2016 IL App (1st) 142599-U

SECOND DIVISION
December 13, 2016

No. 1-14-2599

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. 09 CR 21099
	)	
DUWAYNE ALLMON,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE MASON delivered the judgment of the court.
Justices Neville and Pierce concurred in the judgment.

O R D E R

¶ 1 *Held:* The circuit court's summary dismissal of defendant's *pro se* postconviction petition was affirmed where trial counsel was not ineffective for failing to investigate a potential alibi witness.

¶ 2 Defendant Duwayne Allmon appeals from 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 2014)). He contends that his petition stated the gist of an ineffective assistance of counsel claim based on trial counsel's failure to investigate an alleged alibi witness. We disagree and affirm.

¶ 3 Following a bench trial, Allmon was convicted of residential burglary in connection with the burglary of Akeseiah Felton's apartment on July 20, 2008. A piece of chewing gum containing Allmon's DNA was recovered at the scene and led to his arrest and conviction. The court sentenced Allmon, a Class X offender, to 15 years' imprisonment.

¶ 4 During opening statements, defense counsel argued that the State's entire case revolved around one piece of chewing gum, which would not be sufficient to establish proof beyond a reasonable doubt. Counsel emphasized that the gum could have been tracked into the apartment, particularly where Felton lived in a multi-unit residential building.

¶ 5 At trial, Felton testified that on July 20, 2008 she lived in a multi-unit building at 6956 South Paxton Avenue in Chicago with her two children. Felton cleaned her apartment every morning before leaving, and her hardwood floors were always mopped and waxed. She left the apartment with her children at about 10 a.m., locking her front and back doors. When they returned to the apartment around 1 p.m., Felton saw a shadow in her peripheral vision and saw that her back door had been kicked open off its frame. She also observed that some of her belongings had been disrupted and others were missing. Her children's game box had been moved from the television to the middle of the living room floor. A piece of chewing gum was in the middle of her bedroom floor, "as if somebody had just dropped it." The gum was green, big, wet, had bubbles and teeth marks on it, and did not have any flat surfaces. Felton had not allowed sticky substances such as gum in her house since she had her children.

¶ 6 On cross-examination, Felton testified that, from what she saw, the gum could not have been brought in on the offender's shoe. Felton acknowledged, however, that she did not know where the gum came from, and that it could have been thrown or tracked into the apartment.

Although she did not know the age of the gum, she stated that "[i]t had to be a couple hours old from what I saw because when I left, I had just cleaned my house." When Felton was asked if she had ever seen Allmon prior to trial, she responded that he looked familiar from the neighborhood.

¶ 7 On re-direct examination, the following colloquy occurred between the assistant State's Attorney and Felton:

"Q. Please tell this court why you believe that the gum could not have been more than a couple hours old?

A. It was wet. It looked – it had teeth marks. It had bubbles on it. It looked like chewed gum that someone just chewed and just threw on the floor. It was wet. It had bubbles on it. So if it was old, it would have been dry, and I would have saw [it] that that morning. I would not have left gum sitting in the middle of my floor.

Q. You were asked if it could have been tracked in at any point; is that correct?

A. Yes.

Q. Could it have come in off the bottom of someone's shoe?

A. No.

Q. Can you please explain to the court why not?

A. Because if it came in on the bottom of someone's shoe, it would have been stuck to the floor with a shoe print of some sort in it and that's not how I saw it.

Q. Were there any flat surfaces on this gum at all?

A. No.

Q. You were asked if this gum could have come from behind your TV or some other place in your apartment; is that correct?

A. That's correct.

Q. And can you be certain that it did not come from some place in your apartment?

A. Yeah.

Q. Why is that?

A. Because of the way I clean."

¶ 8 On re-cross examination, Felton testified that she did not know where the gum came from and did not know if somebody "threw [the gum] in," but stated such an occurrence was "highly impossible."

¶ 9 Evidence technician Michael Scarriot testified that when he arrived at the apartment he observed that the apartment was exceptionally clean. The only evidence he recovered from the scene was the chewing gum.

¶ 10 Forensic scientist Debra Kot testified that when she received the gum, she saw that it had some hairs and a piece of tape on it, but otherwise did not have a lot of debris. A second forensic scientist, Janice Youngsteadt, testified that she extracted DNA from the gum. The parties stipulated that the DNA profile on the gum matched Allmon's profile, and this DNA profile would be expected to occur in approximately 1 in 1.4 quintillion black, 1 in 8.9 quintillion white, and 1 in 2.5 quintillion Hispanic unrelated individuals.

