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2016 IL App (3d) 140221-U

Order filed January 27, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

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| 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. 3-14-0221 |
| ANDREW L. LONG, |) | Circuit No. 09-CF-2539 |
| Defendant-Appellant. |) | Honorable Daniel J. Rozak, Judge, Presiding. |

PRESIDING JUSTICE O'BRIEN delivered the judgment of the court.
Justices Schmidt and Wright concurred in the judgment.

ORDER

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

¶ 2 Defendant, Andrew L. Long, appeals the summary dismissal of his postconviction petition. Because we find that defendant's petition failed to present an arguable claim of ineffective assistance of trial counsel, we affirm.

¶ 3 **FACTS**

¶ 4 Defendant was charged with attempted first degree murder (720 ILCS 5/8-4, 9-1(a)(1) (West 2008)) and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2008)). A jury trial was held.

¶ 5 Michael Mays testified that he met up with Lawless Hawk and defendant on the evening of the incident. Mays had worked with Hawk in the past but had not met defendant before. The three of them drove to Chicago so Mays could obtain drugs. They returned to defendant's apartment in University Park to watch a basketball game. Hawk's girlfriend came over. While they were at the apartment, Hawk pulled out a gun and showed it to Mays. The gun was a .380-caliber Smith & Wesson. Eventually, Hawk drove his girlfriend home. He then returned to defendant's apartment to drive Mays home. Defendant came along for the ride to Mays's residence. Mays was sitting in the front seat of the car and defendant was in the back seat. The drive to Mays's residence took approximately two to three minutes. When they arrived at Mays's residence, Mays exited the car and leaned back into the car to offer to tilt the front seat up for defendant. Defendant shot Mays in the face when he leaned into the car. Mays fell back into the car. Defendant shot Mays seven times. Hawk drove Mays to the hospital. Mays called 911 while he was in the car with Hawk. Mays admitted that he failed to identify defendant as his shooter in a photo line-up.

¶ 6 Hawk testified that defendant was his cousin. Hawk's testimony regarding the events leading up to the shooting was consistent with Mays's. Hawk admitted that he showed Mays a handgun while they were at defendant's apartment. Hawk claimed that he found the gun in one of defendant's kitchen cabinets. After he showed the gun to Mays, Hawk placed it between a cushion and the arm of the couch. That was the last time Hawk saw the gun that evening. Eventually, Hawk drove Mays home and defendant came along for the ride. Defendant sat in the

back seat and Mays sat in the front seat. When they arrived at Mays's residence, Mays opened the car door and was in the process of high-fiving Hawk when shots were fired from the back seat. Mays fell back into the car and defendant somehow exited the car. Hawk drove Mays to the hospital.

¶ 7 The parties stipulated that if called to testify, a 911 dispatcher would testify that Mays's cell phone number called 911 at 11:03 p.m. on the evening of the incident. The parties also stipulated that Mays was admitted to the hospital at 11:10 p.m.

¶ 8 Police officers Daniel Murphy and Jermaine Jones testified that they investigated Mays's shooting. On the evening of the shooting, they recovered two shell casings laying on top of broken glass on the road outside Mays's residence. The officers eventually searched Hawk's vehicle. The passenger side window was blown out. Murphy recovered a projectile from the passenger door. Jones recovered shell casings from the driver's and passenger's seats. Jones also observed blood on the passenger seat, center console, and driver's seat. Jones observed a hole in the windshield. It appeared to Jones that a projectile went through the windshield from the inside of the vehicle because the glass was pushed out. This led Jones to believe that shots may have been fired from inside the vehicle. Murphy seized two gun periodicals during a search of defendant's apartment.

¶ 9 The parties stipulated that a forensic scientist employed with the Illinois State Police Crime Lab would testify that a bullet portion was recovered from the interior door of Hawk's vehicle and a bullet portion recovered from Mays's body were fired from the same firearm. The forensic scientist would also testify that the shell casings recovered from inside Hawk's vehicle and on the road were fired from the same firearm.

¶ 10 Angelica Madison, defendant's girlfriend, testified for the defense. Madison stated that she picked defendant up at his apartment around 10:45 p.m. on the evening of the incident and drove him to his parents' house.

