2016 IL App (4th) 140859-U

NO. 4-14-0859

FILED
August 11, 2016
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.	)	Vermilion County
TRIBBEUNA CROSS,	)	No. 10CF619
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.
Justices Appleton and Pope concurred in the judgment.

ORDER

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

¶ 2 In October 2011, a jury found defendant, Tribbeuna Cross, guilty of mob action and aggravated battery with a firearm. In May 2012, the trial court sentenced him to consecutive prison terms of 3 years for mob action and 16 years for aggravated battery with a firearm. On direct appeal, this court affirmed in part, vacated in part, and remanded the cause with directions. In August 2014, defendant filed a *pro se* petition for postconviction relief, which the court summarily dismissed.

¶ 3 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition. We affirm.

¶ 4 I. BACKGROUND

¶ 5 In November 2010, the State charged defendant by information with single counts of mob action (count I) (720 ILCS 5/25-1(a)(1) (West 2010)), aggravated discharge of a firearm (count II) (720 ILCS 5/24-1.2(a)(2) (West 2010)), and aggravated battery with a firearm (count III) (720 ILCS 5/12-4.2(a)(1) (West 2010)). In count I, the State alleged defendant and Terrance Johnson, being two or more persons acting together and without authority of law, used force or violence, disturbing the public peace. In count II, the State alleged defendant knowingly discharged a firearm in the direction of another person, Charles Eaton. In count III, the State alleged defendant, in committing a battery, knowingly, by means of discharging a firearm, caused injury to Eaton. Defendant pleaded not guilty.

¶ 6 In October 2011, defendant's jury trial commenced. Prior to trial, the State moved to dismiss count II, which the trial court granted. The State presented the testimony of the following: (1) Cliff Hegg, a Danville police officer; (2) Tanesha Johnson, an acquaintance of Eaton who helped him after he was shot; (3) Jane McFadden, a Danville police officer; (4) Charles Eaton, the victim; (5) James Smutz, a Danville police officer; and (6) Steve Miller, a nurse at Provena Hospital in Danville. In his case, defendant recalled Officer Hegg.

¶ 7 Officers Hegg and McFadden testified a call of a shooting came in around 7:26 a.m. on October 23, 2010. Tanesha testified she did not see the shooting but heard three to four gunshots shortly before she saw "C-Mitch" (Eaton's nickname) coming toward her with a gunshot wound. Eaton testified he did not remember what time of day it was when he was shot but remembered it was dark and stated "it was probably like four o'clock." He was walking through Fair Oaks in Danville, Illinois, when he saw "Trel" and "Tug." Eaton had known them for about five years and saw them around Danville. Tug said something like "what's your kind doing out here?" Trel said nothing. Eaton said nothing, turned around, and started walking

away. Eaton then turned around to face Trel and Tug and was shot. On direct examination, Eaton testified Trel had a black handgun in his hand. Eaton saw the gun pointed at him and then it "went off." Trel was the only one Eaton saw with the gun. On redirect, Eaton again testified Trel was the person who shot him. On cross-examination, Eaton testified he did not see anybody with a gun and, on re-cross examination, stated he did not see Trel with a gun. Eaton further testified the gun fired three to four times, and it was the first shot that hit him in the lower right stomach. Eaton was knocked to the ground by the shot. He got up and started running. Eaton ran until his legs gave out and remembered seeing Tanesha. He also remembered the ambulance but did not remember anything at the hospital in Danville. Specifically, Eaton did not recall talking to a police officer at the hospital in Danville. Eaton just recalled waking up at Carle Hospital in Urbana, Illinois.

¶ 8 Eaton remembered talking to Officer Smutz while Eaton was in the hospital in Urbana. Officer Smutz presented him with a photographic lineup that contained six photographs. The lineup was admitted into evidence. The exhibit had photographs B and F circled. Eaton believed Officer Smutz had circled them. Written next to photograph B was "Trel gun shot me," and next to photograph F was "Tug." Eaton testified the handwriting next to the two photographs was his. In court, Eaton identified defendant as Trel. Eaton also testified that, while no personal issues existed between defendant and him, Eaton had got into a fight two or three months earlier with a person that "hung out" with defendant.

¶ 9 Officer Smutz testified about the photographic lineup he presented to Eaton at the hospital in Urbana. Eaton identified photograph B as being "Trel" and the person who shot him. Eaton further identified photograph F as being "Tug" and the person who talked to him before the shooting. Officer Smutz testified Trel was defendant, and Tug was Terrance. He further

testified he asked Eaton to circle the two photographs he had selected.

