2016 IL App (5th) 130371-U

NO. 5-13-0371

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 08-CF-982
	)	
DORIAN BROWN,	)	Honorable
	)	John Baricevic,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Presiding Justice Schwarm and Justice Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Appointed appellate counsel's *Finley* motion to withdraw is granted, and the circuit court's judgment summarily dismissing defendant's postconviction petition is affirmed, where the petition was frivolous and patently without merit, and this appeal likewise lacks merit.

¶ 2 Defendant, Dorian Brown, appeals from a judgment summarily dismissing the petition that he filed under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)). Defendant's appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit and has filed a motion to withdraw on that basis. See *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *People v. Lee*, 251 Ill. App. 3d

63 (1993). Defendant has filed a response to OSAD's motion to withdraw. This court has examined OSAD's motion, defendant's response, the postconviction petition, and the entire record on appeal. OSAD is granted leave to withdraw as counsel, and the judgment of the circuit court is affirmed.

¶ 3 BACKGROUND

¶ 4 In August 2008, a grand jury indicted defendant on three counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)), a Class X felony. Defendant was accused of shooting Fernando Lusk and Regina Davis at the Club Phoenix nightclub in East St. Louis on July 19, 2008.

¶ 5 Before trial, defendant filed notice of an alibi defense. He stated that he was at Club Paradise in East St. Louis at the time of the shooting at Club Phoenix, and he named "Mr. William Moore" and "Victoria LNU" as his alibi witnesses.

¶ 6 In July 2011, the cause proceeded to trial by jury. Defendant testified that he was at Club Paradise at the time of the shooting at Club Phoenix. Both William Moore and Victoria Toney testified in support of this alibi. Other pertinent trial evidence will be discussed in the analysis section of this order. A thorough summary of the trial evidence is unnecessary here; such a summary was included in this court's order affirming the judgment of conviction. The jury found defendant guilty on all three counts. In January 2012, the court sentenced defendant to imprisonment for 13 years on each of the three counts, with the sentences to run concurrently.

¶ 7 On direct appeal, defendant presented three arguments: (1) the trial court erred when it denied defendant's motions for a judgment of acquittal where the identification testimony was unreliable and insufficient to support the convictions; (2) the trial court erred in failing to grant a new trial where defendant was unfairly prejudiced by the admission of inadmissible hearsay purporting to identify him as the shooter; and (3) defendant received ineffective assistance of counsel where his trial attorney elicited testimony from defense witnesses which effectively supplied evidence necessary for the convictions. On February 1, 2013, this court rejected all three arguments and affirmed the judgment of conviction. *People v. Brown*, 2013 IL App (5th) 120061-U.

¶ 8 On July 3, 2013, defendant filed *pro se* a petition for postconviction relief. The petition presented three claims: (1) direct-appeal counsel provided ineffective assistance in that he "failed to raise a well founded 'perjury' issue"; (2) the identification procedure involving the photographic array was "highly suggestive and should have been suppressed under the Due Process Clause"; and (3) "the sentence was imposed as punishment for [defendant's] decision to exercise his right to a jury trial."

¶ 9 Two affidavits from defendant were attached to the postconviction petition. In the first affidavit, defendant accused trial counsel of providing ineffective assistance, in that counsel (1) "approached [defendant] with a 13 year [plea] offer without further explanation regarding the terms", and defendant rejected the offer; (2) "did not fully investigate" alibi witnesses William Moore and Victoria Toney, whose testimony would have "proven" that defendant "could'nt [*sic*] have committed the shooting"; and (3) did not "properly present the

hospital records regarding Fernando Lusk." In his second affidavit, defendant stated that after he gave a statement to police, he informed them of the existence of alibi witnesses Moore and Toney, but the police failed to interview them. "Only after almost 3 years did anyone even try to get a statement from [Moore and Toney]. To [*sic*] much time had passed for them to be clear on what happened on the night in question."

¶ 10 Defendant's postconviction claims will be discussed more fully in the analysis section of this order.

¶ 11 On July 9, 2013, the circuit court found that the petition's allegations did not state the gist of a constitutional claim. The court summarily dismissed the petition as patently without merit. The defendant filed a timely notice of appeal, thus perfecting this appeal.

¶ 12 ANALYSIS

¶ 13 This appeal is from a judgment summarily dismissing a petition for postconviction relief. Appellate review is *de novo*. See *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998).

¶ 14 The Post-Conviction Hearing Act provides a method by which a person under criminal sentence may assert that his or her conviction resulted from a substantial denial of his or her rights. 725 ILCS 5/122-1(a)(1) (West 2008); *People v. Tate*, 2012 IL 112214, ¶ 8. A postconviction proceeding has three distinct stages. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). During the first stage, which is at issue here, the circuit court must determine whether the petition is "frivolous or *** patently without merit." 725 ILCS 5/122-2.1(a)(2) (West 2012). "The court makes an independent assessment as to whether the allegations in the petition, liberally construed and taken as true, set forth a constitutional claim for relief."

