2016 IL App (1st) 142191-U

SIXTH DIVISION
May 27, 2016

No. 1-14-2191

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. PATRICK WHITE, Petitioner-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 09 CR 16394 Honorable Charles P. Burns, Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Rochford and Justice Hall concurred in the judgment.

ORDER

¶ 1 ***Held:*** The trial court erred in summarily dismissing petitioner's postconviction petition at the first stage, because it stated the gist of a claim of ineffective assistance of counsel based upon trial counsel's alleged usurping of petitioner's right to testify on his own behalf. We reverse and remand for further proceedings.

¶ 2 Petitioner Patrick White appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Petitioner contends that he raised an arguable claim of ineffective assistance of counsel for erroneously advising him that he could not testify because

he had been taking psychotropic medication at the time of trial. For the following reasons, we reverse and remand for further proceedings.

¶ 3 BACKGROUND

¶ 4 This court has detailed the underlying facts of this case in an earlier decision. See *People v. White*, 2013 IL App (1st) 112203-U. Therefore, we will summarize only those facts pertinent to our discussion of the particular issue on appeal.

¶ 5 The State charged petitioner with first degree murder in connection with the bludgeoning death of Joseph John Kenski. At trial, Manuel Hernandez testified that, at around 3 p.m. on August 2, 2002, he was on the porch of his home when he saw a man carrying a bag of flyers walk by the victim's home across the street. The man, who was holding a flyer in his hand, first passed the victim's home, walked back, and then quickly went inside. Hernandez told his wife to call the police, and he and his son went to the victim's home where they found the victim on the living-room floor. As Hernandez left the victim's home, he saw the same man he had seen earlier, but without the bag of flyers, jump the fence and run into the alley. Hernandez described the man as African-American, "husky," and 30 or 40 years old, but he did not see the man's face and was unable to identify him in a lineup a month later.

¶ 6 Police found defendant's fingerprints on restaurant menus recovered inside the victim's home. Joseph Kenski, the victim's son, testified that he lived with his father but was not at home during the incident, and that the restaurant flyers were not on the living room floor when he left the house on the morning of the incident. Police also discovered a brick in the home believed to be the murder weapon, but the brick did not contain enough DNA for analysis. The forensic pathologist who performed an autopsy on the victim concluded that he died as a result of blunt head trauma and that the manner of death was homicide.

¶ 7 Nhan Van Vo testified that during the late morning hours of August 2, 2002, he and two other people passed out menus for the "Ms. Egg Roll" and "Primo Pizza" restaurants, but petitioner did not pass out flyers with this group, and Vo did not know and had never seen petitioner before.

¶ 8 Anthony Rideout testified that he had a prior battery conviction and was serving an 11-year sentence for a 2007 conviction for home invasion. On September 27, 2009, Rideout was housed in the segregation unit at the Dixon Correctional Center (Dixon), and heard other inmates talking nearby. One of the inmates identified himself as "Patrick." Rideout could see that the other inmate was an African-American male in A-wing, cell 47, but he could not see his face. The parties stipulated that from September 27, 2009, through November 30, 2009, defendant was incarcerated at Dixon and was assigned to cell 47 in the A-wing. Rideout heard Patrick tell another inmate that he was charged with murder and home invasion, and Patrick asked if it was possible to be convicted based upon a fingerprint on a flyer. In response to Rideout's questions, Patrick said that his case was in Cook County, and no weapon was found because he "wiped it down." Patrick also stated that he had been in a lineup for the murder seven years earlier but was not identified. Rideout wrote down what Patrick said and notified the State's Attorney's office by letter. Rideout conceded that he had hoped to get a reduction in his sentence by notifying authorities, and although he said that no one had promised him a sentence reduction in exchange for his testimony, he was nonetheless promised that LaSalle County would be notified of his testimony and that relocation assistance would be provided for his protection. On cross-examination, Rideout admitted that he had been taking antidepressants for the prior two and a half years.