¶ 11 Detective Daniel O'Connor testified for the defense. O'Connor, reading from a report that he prepared, stated that Allmon's residence was 6956 South Paxton Avenue, apartment 2A.

O'Connor confirmed that Allmon's building address was the same as Felton's address. On cross-examination, O'Connor admitted that his report also listed Allmon's address as 11344 South Washtenaw Avenue in Chicago, but O'Connor could not remember where he received those two addresses. He noted that it was common for him to ask defendants for previous addresses without a time frame. O'Connor added that Allmon did not recall where he was living on July 20, 2008.

¶ 12 During closing arguments, defense counsel reiterated the only evidence recovered was one piece of chewing gum, which was not proof beyond a reasonable doubt, particularly where the gum could have been tracked or thrown into the apartment.

¶ 13 Following closing arguments, the trial court found Allmon guilty of residential burglary. The court stated that the evidence showed Allmon's DNA was on the gum, and thus the issue was how the gum got inside the apartment. The court rejected defense counsel's suggestion that the gum could have been thrown in, and noted Felton's testimony that the gum appeared to be wet, had teeth marks on it, and was not flattened. Additionally, the court stated that there was not much debris on the gum, contradicting Allmon's notion that someone had stepped on the gum and tracked it into the apartment. The court concluded that the evidence against Allmon was "overwhelming" as "there is no explanation for a fresh piece of chewing gum with Allmon's DNA being on it in a burglarized apartment other than the Allmon himself was there and spit or dropped the chewing gum out as he was fleeing the apartment."

¶ 14 The court then sentenced Allmon, a Class X offender, to 15 years' imprisonment. We affirmed that judgment on direct appeal. *People v. Allmon*, 2013 IL App (1st) 120048-U.

¶ 15 On May 1, 2014, Allmon filed a *pro se* postconviction petition alleging, *inter alia*, that trial counsel was ineffective for failing to investigate and present alibi witness Tonette Allmon,

his mother. Allmon asserted that he told his trial counsel to speak with Tonette, who would state that he was working with her at a daycare at the time of the burglary. He also claimed he requested that counsel obtain the names of the children and parents who would have seen him working at the time of the burglary, thus corroborating the statements of his mother. However, counsel failed to investigate Allmon's alibi defense. In support of his petition, Allmon attached affidavits from himself and Tonette. In his affidavit, Allmon averred, in pertinent part, that trial counsel failed to call any alibi witnesses in support of his defense, including his mother. Significantly, in his own affidavit, Allmon did not swear that he was working at the daycare center on July 20, 2008, between the hours of 10:00 a.m. and 1:00 p.m.

¶ 16 In Tonette's affidavit, she indicated that her purpose in making the affidavit was to state "what happened and where [defendant] was working at the time [the] burglary happened." Tonette averred that:

> "On the date of ____ my son [defendant] was working for me at the Mickey & Minnie Daycare Center, located on 8409 South Throop, Chicago. I have my son do odd jobs around the center, to keep him busy and away from certain people. [Defendant] was working *** several days –fixing lights, urinals, toilets, scrub floors, etc.
>
> [Defendant's] counselor never came and spoke to me, even after I told [defendant] it was alright. Also he could have spoken with either the children there or their parents.
>
> My son does not steal, he may do other things I don't like, but he's no thief."

¶ 17 On July 7, 2014, the circuit court issued a written order dismissing Allmon's petition as frivolous and patently without merit. The court found Allmon's claims forfeited.

¶ 18 In this appeal, Allmon challenges the propriety of that dismissal, arguing that he raised an arguable claim of ineffective assistance of counsel. He specifically maintains that his counsel was ineffective for failing to investigate alibi witnesses and, in particular, Tonette, who would have stated that Allmon was working at her daycare at the time of the burglary. According to Allmon, Tonette's statements would have supported the defense theory that his gum was tracked into the apartment by someone else.

¶ 19 The dismissal of a petition is appropriate at the first stage of postconviction review where the circuit court independently reviews the petition, taking the allegations as true, and determines that the petition is frivolous and patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014); *People v. Hodges*, 234 Ill. 2d 1, 11 (2009). A postconviction petition is frivolous or patently without merit where it has no arguable basis in law or in fact. *Id*. at 11-12; see also *People v. Tate*, 2012 IL 112214, ¶ 9 (the threshold for survival at the first stage of proceedings is low). A petition has no arguable basis in fact or law where it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. An indisputably meritless legal theory is one that is completely contradicted by the record, and a fanciful factual allegation is one that is fantastic or delusional. *Id*. at 16-17. Despite the low threshold for survival at the first stage of proceedings, a defendant is still required to support the allegations in his petition with affidavits, records or other evidence, or explain their absence. 725 ILCS 5/122-2 (West 2014); *Hodges*, 234 Ill. 2d at 10.