People v. Hommerson, 2014 IL 115638, ¶ 7. A petition will be considered frivolous or patently without merit only if it "has no arguable basis either in law or in fact." *Tate*, 2012 IL 112214, ¶ 9. For example, a petition based on indisputably meritless legal theories, or a petition based on factual allegations that are rebutted by the record or are fanciful or delusional, is a petition that is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 16 (2009). In short, the first stage of a postconviction proceeding is the time for "screening out" those petitions that are wholly lacking in legal substance or are wholly and obviously without merit. *People v. Rivera*, 198 Ill. 2d 364, 373 (2001). If the circuit court finds the petition frivolous or patently without merit, it must summarily dismiss the petition. 725 ILCS 5/122-2.1(a)(2) (West 2012). If the petition is not summarily dismissed, the court must docket the petition for further consideration, and the petition proceeds to the second stage of the postconviction proceeding. 725 ILCS 5/122-2.1(b) (West 2012); *Hommerson*, 2014 IL 115638, ¶ 7.

¶ 15 The first claim in defendant's postconviction petition was that direct-appeal counsel provided ineffective assistance by "fail[ing] to raise a well founded 'perjury' issue" involving Fernando Lusk's allegedly contradictory statements concerning the identity of the person who shot him. During the State's case in chief, Lusk testified that he clearly saw the shooter in the moments before the shooting started, he recognized the shooter as the man with whom he had squabbled two hours earlier, though he was unfamiliar with the man prior to the squabble, and defendant was undoubtedly the shooter. During defendant's case in chief, Lusk denied that an emergency room nurse asked him whether he knew who shot him, and he denied that

he told the nurse that he did not know who shot him. On cross-examination by the State during defendant's case in chief, Lusk testified that at the time of the shooting and at the hospital, he did not know the name of the shooter. (No witness was called to perfect the defense's attempted impeachment of Lusk.)

¶ 16 Claims of ineffective assistance of direct-appeal counsel are judged under the familiar two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Salazar*, 162 Ill. 2d 513, 521 (1994). In other words, direct-appeal counsel provides ineffective assistance when (1) his failure to raise an issue was objectively unreasonable, and (2) but for the failure to raise the issue, the direct appeal would have resulted in reversal of the circuit court's judgment. *People v. Flores*, 153 Ill. 2d 264, 283 (1992).

¶ 17 In this case, direct-appeal counsel's failure to raise a perjury issue was not objectively unreasonable. Nothing in the record on direct appeal supported a perjury issue. Even if it had been established at trial that Lusk told the emergency room nurse that he did not know who shot him, this prior statement was nothing more than a prior (possibly) inconsistent statement that the jury could consider in evaluating Lusk's testimony. Inconsistent statements do not always spell perjury; the two cannot be equated. *People v. Amos*, 204 Ill. App. 3d 75, 85 (1990). The possible inconsistency between Lusk's alleged statement to the nurse, on the one hand, and his trial testimony, on the other hand, does not demonstrate clearly and convincingly that the testimony was willfully and purposely false so as to constitute perjury. See, *e.g.*, *People v. Pardo*, 83 Ill. App. 3d 556, 562 (1980) (describing nature of perjury). A perjury argument definitely would not have resulted in a successful direct appeal.

¶ 18 The second claim in defendant's postconviction petition was that the procedures surrounding a photo array employed by the police were impermissibly suggestive and the circuit court should have suppressed evidence of pretrial identifications of defendant based on the array. Defendant did not offer any specifics as to how the procedures were "suggestive." The array, which is part of the record on appeal, consisted of six photographs of black men; all of the men appeared to be in their mid-20s to mid-40s; all of the photos were in the same basic format. Nothing about the array itself draws any particular attention to defendant. Nothing in the trial testimony indicated that the police tried to lead witnesses to pick defendant's photograph. This claim was strictly conclusory; it lacked any arguable basis in fact.

¶ 19 The third and final claim in defendant's postconviction petition was that the sentence was imposed as punishment for defendant's exercise of his right to trial. Nothing in the record supports this claim, and defendant did not support it with any evidence outside the record. Instead, defendant merely noted his lack of a significant criminal history, his support of a son, and one or two other factors, and therefrom surmised that the sentence must have been a punishment for demanding a trial.

¶ 20 Defendant was convicted of three counts of aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2006)), an offense categorized as a Class X felony (720 ILCS 5/12-4.2(b) (West 2006)) and therefore punishable by imprisonment for a term of 6 to 30 years (730 ILCS 5/5-8-1(a)(3) (West 2006)). On each of the three counts, defendant was sentenced to 13 years, a term much closer to the minimum term than to the maximum.

