2015 IL App (4th) 130061-U

NO. 4-13-0061

FILED
February 17, 2015
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macon County
LAKEITHAE S. ROBINSON,	)	No. 09CF1674
Defendant-Appellant.	)	
	)	Honorable
	)	Timothy J. Steadman,
	)	Judge Presiding.

PRESIDING JUSTICE POPE delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in summarily dismissing defendant's *pro se* postconviction petition.

¶ 2 On January 2, 2013, defendant, Lakeithae S. Robinson, filed a *pro se* postconviction petition, alleging, in relevant part, his trial and appellate counsel provided him ineffective assistance. On January 7, 2013, the trial court summarily dismissed defendant's petition. On August 20, 2014, this court allowed defendant's motion to discharge the Office of the State Appellate Defender (OSAD). Defendant now proceeds *pro se*, arguing his postconviction petition should not have been summarily dismissed because he presented a sufficient claim his trial counsel was ineffective for failing to obtain an independent deoxyribonucleic acid (DNA) expert to contradict the State's DNA expert. The State's expert

testified the defendant's DNA profile matched the DNA profile found on a shirtsleeve discovered near the crime scene. We affirm.

¶ 3 I. BACKGROUND

¶ 4 We recently addressed the factual background of defendant's criminal case in *People v. Robinson*, 2012 IL App (4th) 100647-U. Only those facts necessary for this appeal are set forth in detail.

¶ 5 At an April 2010 jury trial, testimony revealed Michael Fonville and Tariq Abdullah were sitting in Fonville's car, which was parked in the driveway of Fonville's residence, drinking and smoking cannabis late at night on June 16, 2009. After approximately 30 to 45 minutes, the driver's door opened and an individual wearing a dark-colored mask aimed a semiautomatic handgun at the back of Fonville's head. The individual, who sounded like a man, indicated it was a robbery. Abdullah, who was sitting in the passenger seat, could only see the man's torso. Abdullah happened to have a semiautomatic handgun in his shorts pocket. When the individual did not retreat after being told to leave because there was nothing to steal, Abdullah pulled out the handgun and fired twice in the direction of the driver's doorway and at the man. Abdullah jumped out of the car and was shot four times: twice in the right leg, once in the left thigh, and once in the left foot.

¶ 6 Fonville observed the masked individual flee down the alley, which was approximately 20 feet away from his vehicle. Fonville took Abdullah to the hospital. He then returned to his home, where he retrieved Abdullah's handgun and hid it in the basement behind the clean-out door of the chimney. Eventually, Fonville lead the police to the handgun he had hidden.

¶ 7 Erin St. Pierre, a Decatur police officer, was dispatched to the area in response to a report of shots fired. She approached the area via an alley where she saw a black object lying in the alley just south of the scene. St. Pierre exited her squad car and approached the object, which appeared to be made out of undershirt material. She then proceeded to the scene. Based on information she overheard about a black mask with holes cut out for eyes, St. Pierre returned to the cloth in the alley. She photographed it and then picked it up. It looked like a shirtsleeve someone had torn or cut from their shirt so it was still cylindrical in shape. It had been stabbed or cut to make two eyeholes. St. Pierre walked further south down the alley, around the corner on the next street, and found a Colt .38-caliber semiautomatic handgun lying in the grass.

¶ 8 Officer Steve Kennedy was responding to the scene when he was advised two people who had been shot were at Decatur Memorial Hospital. He proceeded to the hospital and found the two people at the hospital with gunshot wounds were Abdullah and defendant. Defendant had been shot in the lower left torso.

¶ 9 The jury was read a stipulation stating Illinois State Police (ISP) forensic scientist Amanda Humke would testify, in part, as follows: Humke received sealed exhibits, including swabs from the inside and outside of a T-shirt sleeve, from forensic scientist Kelly Biggs. In the swab from the outside of the sleeve (1) there was a mixture of DNA profiles, one major profile and one minor profile; (2) neither the major DNA profile nor the minor DNA profile matched Fonville's DNA profile; (3) the major DNA profile from the outside of the sleeve matched the DNA profile taken from the inside of the sleeve.

¶ 10 ISP DNA analyst Kelly Biggs explained the comparison process performed in forensic DNA analysis, which compares 13 DNA "locations." A computer program is used to

develop a DNA profile. In comparing an unknown DNA sample with a person's DNA standard, the numbers at each of the 13 locations must match in order to call it a match. If there is even one difference at any of the 13 locations, that person is excluded as the contributor of that sample.

¶ 11 Biggs swabbed the inside and outside of the sleeve. Based on the DNA profiles from the inside and outside of the sleeve developed by Humke, Abdullah could be excluded from contributing the DNA profile on both specimens.