¶ 10 Miller testified he cared for Eaton at the hospital in Danville. Eaton had suffered a gunshot wound to the right groin. Eaton was stabilized and transferred to Carle Hospital. While at the hospital in Danville, Eaton was given Dilaudid for pain. Dilaudid can cause drowsiness, and if a person is allergic to it, Dilaudid can cause delusions or hallucinations. Eaton did not seem allergic or delusional.

¶ 11 In defendant's case, Officer Hegg testified he spoke with Eaton about 30 minutes after the shooting at the hospital in Danville. Eaton told Officer Hegg he was walking in the Fair Oaks area and was shot by a male whom he did not know. Eaton described the shooter as a "new face." According to Officer Hegg, Eaton was alert and conscious when he made the statements about the shooting. Defendant exercised his right not to testify. Following closing arguments, the jury found defendant guilty of both mob action and aggravated battery with a firearm.

¶ 12 In November 2011, defendant filed a posttrial motion, asserting (1) he was not proved guilty beyond a reasonable doubt, (2) the trial court erred by not admitting Eaton's spontaneous declaration shortly after the shooting, (3) the court erred by instructing the jury on accountability, and (4) the court erred by denying defendant's pretrial motion for discharge. The court denied the motion in January 2012. Thereafter, defendant filed a *pro se* motion arguing defense counsel rendered ineffective assistance of counsel. While the court did not find defense counsel ineffective, it appointed defendant new counsel.

¶ 13 In May 2012, the trial court sentenced defendant to consecutive prison terms of 3 years on count I and 16 years on count III. In June 2012, defendant filed a motion to reconsider his sentence, which the court denied.

¶ 14 On direct appeal, defendant argued (1) the State failed to prove him guilty beyond

a reasonable doubt of aggravated battery with a firearm and mob action; (2) his conviction for mob action violated the one-act, one-crime rule; (3) his consecutive sentences were improper under *Apprendi v. New Jersey*, 530 U.S. 466 (2000); (4) errors occurred in the imposition and calculation of his fines; and (5) he was entitled to monetary credit for his state police operations fine. *People v. Cross*, 2013 IL App (4th) 120551-U, ¶ 5.

¶ 15 This court affirmed in part, vacated in part, and remanded the cause with directions. *Cross*, 2013 IL App (4th) 120551-U, ¶ 41. We found (1) the evidence was sufficient to prove defendant guilty of mob action and aggravated battery with a firearm; (2) defendant's mob-action conviction must be vacated under the one-act, one-crime rule; and (3) remand was necessary to address errors concerning defendant's fines and fees. *Cross*, 2013 IL App (4th) 120551-U, ¶¶ 20-39.

¶ 16 In August 2014, defendant filed a *pro se* petition for postconviction relief pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 to 122-7 (West 2014)). Therein, defendant alleged the State violated his right to due process when it knowingly introduced perjured testimony from Eaton during trial. Defendant also stated the issues in the petition were not raised on direct appeal due to the ineffective assistance of appellate counsel. In his affidavit, defendant stated as follows:

> "My appellate attorney, Amber Corrigan, failed to raise the issues that were reserved for review in Exhibit A (motion for a new trial). I asked her to include these issues but she plainly refused. She could have at the very least made an investigation of the case. She was also asked to contact the trial attorney but she refused."

¶ 17 In September 2014, the trial court dismissed the petition, finding defendant's

claims frivolous and patently without merit. This appeal followed.

¶ 18 II. ANALYSIS

¶ 19 Defendant argues the trial court erred in dismissing his postconviction petition, claiming he presented the gist of a constitutional claim that appellate counsel was ineffective for failing to investigate his case. We disagree.

¶ 20 The Act "provides a mechanism for criminal defendants to challenge their convictions or sentences based on a substantial violation of their rights under the federal or state constitutions." *People v. Morris*, 236 Ill. 2d 345, 354, 925 N.E.2d 1069, 1075 (2010). A proceeding under the Act is a collateral proceeding and not an appeal from the defendant's conviction and sentence. *People v. English*, 2013 IL 112890, ¶ 21, 987 N.E.2d 371. The defendant must show he suffered a substantial deprivation of his federal or state constitutional rights. *People v. Caballero*, 228 Ill. 2d 79, 83, 885 N.E.2d 1044, 1046 (2008).