¶ 9 Holly Williams testified that she had three prior convictions for retail theft, and at the time of her testimony, she was living out of state and the State had paid her travel expenses to court. Williams testified that, in 2005, she met defendant at a "recovery home" for drug addiction. They began dating and lived together for three months at a Chicago hotel, during which they relapsed, resulting in Williams using heroin daily. According to Williams, defendant told her in July 2005 that he had committed a murder on Chicago's north side. He also told her that he had been arrested for the crime, but he was released because there was insufficient evidence to charge him. Williams testified that she was not under the influence of narcotics when defendant made these statements.

¶ 10 At the conclusion of the State's case in chief, the trial court denied petitioner's motion for a directed verdict, and the following colloquy took place:

> "THE COURT: Okay. Mr. White, it's my understanding that the State is going to rest its case in chief and Defense is not going to present any evidence. Obviously you don't have to because you don't have to prove your innocence. The burden of proof is on the State to prove the case beyond a reasonable doubt. But do you understand if you rest there will be no witnesses called in this matter, do you understand that?
>
> DEFENDANT: Yes.
>
> * * *
>
> THE COURT: Now, one—one decision that's made by you and you alone, Mr. White, is whether or not you want to testify. Now, your attorney can advise you but they cannot make

that decision. If, in fact, you rest your case in chief, you will not be testifying in this matter, do you understand that?

DEFENDANT: Yes.

THE COURT: Is that your decision, that you don't want to testify in this matter?

DEFENDANT: Correct.

THE COURT: And have you had an opportunity to discuss that decision of yours with your attorneys, ***?

DEFENDANT: Correct.

THE COURT: Okay. We're going to break for lunch. If you change your mind, let your attorneys know right away.

DEFENDANT: Yes, your Honor.

THE COURT: Okay."

When the court reconvened after lunch, the trial court asked whether petitioner had changed his mind with regard to testifying. Trial counsel stated, "I don't believe so," and petitioner informed the trial court, "I'm not testifying, your Honor."

¶ 11 The State rested its case, and the defense elected not to present any evidence. Following closing arguments, the trial court instructed the jury, and the jury then retired to deliberate. During its deliberations, the jury sent out two notes. The first note requested Rideout's note to the State's Attorney regarding petitioner's statements. The trial court informed the jury that no note had been entered into evidence, so it would not be sent back to them. The second note asked what dates Rideout and Williams heard petitioner's purported statements, and the trial court responded to this note by telling the jury that there were no transcripts, it had heard all of

the evidence, and to continue deliberating. Following deliberations, the jury found petitioner guilty, and the trial court subsequently sentenced petitioner to 55 years' imprisonment.

¶ 12 On direct appeal, petitioner contended that allowing the autopsy photographs to be sent to the jury room denied his right to a fair trial and that the DNA indexing fee should be vacated. This court vacated the fee but otherwise petitioner's conviction and sentence. *People v. White*, 2013 IL App (1st) 112203-U, ¶ 37.

¶ 13 On April 17, 2014, petitioner filed a *pro se* postconviction petition contending, among other things, that his trial counsel usurped his right to testify by advising petitioner that he was "not allowed" to testify because of the psychotropic medication petitioner had been taking. Petitioner acknowledged that the trial court asked him if he intended to testify, but petitioner explained that, "due to my attorney constantly telling me that it wasn't allowed because of my phyc [*sic*] meds (in which I took as true), I told the judge no." Petitioner argued that, absent this erroneous advice, he would have testified and denied making any statements to either Rideout or Wilson. Petitioner further stated that he would have testified that he ended the relationship with Wilson after only one month because she had relapsed into using illegal drugs. The trial court summarily dismissed the petition as frivolous and patently without merit. This appeal followed.