¶ 12 ISP DNA analyst Jennifer Aper developed a DNA profile from defendant's buccal swab standard and compared it to the DNA profiles from the shirtsleeve. Aper concluded with a reasonable degree of scientific certainty the DNA profile from the inside of the sleeve and the major DNA profile from the outside of the sleeve matched defendant's DNA profile. The frequency with which defendant's DNA profile could be expected to occur was approximately 1 in 2.7 quintillion African American unrelated individuals, 1 in 26 quintillion Caucasian unrelated individuals, or 1 in 110 quintillion Hispanic unrelated individuals out of a world population of approximately 7 billion people.

¶ 13 The jury found defendant guilty of both attempt (first degree murder) (count I) (720 ILCS 5/8-4(a), (c)(1)(D); 720 ILCS 5/9-1(a)(1) (West 2008)) and aggravated battery with a firearm (count II) (720 ILCS 5/12-4.2 (West 2008)). The jury also found, in a separate verdict form, defendant personally discharged a firearm during the attempt (first degree murder) and thereby caused great bodily harm to another person. Before sentencing, however, the trial court vacated the aggravated battery with a firearm conviction because it was based on the same physical act as the conviction of attempt (first degree murder).

¶ 14 In May 2010, defendant filed three *pro se* documents, including a motion for new trial in which he alleged the following: (1) his appointed counsel was ineffective because counsel failed to "call for or file motion for fingerprint, integrated ballistic identification system or forensic testing not available at trial regarding actual innocence"; (2) he had not wanted to proceed to trial with his appointed counsel; and (3) counsel had told him to take the stand and tell the jury he was not being represented correctly, causing a mistrial. (Defendant did not testify at trial.)

¶ 15 In June 2010, defense counsel filed a motion for a new trial, alleging the State presented insufficient evidence to convict and the trial court erred by denying defendant's motion *in limine* regarding the mask and his motion for a directed verdict.

¶ 16 At the June 2010 hearing on these filings, defendant explained his complaint about the fingerprint and other forensic testing in his motion for a new trial related to the fact no gun-residue test was done on him and the handguns were not checked for fingerprints. The State noted any gun-residue testing would have taken place during the initial investigation of the case, prior to counsel's appointment. The State further noted testimony at trial indicated the handguns had been tested but no prints were found suitable for comparison. Regarding the third allegation, the trial court noted it had (1) admonished defendant the choice whether to testify was his decision to make and (2) advised defendant his testimony would be confined to the facts and circumstances of the case, not complaints about his representation. The court denied the *pro se* motion for a new trial, struck the *pro se* notice of appeal as premature, and struck the *pro se* motion in arrest of judgment since defendant was represented by counsel. The court also denied the motion for a new trial filed by defense counsel.

¶ 17 In June 2010, the trial court sentenced defendant to 20 years' imprisonment for attempt (first degree murder) and imposed an additional 25-year prison term on the basis of the jury's finding defendant discharged a firearm, causing great bodily harm to another.

¶ 18 In June 2010, defense counsel filed a motion to reconsider the sentence, alleging the sentence was excessive.

¶ 19 In July 2010, defendant, *pro se*, filed a motion for a new trial, a motion to dismiss with prejudice, and a notice of appeal. In his motion for a new trial, defendant alleged his counsel was ineffective because he did not file anything on defendant's behalf and never responded to defendant's letters. Defendant again alleged he had not wanted to proceed to trial with his appointed counsel and was told to complain at trial about counsel's representation, creating a mistrial. This motion was set for a hearing in August 2010.

¶ 20 In his motion to dismiss, defendant alleged (1) the DNA found on the mask had a mixture of four DNA profiles, (2) the State never established the two guns admitted into evidence were involved in the crime, (3) the victim never identified defendant, (4) no shell casings matching the two handguns were found at the scene, (5) no fingerprints or DNA were found on the handgun attributed to defendant, (6) the testimony of Fonville and Abdullah was inconsistent, and (7) the State failed to prove defendant guilty beyond a reasonable doubt. The trial court struck defendant's motion to dismiss with prejudice because he was represented by counsel.

¶ 21 At the August 2010 hearing on defendant's *pro se* postsentencing motion, defendant reiterated the allegations in his motion for a new trial regarding ineffective assistance. Defendant also complained counsel failed to (1) contact a key witness, (2) respond to his letters

and phone calls, and (3) prepare for trial. Defendant also, for the first time, alleged he had told counsel who shot Abdullah. Defense counsel stated prior to trial he met with defendant on at least three occasions and went over the case with defendant. Counsel stated he tried to call the witness, but the phone number defendant provided was disconnected. Counsel maintained defendant had never given him the name of the alleged shooter prior to the August 2010 hearing. Counsel had no letters from defendant in his file. He maintained his performance at trial proved he was prepared. The trial court denied the *pro se* motion. The court then heard and denied the motion to reconsider the sentence.