¶ 11 Defendant testified that he went to Chicago with Mays and Hawk on the evening of the incident. They returned to University Park and went to defendant's apartment. At the apartment, Hawk pulled a gun out of his back pocket and showed it to Mays. Mays handed it back after looking at it, and Hawk then returned the gun to his back pocket. Defendant denied that the gun belonged to him or had ever been in his kitchen. Mays took out some heroin and defendant told him to put it away. Defendant admitted that the police found a "Guns & Ammo" magazine while searching his apartment but claimed that a friend left it there.

¶ 12 Hawk and Mays left defendant's apartment between 10:30 and 10:40 p.m. Defendant remained at his apartment. Madison picked defendant up approximately 5 to 10 minutes after Hawk and Mays left. Hawk called defendant at 10:55 p.m. and defendant called him back a few minutes later. Defendant spoke to Hawk at that time. Madison drove defendant to his parents' house, where he spent the night. Defendant denied shooting Mays.

¶ 13 Beatrice Xayakham, a legal analyst for Verizon, testified that Hawk's cell phone number called defendant's cell phone number at 10:55 p.m. and defendant's cell phone number called Hawk's cell phone number at 11:01 p.m. Xayakham could not determine from the cell phone records whether the calls connected and a conversation took place. Hawk's cell phone records indicated that the 10:55 p.m. call from Hawk's cell phone to defendant's cell phone lasted for 28 seconds, and the 11:01 p.m. call from defendant's cell phone to Hawk's cell phone lasted for 20 seconds.

¶ 14 Regarding the cell phone calls between Hawk and defendant, the State theorized during closing arguments that Hawk called defendant at 10:55 p.m. to ask to be let back into defendant's apartment when he returned to pick up Mays. The State further argued that defendant could have called Hawk at 11:01 p.m. after the shooting was over and Hawk pulled away to ask Hawk what was going on. The State argued that Hawk likely did not answer the call, as the call was only 20 seconds long and Hawk was trying to figure out what to do after the shooting.

¶ 15 The jury found defendant guilty on both counts. The trial court sentenced defendant to 45 years' imprisonment for attempted first degree murder and 10 years' imprisonment for aggravated battery with a firearm, to be served consecutively. On direct appeal, we vacated defendant's conviction and sentence for aggravated battery with a firearm under one-act, one-crime principles and affirmed defendant's attempted first degree murder conviction. *People v. Long*, No. 3-11-0613 (Dec. 11, 2012) (dispositional order).

¶ 16 Defendant filed a postconviction petition in which he argued, *inter alia*, that his trial counsel was ineffective for failing to investigate and interview Jason Collins and his mother, Katherine Harper. The petition also alleged that counsel was ineffective for failing to call Harper and Collins to testify. Defendant alleged that if Harper had been called to testify, she could have produced his cell phone. Defendant's cell phone would have shown that "the call from Mr. Hawk in fact connected at 10:55 p.m. on October 29, 2009" and was not a missed call. Additionally, defendant alleged that Collins would have testified that the firearm periodicals that were found in defendant's apartment belonged to Collins rather than defendant. Defendant argued that the State used the gun periodicals to paint defendant as a "gun fanatic." Defendant alleged that there was no strategic reason for trial counsel not to call Harper and Collins as

witnesses and that there was a reasonable probability that the result of the proceedings would have been different had the witnesses been called.

¶ 17 Defendant attached notarized affidavits from Harper and Collins to his petition. Harper's affidavit stated that she informed defendant's trial counsel that the gun periodicals found in defendant's apartment belonged to Collins and that Collins would be willing to testify at trial that the periodicals belonged to him. Harper also told defendant's trial counsel that she was in possession of defendant's cell phone and the number indicating that Hawk called defendant at the time of the incident was saved in the phone. Harper explained to trial counsel that the evidence in the cell phone was "very critical to what was being presented by the State placing [defendant in] two places at once." Harper further stated that trial counsel never contacted Harper, asked her to testify, or asked her to produce defendant's cell phone.