¶ 14 ANALYSIS

¶ 15 On appeal, petitioner contends that the trial court erred in summarily dismissing his postconviction petition at the first stage of proceedings. Petitioner argues that his trial counsel was at least arguably ineffective for erroneously advising him that he was "not allowed" to testify at his trial because he was taking psychotropic medication. Petitioner explains that, relying upon this incorrect advice, he waived his right to testify even after the trial court admonished him of this right. Petitioner further contends that his testimony would have refuted

the testimony of Rideout and Williams and also undermined Williams's credibility, fatally weakening the State's case against him.

¶ 16 The Act allows a defendant to challenge a conviction or sentence for violations of federal or state constitutional rights. *People v. Pendleton*, 223 Ill. 2d 458, 471 (2006). Once a petitioner files a petition under the Act, the trial court must first, independently and without considering any argument by the State, decide whether the petition "is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). A postconviction petition is frivolous or patently without merit only if it "has no arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). A petition lacking an arguable basis in law or fact is one "based on an indisputably meritless legal theory or a fanciful factual allegation." *Id.* A claim completely contradicted by the record is an example of an indisputably meritless legal theory. *Id*. Fanciful factual allegations include those that are fantastic or delusional. *Id*. at 17.

¶ 17 To survive dismissal at this initial stage, the postconviction petition "need only present the gist of a constitutional claim," which is "a low threshold" that requires the petition to contain only a limited amount of detail. *People v. Gaultney*, 174 Ill. 2d 410, 418 (1996). The *Hodges* court "reemphasized the liberal standard" used to evaluate *pro se* postconviction petitions, instructing courts to view them "with a lenient eye, allowing borderline cases to proceed to stage two." *People v. Carballido*, 2011 IL App (2d) 090340, ¶¶ 38-39. In addition, all well-pleaded facts must be taken as true unless "positively rebutted" by the trial record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). We review the trial court's summary dismissal of a postconviction petition *de novo*. *People v. Simms*, 192 Ill. 2d 348, 360 (2000).

¶ 18 In this case, petitioner alleged ineffective assistance of trial counsel. Those claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and

adopted by the supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). *People v. Petrenko*, 237 Ill. 2d 490, 496 (2010). To establish ineffective assistance, a defendant must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defendant. *Id.* (citing *Strickland*, 466 U.S. at 687). Applied to a first-stage postconviction petition, "a petition alleging ineffective assistance may *not* be summarily dismissed 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." (Emphases added.) *Hodges*, 234 Ill. 2d at 16-17. Deficient performance is performance that is objectively unreasonable under prevailing professional norms, and prejudice is found where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Petrenko*, 237 Ill. 2d at 496-97; *Strickland*, 466 U.S. at 690, 694.

¶ 19 In this case, defendant's ineffective assistance claim is predicated upon trial counsel's alleged usurpation of defendant's right to testify on his own behalf. A defendant's right to testify or not testify at trial is a fundamental constitutional right. *Rock v. Arkansas*, 483 U.S. 44 (1987). The decision whether to testify ultimately rests with the defendant, and is not a strategic or tactical decision best left to trial counsel. *People v. Madej*, 177 Ill. 2d 116, 146 (1997), *overruled in part on other grounds by People v. Coleman*, 183 Ill. 2d 366 (1998). Consequently, only the defendant may waive his right to testify. *Id.*

¶ 20 The court in *People v. Frieberg*, 305 Ill. App. 3d 840 (1999), however, aptly noted that "because the decision whether to testify at trial lies ultimately with a defendant, issues involving how that decision was made lurk—like an unexploded bomb—in every case resulting in a conviction." *Id.* at 852. In essence, the *Frieberg* court posited that convicted defendants who testified on their own behalf would later claim that "their trial counsel forced them to testify,"

whereas convicted defendants who did not testify at trial would later claim that "their trial counsel prevented them from doing so." *Id.* The court thus urged trial courts to personally admonish a criminal defendant "that he alone possesses the right to choose whether to testify on his own behalf, and that he should make that decision after consulting with counsel," and that trial courts should further "emphasize to the defendant that *whatever trial counsel's advice on this point may be, counsel cannot force the defendant to testify, nor can counsel prevent the defendant from testifying*." (Emphasis added.) *Id.*

