2017 IL App (1st) 142553-U

No. 1-14-2553

Order filed April 10, 2017

First Division



IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 CR 2281 |
| | ) | |
| JAMES PHILLIPS, | ) | Honorable |
| | ) | Dennis J. Porter, |
| Defendant-Appellant. | ) | Judge Presiding. |

JUSTICE HARRIS delivered the judgment of the court.
Presiding Justice Connors and Justice Mikva concurred in the judgment.

**ORDER**

¶ 1 *Held*: We affirm the trial court's dismissal of defendant's first-stage postconviction petition where defendant failed to present an arguable claim of ineffective assistance of counsel for denying him the right to testify.

¶ 2 Following a bench trial, defendant James Phillips was convicted of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse

and sentenced to consecutive prison terms of eight, eight, and three years, respectively. We affirmed defendant's conviction on direct appeal. See generally *People v. Phillips*, 2014 IL App (1st) 120662-U (unpublished order under Supreme Court Rule 23).

¶ 3 Defendant now appeals from an order of the circuit court of Cook County summarily dismissing his pro se petition for relief under the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)). Petitioner argues that his petition raised an arguable claim of ineffective assistance of counsel where he alleged trial counsel failed to call defendant as a witness despite defendant's desire to testify. For the reasons set forth below, we affirm.

¶ 4 A detailed recitation of the underlying facts in this case is included in our earlier decision. See *People v. Phillips*, 2014 IL App (1st) 120662-U. We will recite the facts necessary to our discussion of the particular issue on appeal. Defendant was charged with four counts of predatory criminal sexual assault of a child, four counts of criminal sexual assault, three counts of aggravated criminal sexual abuse, and six counts of criminal sexual abuse stemming from acts occurring between July 1, 2008 and September 30, 2009.

Before the start of trial, the following colloquy occurred:

> "[THE COURT:] Okay. Jury waiver accepted. I have one more thing to talk to you about. And that is, you have the right to testify in your own defense.
>
> [DEFENDANT:] Yes.
>
> [THE COURT:] That means if you want to testify, you get to testify. It is your call. It is not my call, not the State's call, not your lawyer's call. It is your call. Nobody else but you.

If you want to testify, you can testify. If you don't want to testify, nobody can make you testify. Do you understand?

[DEFENDANT:] Yes, sir.

[THE COURT:] It is up to you, James Phillips, nobody else.

[DEFENDANT:] Yes, sir.

[THE COURT:] Do you understand?

[DEFENDANT:] Yes.

[THE COURT:] All right. So, if I don't talk to you about this anymore, if we get to the end of the trial and your lawyers says you rest, you haven't testified and you want to, you let me know that.

Don't sit over there like a bump on a log and not say anything. I might figure talked [*sic*] and decided not to testify.

Do you understand?

[DEFENDANT:] Yes.

[THE COURT:] It is an important decision. You ought to make it after getting his best advice on the matter, but like I say it is your call. Do you understand?

[DEFENDANT:] Yes. Yes."

¶ 5 At the 2011 trial, D.H. testified that, in 2008 when she was 11 years' old, she would stay "almost every day" at her aunt's, Sheila Hall's, house. D.H. would stay the night with her brother and two sisters. D.H.'s cousin Eric Hall, his infant daughter, and Sheila Hall's ex-boyfriend, defendant, lived in the home. D.H. saw defendant at the home every day but stopped going

"because of [defendant]." Defendant touched D.H. both during the day and night when she was sleeping in a back room. D.H.'s siblings slept in the same room, sometimes in the same bed.

¶ 6 On four separate occasions, defendant touched D.H.'s vagina with his hand, touched her vagina with his penis, touched her vagina with his mouth, and had her hold his penis in her hand. D.H. did not attempt to cry out or wake up her siblings because she was afraid of defendant.

¶ 7 In 2010, D.H.'s cousin, Tanisha Townsend, discovered D.H. crying, prompting D.H. to tell her what defendant had done. She told Townsend that defendant had done this to her about 20 times. D.H. eventually told the police what had happened.

¶ 8 On cross-examination, D.H. testified the room she slept in did not have a door and that others, including Sheila Hall, Eric Hall, and defendant, slept in the same home. She further stated that she told Cynthia Pettis of the Department of Children and Family Services that, when defendant tried to penetrate D.H., she "hollered" for defendant to stop and he complied.

¶ 9 D.H. also stated that she "struggled" and "wriggled" while defendant was touching her, but her siblings did not wake up despite sometimes being in the same bed. D.H. testified that variously the incidents with defendant occurred more than 30 but less than 40 times over the two and a half years D.H. stayed at the Hall house. During this, defendant never threatened her or stated he would hurt D.H. if she told anyone. D.H. also testified that defendant came into her room every other night so there were hundreds of incidents. She told Detective Schmuck that defendant touched her approximately 60 times and not hundreds of times.