¶ 18 Collins's affidavit stated that he would have been willing to testify at trial that the gun and ammunition magazines found in defendant's apartment belonged to him, but he was never called to testify. Collins's affidavit further stated that at the time of the incident, Collins was a security guard and carried a gun for work. When Collins visited defendant's apartment, he left his gun in his car. Defendant did not allow Collins to bring his gun into defendant's apartment because defendant did not like guns around him.

¶ 19 The trial court summarily dismissed defendant's postconviction petition. The trial court reasoned that defendant failed to explain the significance of Harper's and Collins's testimony. The trial court noted that defendant conceded that trial counsel had several conversations with Harper. The trial court further reasoned that while defendant stated that the guns and ammunition periodicals belonged to Collins, he admitted that they were found in defendant's apartment.

¶ 20

ANALYSIS

¶ 21

On appeal, defendant argues that the trial court erred in summarily dismissing his postconviction petition because his petition stated the gist of a constitutional claim of ineffective assistance of counsel. Upon review, we find that defendant has not presented an arguable claim of ineffective assistance of counsel because the proffered testimony of Harper and Collins would have neither contradicted the State's case nor tended to exculpate defendant.

¶ 22

At the first stage of postconviction proceedings, a circuit court may summarily dismiss a postconviction petition if the court determines that 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 if it has no "arguable basis either in law or in fact." *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). The petitioner faces a low threshold at the first stage of postconviction proceedings where "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *People v. Brown*, 236 Ill. 2d 175, 184 (2010). Our review of the trial court's first-stage summary dismissal of defendant's petition is *de novo*. *Hodges*, 234 Ill. 2d at 9.

¶ 23

We review claims of ineffective assistance of counsel under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). At the first stage of postconviction proceedings, a petition alleging ineffective assistance of counsel cannot be summarily dismissed by the circuit court 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." *Hodges*, 234 Ill. 2d at 17. "Failure to subpoena witnesses known to defense counsel who contradict the State's case or provide exonerating testimony demonstrates ineffective assistance of counsel." *People v. Makiel*, 358 Ill. App. 3d 102, 106 (2005).

¶ 24 With regard to Collins's purported testimony, we find it would have served to corroborate defendant's testimony on only the very minor point that the gun periodicals found in defendant's apartment did not belong to defendant. Contrary to defendant's assertion that the gun periodicals were used to paint him as a "gun fanatic," the discovery of gun periodicals in his apartment was a very small part of the State's case. The prosecutor did not even mention the gun periodicals during closing argument. Moreover, the remaining evidence clearly established defendant's guilt. Both Mays and Hawk testified that defendant shot Mays from the back seat of Hawk's car. Physical evidence gathered by police officers indicated that shots were fired from inside the car. Additionally, Hawk testified that defendant had a gun in his apartment. Thus, we find it is not arguable that the trial outcome would have been different had Collins testified that the gun periodicals belonged to him rather than defendant.

¶ 25 Additionally, we find that defendant has failed to make an arguable claim of ineffective assistance of counsel based on trial counsel's failure to call Harper as a witness or introduce defendant's cell phone into evidence. Neither defendant's petition nor Harper's affidavit indicates that Harper would have testified to anything other than being in possession of defendant's cell phone. Defendant's trial evidence established that on the evening of the incident, a 28-second call from Hawk's cell phone to defendant's cell phone was made at 10:55 p.m., and a 20-second call from defendant's cell phone to Hawk's cell phone was made at 11:01 p.m. The only new evidence defendant alleges his cell phone would have shown was that the 10:55 p.m. call from Hawk's phone to defendant's phone was not a missed call but rather was received. However, the State argued during closing argument that the 10:55 p.m. call occurred before defendant was in the car with Hawk and Mays and that the 11:01 p.m. call occurred after the shooting. Thus, contrary to defendant's argument on appeal, evidence that defendant answered Hawk's 10:55

p.m. call would not have contradicted the State's case and would not have shown that defendant was not in the car with Hawk and Mays at the time of the shooting.

¶ 26

CONCLUSION

¶ 27

The judgment of the circuit court of Will County is affirmed.

¶ 28

Affirmed.