¶ 22 On direct appeal, defendant alleged the (1) trial court erred in admitting irrelevant evidence, (2) evidence was insufficient to convict him of attempt (first degree murder), and (3) court erred by not instructing the jury regarding defendant's presumption of innocence. This court affirmed. *Robinson*, 2012 IL App (4th) 100647-U (Appleton, J., dissenting). In September 2012, a petition for leave to appeal was denied. *People v. Robinson*, No. 114511, 979 N.E.2d 886 (2012) (Table).

¶ 23 On January 2, 2013, defendant filed a *pro se* postconviction petition, seeking relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2012)). The petition is 44 pages in length with 371 pages of exhibits. The petition contains numerous allegations of ineffective assistance of trial and appellate counsel. In pertinent part, defendant alleged trial counsel was ineffective for failing to (1) "challenge DNA partial profile DNA amounted to a mixture of at least [three] people"; and (2) "present any evidence, through cross-examination or the presentation of witnesses, reflecting that a finding based on a partial profile fewer than 13 locations is unreliable."

¶ 24 On January 7, 2013, the trial court, in a written order, dismissed the postconviction petition as frivolous and patently without merit. The court found the (1) claims were not supported by affidavits, records, or other evidence; (2) allegations were mere conclusions having no basis in fact; (3) allegations included claims previously raised on direct appeal and, therefore, were barred by *res judicata*; (4) claims of actual innocence cited no newly discovered evidence supported by affidavits, records, or other evidence; and (5) numerous claims of ineffective assistance of counsel did not form an arguable basis counsel's performance fell below an objective standard of reasonableness and did not prejudice defendant.

¶ 25 This appeal followed.

¶ 26 II. ANALYSIS

¶ 27 On August 20, 2014, this court allowed defendant's motion to discharge OSAD. Defendant now proceeds *pro se*. On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition at the first stage of postconviction proceedings. He contends his petition presented an arguable claim of ineffective assistance of counsel because defense counsel failed to "challenge the DNA profile" by failing to "subpoena any expert witness or doctor" to contradict the State's DNA analyst's testimony the DNA profile on the shirtsleeve matched defendant's DNA profile. Defendant maintains it is arguable he was prejudiced by counsel's failure to subject the prosecution's case to meaningful adversarial testing where the only evidence linking defendant to the offense was the DNA match. Because defendant only developed his claim of ineffective assistance of counsel for failure to contest the DNA testimony, he has abandoned the remaining claims set forth in his postconviction petition, forfeiting them for review. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013); *People v. Guest*, 166 Ill. 2d 381, 414, 655

N.E.2d 873, 888 (1995).

¶ 28 The Act provides a means for a defendant to challenge a conviction or sentence based on an alleged violation of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471, 861 N.E.2d 999, 1007 (2006). At the first stage of postconviction review, the trial court independently reviews the petition to determine whether it is "frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). To avoid dismissal at this stage, the petitioner need only present the gist of a constitutional claim. *People v. Edwards*, 197 Ill. 2d 239, 244, 757 N.E.2d 442, 445 (2001). At this point in the proceedings, all well-pleaded allegations in the petition are taken as true and liberally construed in favor of the petitioner. *People v. Brooks*, 233 Ill. 2d 146, 153, 908 N.E.2d 32, 36 (2009). "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010).

¶ 29 A petition may be dismissed at the first stage only if it has no arguable basis either in law or in fact. *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 1209 (2009). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Id*. at 16, 912 N.E.2d at 1212. To establish the ineffectiveness of trial counsel at the first stage of postconviction proceedings, the defendant must show it is arguable counsel's performance fell below an objective standard of reasonableness and the defendant was prejudiced by counsel's deficient representation. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984).

¶ 30 Although a *pro se* postconviction petition need only meet "a low threshold" to survive first-stage review (*Hodges*, 234 Ill. 2d at 10, 912 N.E.2d at 1208), the State argues,

among other things, it still must comply with the Act's provisions the petition must "clearly set forth the respects in which petitioner's constitutional rights were violated" and "shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached." 725 ILCS 5/122-2 (West 2012). The State argues such failure is fatal to defendant's claim.

¶ 31 The failure to meet the requirements of section 122-2 justifies the petition's summary dismissal. *People v. Delton*, 227 Ill. 2d 247, 255, 882 N.E.2d 516, 520 (2008). The purpose of requiring such materials is to ensure the allegations in the petition are capable of objective or independent corroboration. *Id*. at 254, 882 N.E.2d at 520.