¶ 21 The Act establishes a three-stage process for adjudicating a postconviction petition. *English*, 2013 IL 112890, ¶ 23, 987 N.E.2d 371. Here, defendant's petition was dismissed at the first stage. At the first stage, the trial court must review the postconviction petition and determine whether "the petition is frivolous or is patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2014). Our supreme court has held "a *pro se* petition seeking postconviction relief under the Act for a denial of constitutional rights may be summarily dismissed as frivolous or patently without merit only if the petition 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 lacks an arguable legal basis when it is based on an indisputably meritless legal theory, such as one that is completely contradicted by the record. *Hodges*, 234 Ill. 2d at 16, 912 N.E.2d at 1212. A petition lacks an arguable factual basis when it is based on a fanciful factual

allegation, such as one that is clearly baseless, fantastic, or delusional. *Hodges*, 234 Ill. 2d at 16-17, 912 N.E.2d at 1212.

¶ 22 Our supreme court has also noted a postconviction petition "need present only a limited amount of detail and is not required to include legal argument or citation to legal authority." *People v. Brown*, 236 Ill. 2d 175, 184, 923 N.E.2d 748, 754 (2010). Moreover, "[t]he allegations of the petition, taken as true and liberally construed, need only present the gist of a constitutional claim." *Brown*, 236 Ill. 2d at 184, 923 N.E.2d at 754.

¶ 23 "In considering a petition pursuant to [section 122-2.1 of the Act], the [trial] court may examine the court file of the proceeding in which the petitioner was convicted, any action taken by an appellate court in such proceeding[,] and any transcripts of such proceeding." 725 ILCS 5/122-2.1(c) (West 2014). The petition must be supported by "affidavits, records, or other evidence supporting its allegations," or, if not available, the petition must explain why. 725 ILCS 5/122-2 (West 2014). Our review of the first-stage dismissal of a postconviction petition is *de novo*. *People v. Dunlap*, 2011 IL App (4th) 100595, ¶ 20, 963 N.E.2d 394.

¶ 24 In the case *sub judice*, defendant argues his petition presented the gist of a constitutional claim where it stated his appellate counsel was ineffective for failing to investigate his case. Specifically, defendant claims that, had appellate counsel properly investigated his case, counsel would have raised on direct appeal that the trial court failed to comply with Illinois Supreme Court Rule 431(b) (eff. May 1, 2007) during *voir dire*. Defendant claims on appeal the trial court failed to ask prospective jurors whether they accepted the Rule 431(b) principles and failed to inform jurors that defendant was presumed innocent throughout his trial. Defendant concludes appellate counsel's failure to raise this issue on direct appeal prejudiced him because it is likely the error would have been grounds for reversal and a new trial.

¶ 25 Our supreme court has noted a defendant cannot raise an issue for the first time on appeal from the dismissal of a postconviction petition. *People v. Jones*, 211 Ill. 2d 140, 148, 809 N.E.2d 1233, 1239 (2004); see also 725 ILCS 5/122-3 (West 2014) ("[a]ny claim of substantial denial of constitutional rights not raised in the original or [in] an amended petition is waived"). The court further stressed "our appellate court is not free, as this court is under its supervisory authority, to excuse, in the context of postconviction proceedings, an appellate waiver caused by the failure of a defendant to include issues in his or her postconviction petition." *People v. Jones*, 213 Ill. 2d 498, 508, 821 N.E.2d 1093, 1099 (2004).

¶ 26 Here, defendant's postconviction petition did not include a claim regarding Rule 431 admonishments by the trial court or appellate counsel's failure to raise it on direct appeal. We note the Rule 431(b) issue was a matter of record, and thus appellate counsel's alleged failure to raise it on direct appeal could have been raised in defendant's postconviction petition. Defendant contends the statement in his affidavit that appellate counsel should "have at the very least made an investigation of the case" allows him to raise the new claim that appellate counsel was ineffective for failing to raise the issue on direct appeal. However, defendant's affidavit alleged appellate counsel failed to raise the issues that were raised in his motion for a new trial, but that motion did not include the issue raised for the first time now on appeal. Moreover, no matter how liberally we construe defendant's allegation, we cannot conclude defendant actually raised a claim relating to appellate counsel's failure on direct appeal to raise the issue of Rule 431(b) admonishments. To hold otherwise would allow postconviction appellate counsel to use the defendant's broad language as a general savings clause and thereby engage in a fishing expedition for a whole host of issues not presented to the trial court in the postconviction petition. We find defendant has forfeited this issue raised on appeal for the first time by failing

to raise it in his postconviction petition. See *People v. Pendleton*, 223 Ill. 2d 458, 475, 861 N.E.2d 999, 1009 (2006) (stating issues not included in a defendant's postconviction petition and raised for the first time on appeal are forfeited).

¶ 27 III. CONCLUSION

¶ 28 For the reasons stated, we affirm the trial court's judgment. As part of our judgment, we award the State its $50 statutory assessment against defendant as costs of this appeal.

¶ 29 Affirmed.