Furthermore, the sentence is equal to the sentence that he would have received under the plea offer he rejected before trial, as described by defendant in one of the affidavits he attached to his petition (discussed *infra*). Nothing indicates any impropriety with regard to defendant's sentence. This claim lacked any arguable basis in fact.

¶ 21 Apparently as part of this claim, defendant also faulted the court for considering a jailhouse surveillance video that was played at his sentencing hearing. However, the court, after viewing the video, stated that it "found the video to be very inconclusive, to say the least" and further stated that it "would certainly not be inclined" to consider the video when deciding on a sentence. The record thus indicates that the court did not consider the video when determining defendant's sentence; nothing indicates the contrary.

¶ 22 In defendant's two affidavits, attached to his petition, defendant attempted to present other postconviction claims. This court will address those claims.

¶ 23 Defendant faulted trial counsel for allegedly failing to provide him with a "further explanation" of a 13-year plea offer from the State, a failure that caused defendant to reject the 13-year offer. The sixth amendment right to the effective assistance of counsel applies to the plea-bargaining process. *Hill v. Lockhart*, 474 U.S. 52, 57 (1985). Claims of ineffective assistance of counsel in the context of plea bargaining are governed by the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defendant must establish deficient performance and resulting prejudice). *Hill*, 474 U.S. at 57. A court may dispose of an ineffective-assistance-of-counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance. *Strickland*, 466 U.S. at 697.

¶ 24 In the instant case, defendant did not even attempt to explain what sort of "further explanation regarding the terms [of the State's plea offer]" trial counsel should have provided to him, or how he was prejudiced by counsel's alleged failure to provide the "further explanation." The State's offer was for 13 years. Defendant's actual sentence, after a trial, was 13 years. What "further explanation" counsel should have provided, and what prejudice resulted from defendant's refusal of the plea offer, are not evident from these facts.

¶ 25 In regard to witnesses William Moore and Victoria Toney, defendant alleged in his affidavits that trial counsel "did not fully investigate [Moore and Toney]" and also alleged that the police did not interview them. According to defendant, nobody interviewed Moore or Toney until nearly three years after the shooting, and by that time they were no longer "clear" about what happened the night of the shooting. These allegations are reminiscent of cases in which defendants file postconviction petitions claiming that their trial attorneys provided ineffective assistance by failing to call certain witnesses to testify at trial. In this case, though, both Moore and Toney did in fact testify at defendant's trial, and both testified in support of defendant's alibi defense. Under these circumstances, identifying a constitutional violation concerning witnesses Moore and Toney seems impossible. Certainly the defendant did not offer any help in identifying a constitutional violation. He did not even begin to describe how trial counsel "did not fully investigate" Moore or Toney, or what additional investigation counsel could have performed, or what information a fuller investigation might have yielded. The claims regarding Moore and Toney had no arguable basis.

¶ 26 Defendant asserted that trial counsel did not "properly present the hospital records regarding Fernando Lusk", specifically Lusk's blood alcohol concentration. Lusk was one of the two shooting victims in this case. At trial, Lusk testified for the State that he was working as a bouncer at Club Phoenix during the night of July 18, 2008, and into the early hours of July 19, 2008. According to Lusk, he "[s]ometimes" drank alcoholic beverages after his shift ended. It was "possible" that he drank immediately after his shift of July 18-19, 2008, but he "doubt[ed] it", and he certainly was not intoxicated after the shift. During cross-examination, defense counsel showed Lusk an "outpatient laboratory final report" from the hospital to which Lusk was transported after being shot. Counsel asked Lusk, "And if this document showed that there was alcohol in your system, you wouldn't contest that because you said you may have had a drink or so?", and Lusk replied, "Right." Counsel did not seek to have the laboratory report admitted into evidence.

¶ 27 Defendant attached to his postconviction petition an apparent photocopy of the laboratory report. The report seems to indicate that in the early morning of July 19, 2008, Lusk had a blood alcohol concentration of 5 mg/dL. The report included this printed note: "In the state of Illinois, the toxic concentration of Blood Alcohol is equal to or greater than 80 mg/dL (0.08g/dL)." This document suggests that Lusk, at the time he was shot, had alcohol in his system, but at an extremely low concentration.

¶ 28 Defendant seems to imply that trial counsel should have tried to have the laboratory report admitted into evidence and published to the jury. However, admission and publication of the report would have done nothing more than allow the jury to learn that Lusk had an

extremely low blood alcohol concentration, and it is difficult to imagine that this fact would have significantly diminished Lusk's credibility in the eyes of the jury. Trial counsel was not constitutionally ineffective in his use of the laboratory report.

¶ 29 Defendant's postconviction petition was frivolous and patently without merit, and the circuit court properly dismissed it. Accordingly, OSAD is granted leave to withdraw as defendant's appointed attorney on appeal, and the judgment of the circuit court is affirmed.

¶ 29 Motion to withdraw granted; judgment affirmed.