¶ 21 Turning to the case before us, we observe at the outset that the trial court's order summarily dismissing the petition read, "[t]o warrant an evidentiary hearing under the Act on a claim of deprivation of the right to testify on one's own behalf, a petitioner must allege that 'when the time came for [the petitioner] to testify, [he] told his lawyer he wanted to despite advice to the contrary.' *People v. Brown*, 54 Ill. 2d 21, 24 (1973); accord *People v. Thompkins*, 161 Ill. 2d 148, 177-78 (1994)." We note, however, the question of whether an evidentiary hearing is warranted arises at the *second* stage of proceedings, after the appointment of postconviction counsel, who would amend the petition, if necessary. *Brown* and *Thompkins* were both second-stage postconviction appeals. *Brown*, 54 Ill. 2d at 22; *Thompkins*, 161 Ill. 2d at 154. This petition was dismissed at the first stage of proceedings, and therefore *Brown* and *Thompkins* are inapplicable.

¶ 22 Here, petitioner alleged that trial counsel told him that he was not allowed to testify because he was on psychotropic medications. Taking this advice as true, as we must (*Coleman*, 183 Ill. 2d at 385), dismissal of the postconviction petition was incorrect. The use of psychotropic medication does not *per se* render a defendant unfit for trial. 725 ILCS 5/104-21(a) (West 2014) ("A defendant who is receiving psychotropic drugs shall not be presumed to be

unfit to stand trial solely by virtue of the receipt of those drugs or medications."). In addition, fitness for trial includes the right to testify (or not) on one's own behalf. See *People v. Nitz*, 173 Ill. 2d 151, 155-56 (1996) (citing *Riggins v. Nevada*, 504 U.S. 127, 139-40, (1992) (Kennedy, J., concurring)), *overruled on other grounds by People v. Mitchell*, 189 Ill. 2d 312 (2000). Therefore, the mere fact that petitioner was taking some sort of psychotropic medication did not *per se* prohibit him from testifying on his own behalf.

¶ 23 The State argues that petitioner knew he could testify because petitioner heard Rideout admit on cross-examination during the State's case-in-chief that Rideout had been under treatment for depression. There is nothing in the petition, however, to indicate *what* specific psychotropic medication petitioner had been taking. Petitioner further points out that he still told the trial court that he was not going to testify because of trial counsel's "constantly telling [him]" (erroneously) that the psychotropic medication he had been taking precluded him from testifying in his own defense. Despite the trial court's admonishments, including a brief recess to allow defendant to consider his decision, the trial court did not admonish petitioner (as recommended in *Frieberg*) that, regardless of trial counsel's advice, trial counsel could neither force nor prevent petitioner from testifying. *Frieberg*, 305 Ill. App. 3d at 852. In any event, we cannot hold that Rideout's admission is a fact in the record that "positively rebut[s]" this allegation. *Hodges*, 234 Ill. 2d at 16. Consequently, it is at least arguable that trial counsel rendered objectively unreasonable advice, which meets the first prong of *Strickland* in the context of a postconviction petition.

¶ 24 With respect to the second prong, we recognize that in petitioner's direct appeal, we held that there was "ample" evidence of guilt. *White*, 2013 IL App (1st) 112203, ¶ 34. This ample evidence, however, consisted primarily of Williams's and Rideout's testimony recounting