¶ 20 We review the summary dismissal of a postconviction petition *de novo*. *Tate*, 2012 IL 11214, ¶ 10. We thus review the circuit court's judgment, rather than the reasons for its judgment. *People v. Collier*, 387 Ill. App. 3d 630, 634 (2008).

¶ 21 Where a defendant claims that he was provided ineffective assistance of trial counsel, he must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). At the first stage of post-conviction proceedings, however, a petition alleging ineffective assistance of counsel may not be dismissed if (1) it is arguable that counsel's performance fell below an objective standard of reasonableness and (2) it is arguable that the defendant was prejudiced. *Tate*, 2012 IL 112214, ¶ 19 (citing *Hodges*, 234 Ill. 2d at 17). While a defendant must generally overcome the presumption that counsel's actions were the product of sound trial strategy (*People v. Manning*, 241 Ill. 2d 319, 327 (2011)), trial strategy related arguments are not considered when reviewing a postconviction petition at the first stage. *Tate*, 2012 IL 112214, ¶ 22. If a claim of ineffectiveness may be disposed of due to lack of prejudice, a reviewing court is not required to determine whether counsel's performance was deficient. *People v. Wilson*, 2014 IL App (1st) 113570, ¶ 46.

¶ 22 Even assuming that counsel erred in failing to investigate Tonette as a witness, Allmon has failed to show that it was arguable that the result of the trial would have been different had Tonette testified. Tonette's testimony would have contradicted Allmon's argument that gum containing Allmon's DNA was tracked into the apartment by someone other than Allmon because, if true, Tonette would have placed Allmon miles away from the scene with no explanation for how freshly chewed gum with Allmon's DNA on it was located in Felton's apartment.

¶ 23 Although Tonette's affidavit indicated that she was writing it for the purpose of explaining where Allmon was working "at the time of the burglary," she failed to state specific

times and dates that Allmon had worked at the daycare center, failing to even mention July 20, 2008. Instead, her affidavit included a blank space where a date could have been entered, and she only averred that Allmon did odd jobs for several days at the daycare center "to keep him busy and away from certain people." As Tonette's affidavit does not positively state that Allmon was working on the day of the burglary, her affidavit was not only insufficient to support a claim of ineffective assistance of counsel (*People v. Gosier*, 165 Ill. 2d 16, 24 (1995)), but was also inconsistent with Allmon's theory at trial that someone else tracked his gum into Felton's apartment. It is not arguable that a trier of fact would have accepted that Allmon's freshly chewed gum was found inside of the apartment, even though he was nowhere near the scene of the crime.

¶ 24 Moreover, Tonette's potential testimony would not have made a difference in the outcome of the trial because, as found by the trial court, there was overwhelming evidence that Allmon entered Felton's apartment and committed the residential burglary. The trial evidence clearly showed that the gum was not tracked into the apartment, but was put or dropped there by someone at the time of the residential burglary. Felton described the gum at trial as being green and wet with bubbles on it, and "just sitting in the middle of the floor, like as if somebody had just dropped it." She further testified that the gum could only have been a couple of hours old as she had just cleaned her house and the gum was still wet. Moreover, Felton stated that the gum could not have been tracked into the apartment on the bottom of someone's shoe where it was not stuck to the floor, did not contain a shoe print, and did not contain any flat surfaces. Felton's testimony that the gum was fresh was corroborated by forensic scientist Kot who testified that the gum did not contain a lot of debris. Thus, the appearance and condition of the gum positively

rebuts Tonette's statements in her affidavit that Allmon was working at the time of the burglary. Further, the location of the gum refuted Allmons' theory that it had been thrown into Felton's apartment by someone else. If the gum had been thrown in through Felton's open back door—the only possible point of entry—it could not have landed, due to the layout of Felton's apartment, in the middle of her bedroom floor. Accordingly, Allmon did not state even an arguable claim of prejudice. *Wilson*, 2014 IL App (1st) 113570, ¶ 46.

¶ 26 For the foregoing reasons, Allmon failed to make a gist of an ineffective assistance of counsel claim at the first stage of postconviction proceedings and his petition was, therefore, properly dismissed.

¶ 27 Affirmed.