¶ 32 Citing *Williams v. Kullman*, 722 F.2d 1048, 1050 (2nd Cir. 1983) ("due to the *pro se* petitioner's general lack of expertise, courts should review *habeas* petitions with a lenient eye, allowing borderline cases to proceed"), defendant asserts his ineffective-assistance claim is the type of borderline case the trial court should have reviewed since he is a *pro se* petitioner. Defendant maintains the court should have appointed him postconviction counsel, who could have consulted with him and gained evidentiary support for his ineffective-assistance claim by requesting "appointment of an expert to assist in the post[]conviction proceeding." We disagree.

¶ 33 In *People v. Collins*, 202 Ill. 2d 59, 68, 782 N.E.2d 195, 200 (2002), our supreme court stated:

> "We recognize, of course, that requiring the attachment of 'affidavits, records, or other evidence' will, in some cases, place an unreasonable burden upon post-conviction petitioners. Indeed, *Washington* and *Williams* are two such cases. This does not mean,

> however, that the petitioners in such cases are relieved of bearing any burden whatsoever. On the contrary, section 122-2 makes clear that the petitioner who is unable to obtain the necessary 'affidavits, records, or other evidence' must at least explain why such evidence is unobtainable. In this case, defendant is asking to be excused not only from section 122-2's *evidentiary* requirements but also from section 122-2's *pleading* requirements. Nothing in the Act authorizes such a comprehensive departure." (Emphases in original.)

In this case, defendant did not tender any expert affidavits contradicting or contesting the ISP DNA results or any other documentation calling into question those results. Further, defendant did not explain in his postconviction petition why he had not attached such documentation or why he believed the State's DNA analysis was defective. The record does not shed any light on what an independent expert might find wrong with the ISP procedures or findings. All we have is defendant's argument an expert should have been found, hired, and called to testify on his behalf based wholly on unsubstantiated speculation the unknown expert's testimony would have changed the result of the trial. Defendant complains counsel was ineffective for failing to present evidence to show a match based on a partial profile with fewer than 13 locations is unreliable. However, we note the State's DNA expert testified if even 1 of the 13 locations they compare in a profile is missing, it would exclude that contributor as a *match*. In this case, defendant's DNA *matched* the DNA profile on the inside of the shirtsleeve and the major DNA profile on the outside of the sleeve, meaning there were at least 13 points of comparison that

matched. For that reason, the trial court's summary dismissal was proper.

¶ 34 Even if we could find defendant's petition was not fatally flawed, we would find the summary dismissal appropriate because the petition is frivolous and patently without merit. "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000). Decisions concerning which witnesses to call and what evidence to present on a defendant's behalf are viewed as matters of trial strategy and are generally immune from claims of ineffective assistance of counsel. *People v. Munson*, 206 Ill. 2d 104, 139-40, 794 N.E.2d 155, 175 (2002). Such decisions will generally not be second-guessed by a reviewing court. *People v. Simms*, 168 Ill. 2d 176, 200, 659 N.E.2d 922, 934 (1995). To establish deficient performance, the defendant must overcome the strong presumption counsel's actions or inactions were sound trial strategy. *People v. Perry*, 224 Ill. 2d 312, 341-42, 864 N.E.2d 196, 214 (2007).

¶ 35 The shirtsleeve was the only physical evidence at the crime scene that connected defendant to the crime. (However, we note defendant's arrival at the hospital with a gunshot wound to his torso shortly after Abdullah shot a masked attacker in the torso is strong circumstantial evidence implicating defendant in the crime.) We cannot agree, however, failure to present an expert for the defense to *possibly* refute the testimony of the State's expert witnesses fell below an objective standard of reasonableness. Defense counsel cross-examined the State's experts concerning DNA analysis and how the major and minor DNA profiles do not relate to how much or how often an individual had been in contact with the item. Counsel also argued that point in closing argument, and questioned the reliability of the DNA evidence since a minimum of three people had left DNA on the shirtsleeve.

¶ 36 Professional standards do not require defense counsel to hire an expert to double-check every scientific test the State performs in a case to rule out the theoretical possibility of a defect in the analysis. Defendant has cited no authority to that effect. We cannot say failure to produce such an expert fell below an objective standard of reasonableness, considering all the circumstances, or so undermined the proper functioning of the adversarial process the trial cannot be relied on as having produced a just result.

¶ 37 The Supreme Court observed in *Strickland*:

> "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. [Citation.] A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'

> [Citation.] There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [Citation.]" *Strickland*, 466 U.S. at 689-90.

¶ 38 For the reasons stated above, defendant's petition fails to assert a factual or legal basis to support his claim his trial counsel's performance fell below an objective standard of reasonableness and that defendant was prejudiced as a result. Therefore, the trial court did not err in summarily dismissing defendant's petition.

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated, we affirm the trial court's summary dismissal of defendant's postconviction petition. As part of our judgment, we award the State its $50 statutory assessment as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 41 Affirmed.