inculpatory statements that petitioner had allegedly made to them. *Id.* Petitioner's allegations, which we must take as true (*Coleman*, 183 Ill. 2d at 385), would have squarely contradicted the testimony of Williams (his heroin-addicted girlfriend whom he allegedly left after one month following her relapse) and Rideout (who never saw petitioner and testified that the individual he spoke to said the murder weapon was *not* at the scene). Petitioner's allegations would have also furthered an argument that Williams had a motive to fabricate her testimony because she was angry with petitioner for ending their relationship. Had the finder of fact credited petitioner's testimony over that of Williams and Rideout, this would have left as the only remaining evidence Hernandez's testimony (in which he could not identify petitioner as the individual entering the victim's residence), the brick (the murder weapon that was devoid of fingerprints, DNA, or other evidence connecting petitioner to the crime), and the restaurant flyers (four of which evidenced the mere fact that petitioner touched them at some point in time). *Id.* This remaining evidence is hardly ample, and consequently it was at least *arguable* that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. See *Hodges*, 234 Ill. 2d at 16-17; *Petrenko*, 237 Ill. 2d at 496-97. Therefore, petitioner has also met the second prong of *Strickland*, and we must reverse the trial court's summary dismissal of petitioner's *pro se* postconviction petition and remand this cause for second-stage proceedings, including the appointment of counsel.

¶ 25 The State, however, maintains that, where a trial court has admonished a defendant with respect to his right to testify in his own defense, it is " 'virtually impossible' " to claim his right to testify was usurped. The State relies upon both *People v. Collier*, 329 Ill. App. 3d 744 (2002), and *Frieberg* in support of this argument, but its reliance is misplaced. First of all, neither case concerned a first-stage postconviction petition. See *Collier*, 329 Ill. App. 3d at 748 (the

defendant attempted to "re-open" his case after the jury instructions conference so that the defendant could testify); *Frieberg*, 305 Ill. App. 3d at 843 (third-stage evidentiary hearing). In addition, *Collier* was reviewed under an abuse of discretion standard of review (*Collier*, 329 Ill. App. 3d at 750) and *Frieberg* was reviewed under a manifest weight standard (*Frieberg*, 305 Ill. App. 3d at 847). Here, the threshold for survival at the first stage of postconviction proceedings simply requires that his ineffective assistance of counsel claim be of arguable merit. See *Hodges*, 234 Ill. 2d at 16-17. Furthermore, we review the trial court's summary dismissal of petitioner's postconviction petition *de novo* and not under an abuse of discretion or manifest weight standard of review. *Simms*, 192 Ill. 2d at 360. Finally, there is nothing in *Collier* or *Frieberg* to indicate that trial counsel affirmatively misled the defendant into believing the defendant was prohibited from testifying. *Collier* and *Frieberg* are thus unavailing.

¶ 26 The State cites numerous additional cases, none of which are persuasive. *People v. Vida*, 323 Ill. App. 3d 554 (2001), *People v. Steward*, 295 Ill. App. 3d 735 (1998), and *People v. Clemons*, 277 Ill. App. 3d 911 (1996), were all before the appellate court on direct appeal, and therefore unlike at the first stage of postconviction proceedings (as here), there was no presumption that all well-pleaded facts must be taken as true unless "positively rebutted" by the trial record. *Coleman*, 183 Ill. 2d at 385. In addition, all of the cases are factually distinguishable. In *Vida*, defendant admitted in posttrial proceedings that his trial counsel "advised" him not to testify despite his wish to do so. *Vida*, 323 Ill. App. 3d at 563-64, *appeal denied, judgment vacated on other grounds*, 202 Ill. 2d 696 (2003). In *Steward*, the defendant testified during the hearing on his motion for a new trial that trial counsel "preferred" that he not testify. *Steward*, 295 Ill. App. 3d at 743-44. The court in *Clemons* observed that "there was no indication that the defendant wished to testify." *Clemons*, 277 Ill. App. 3d at 922. Finally, in

People v. Adams, 338 Ill. App. 3d 471, 475-76 (2003), there was similarly nothing in the record, including the petitioner's or witnesses' affidavits demonstrating that "petitioner, at any time, advised counsel of his desire or intention to testify."

¶ 27 CONCLUSION

¶ 28 The trial court erred in summarily dismissing petitioner's postconviction petition at the first stage because, under the standard of review at the first stage, his claim of ineffective assistance of trial counsel was not frivolous or patently without merit. Accordingly, we reverse the judgment of the trial court and remand this matter for further proceedings.

¶ 29 Reversed and remanded.