiding.

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JUSTICE WRIGHT delivered the judgment of the court.  
Presiding Justice McDade and Justice Lytton concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* Defendant's postconviction petition presented the gist of a claim of ineffective assistance of appellate counsel, and the cause is remanded for further postconviction proceedings.
- ¶ 2 Defendant, Reginald D. Chandler-Martin, appeals from the trial court's summary dismissal of his *pro se* postconviction petition. On appeal, defendant argues that the cause should be remanded for further postconviction proceedings because defendant's petition raised an arguable claim of ineffective assistance of appellate counsel. We reverse and remand.

## FACTS

¶ 3

¶ 4 Defendant was charged by indictment with two counts of first degree murder (720 ILCS 5/9-1(a)(2), (3) (West 2008)), two counts of home invasion (720 ILCS 5/12-11(a)(3), (5) (West 2008)), and one count of armed robbery (720 ILCS 5/18-2(a) (West 2008)). Prior to jury selection, the State agreed to *nolle prosequi* the armed robbery charge.

¶ 5 The trial evidence established that after midnight on April 1, 2008, John Rosales and his friends were playing video games when two masked men with firearms entered Rosales's house. The men told Rosales and his friends to get down on the ground and demanded their drugs and money. One of the men fired a shot that hit Rosales in the neck. The men fled the house, and Rosales later died from his injury.

¶ 6 On April 2, 2008, defendant was taken into custody. At the police station, defendant admitted that he and Tyrell Jackson went to Rosales's house to rob him. Defendant told the police that he carried an unloaded .22-caliber revolver during the robbery. Jackson had a .32-caliber revolver. In the afternoon, defendant gave a more detailed description of the plan to rob Rosales.

¶ 7 Justin Harper testified that he provided the .22-caliber revolver used in the robbery. After the incident, defendant told Harper that he had to leave town and asked Harper to pick up some guns at a residence in Aurora. Harper retrieved the .22-caliber revolver and a .32-caliber handgun from the Aurora residence.

¶ 8 At the close of the evidence, the trial court instructed the jury on the charged offenses. The court specifically instructed the jury on the felony murder and home invasion charges that “[i]f you find from your consideration of all the evidence that even one of [the elements of the offense] has been proved beyond a reasonable doubt, you should find the defendant guilty.” The

jury also received written jury instructions on the charged offenses. The felony murder and home invasion instructions included the directive “[i]f you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.”

¶ 9 The jury found defendant guilty of both counts of first degree murder and home invasion. The trial court sentenced defendant to consecutive terms of 31 years’ imprisonment for first degree murder and 8 years’ imprisonment for home invasion. On direct appeal, we affirmed defendant’s convictions and sentences. *People v. Chandler-Martin*, 2012 IL App (3d) 100734-U.

¶ 10 On April 3, 2013, defendant filed a *pro se* postconviction petition. Defendant alleged, *inter alia*, that the jury was improperly instructed because the trial court instructed the jury that it should find defendant guilty of felony murder and home invasion if the jury found from its consideration of the evidence that “even one” of the propositions had been proved beyond a reasonable doubt. Defendant also alleged that appellate counsel was ineffective for failing to raise this issue. The trial court summarily dismissed defendant’s postconviction petition, and defendant appeals.

¶ 11 ANALYSIS

¶ 12 Defendant argues that the cause should be remanded for further postconviction proceedings because he made an arguable claim that he received ineffective assistance of appellate counsel when counsel did not raise an issue regarding the contradictory jury instructions. The State argues that the court correctly dismissed the petition at the first stage of proceedings.

¶ 13 We review the summary dismissal of a postconviction petition *de novo*. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). A postconviction petition may be summarily dismissed if “the

court determines the petition is frivolous or is patently without merit[.]” 725 ILCS 5/122-2.1(a)(2) (West 2012). A petition is frivolous or patently without merit only if it has no “arguable basis either in law or in fact.” *Hodges*, 234 Ill. 2d at 16.

¶ 14 A postconviction petition alleging ineffective assistance of appellate counsel may not be dismissed at the first stage of proceedings if: (1) counsel’s performance arguably fell below an objective standard of reasonableness; and (2) the petitioner was arguably prejudiced as a result. *Hodges*, 234 Ill. 2d at 17. The failure to satisfy either prong precludes a finding of ineffective assistance of counsel. *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 76. Appellate counsel is not required to raise every conceivable issue on appeal, and counsel is not incompetent for refraining from raising meritless issues. *Id.* ¶ 77.

¶ 15 In *People v. Jenkins*, 69 Ill. 2d 61 (1977), the supreme court was faced with a situation that is factually similar to the instant case. In *Jenkins*, two jury instructions were in direct conflict. The court found “where the instructions are contradictory, the jury cannot perform its constitutional function[.]” and “the giving of contradictory instructions on an essential element in the case is prejudicial error, and is not cured by the fact that another instruction is correct.” *Id.* at 66. The contradictory instructions required that the jury select the proper instruction, which is a function exclusively reserved to the court. *Id.* at 67. Due to the contradictory instructions, the supreme court stated it was unable to determine whether defendant was convicted on the basis of the erroneous instruction and reversed and remanded the cause for a new trial. *Id.*

¶ 16 Additionally, the issuance of a correct written jury instruction does not render the issuance of an erroneous instruction harmless. See *People v. Haywood*, 82 Ill. 2d 540, 545 (1980). The issuance of contrary instructions prevents the jury from performing its

constitutionally appointed function because it has not been properly informed of the law to be applied in the case. *Id.*

¶ 17 In the instant case, the report of proceedings documents that the trial court appears to have erroneously instructed the jury on the State’s burden of proof as to the felony murder and home invasion charges by misreading jury instructions. Specifically, the court announced the jury must find defendant guilty if the State proved “even one” of the requisite elements delineated by the court. The court’s verbal recitation of the printed jury instructions conflicted with the language set out in the written issues instruction the court was attempting to recite to the jury. The printed issues instruction correctly stated that the jury must find defendant guilty if “each one” of the propositions was proven beyond a reasonable doubt. Due to the court’s purported error when reading the instruction aloud, the instruction as read to the jury by the judge actually conflicted with the written version of the instruction the jury received and was allowed to take into the jury room for deliberations. Based on this record, we are unable to determine whether the jury applied the erroneously recited verbal instruction given by the court or the correctly prepared written instruction delivered to the jurors.

¶ 18 The State also contends the report of proceedings contains a stenographer’s error. On this basis, the State claims the trial court correctly read the written jury instructions to the jury but asserts the stenographer inaccurately transcribed the court’s remarks for our review. The State’s position attributing the conflict in the record to a purported stenographer’s error supports the view that further postconviction proceedings are warranted in order to determine whether the trial court read the instruction correctly and the stenographer inaccurately transcribed the court’s statements. As a result, it is at least arguable that appellate counsel was deficient for not raising an issue regarding the conflicting jury instruction on direct appeal, and the defendant was

arguably prejudiced as a result of a jury instruction error. Therefore, we reverse the dismissal of defendant's *pro se* postconviction petition and remand the cause for second stage proceedings.

¶ 19

#### CONCLUSION

¶ 20

The judgment of the circuit court of Will County is reversed and remanded.

¶ 21

Reversed and remanded.