¶ 10 On redirect examination, D.H. testified that it wasn't a "holler," it was "like a whisper" so that she would not wake her siblings. Further she stated that Sheila's bedroom door was

always closed. D.H. testified that defendant would "sometimes" cover her mouth and nose with his hand.

¶ 11 On recross-examination, D.H. stated she did not mention that defendant covered her mouth to either Pettis or Schmuck.

¶ 12 Detective Ronald Schmuck testified that, after interviewing D.H. regarding a sexual assault and putting out an investigative alert, he was contacted by defendant in October 2010. Defendant stated that he was out of town and did not know when he would be back but would contact Schmuck immediately when he returned. Defendant never contacted Schmuck again and was arrested on January 17, 2011.

¶ 13 The next day, Schmuck interviewed defendant. Prior to the interview, defendant was in lockup, which has "a very set feeding schedule." Schmuck stated that he did not give defendant a full meal but did provide him with two bags of chips, which defendant ate. Schmuck did not know if defendant ate in lockup, but did know he would have been offered food. Schmuck gave defendant a bottle of water at the beginning of the interview and then another several hours later. The interview lasted several hours and, during this time, Schmuck asked defendant multiple times if he needed food, water, or to use the [bathroom]. During the interview, defendant used the bathroom three or four times. Schmuck did not deny defendant food, drink, or use of the bathroom. He further testified that he did not mistreat defendant.

¶ 14 Defendant initially denied the allegations. After speaking with defendant, Schmuck contacted Assistant State's Attorney Lisa Morrison, who interviewed D.H. at D.H.'s home. Schmuck interviewed D.H. again after defendant initially denied the allegations and "learned more information with each additional interview" with her. Schmuck Mirandized defendant and

interviewed him again. Defendant denied the allegations again but then admitted to the following four incidents: licking D.H.'s vagina in the bathroom of Sheila Hall's home in the summer of 2008, touching the area of her vagina while she was wearing clothes, that his penis touched her vagina as they hugged wearing "short shorts," and later touching her vagina with his penis but not penetrating her because he "realized it was wrong." The first three incidents differed from D.H.'s account, but Schmuck did not confront her about these incidents when he subsequently interviewed her.

¶ 15 Morrison and Schmuck then interviewed defendant, who signed a written statement that was consistent with the inculpatory statement previously given. During defendant's interview with Morrison, defendant described three incidents but stated there could be more because he was "drinking alcohol heavily at the time these incidents were happening." These incidents differed from D.H.'s account, in particular because defendant stated D.H. initiated each incident. Schmuck stated that he confronted defendant with D.H.'s account of penis-vagina and mouth-vagina contact, and that defendant's description of the events were "his take on things." Schmuck testified that the handwritten statement was not consistent with defendant's initial denial.

¶ 16 Assistant State's Attorney Lisa Morrison testified that she interviewed D.H. with Detective Schmuck at D.H.'s home. She then Mirandized and interviewed defendant with Schmuck at the police station. Morrison told defendant that she was not his attorney but was a prosecutor. Defendant stated he understood and spoke with Morrison and Schmuck. During the interview, defendant was not handcuffed, did not indicate he was hungry, did not indicate he

wanted something to drink, and was taken to the bathroom when he indicated he needed to use it. Further, defendant was given a bag of chips and a bottle of water at one point in the interview.

¶ 17 Defendant told Morrison his version of the events. He then indicated outside the presence of Schmuck that he had not been denied food, water, or the use of the bathroom and that no threats or promises were made to induce his statement. Morrison wrote out defendant's statement, which defendant corrected and signed. Morrison then read the statement at trial. In the statement defendant described three incidents: when D.H. kissed him on the lips, when he licked her vagina, and when his penis touched D.H.'s vagina while they were hugging. The statement further indicated defendant was treated "fine" by Schmuck and that his statement was given freely and voluntarily.

¶ 18 On cross-examination, Morrison testified that the interview room contained a bed but no pillow or blanket. Morrison indicated that during D.H.'s interview, D.H. stated there were several incidents in the bathroom but that the majority occurred in the bedroom where she slept. Although D.H. did not describe the incidents defendant admitted to, Morrison believed defendant was putting his own spin on them by trying to blame D.H.

¶ 19 After the State rested its case, defense counsel informed to the trial court that "maybe the defendant" would testify in defendant's case-in-chief.

¶ 20 Defense witness Cynthia Pettis of the Department of Children and Family Services testified that, when she interviewed D.H., D.H. stated she hollered for defendant to stop and that defendant molested her 20 times. Pettis indicated "holler" does not necessarily mean to raise one's voice. Pettis further indicated she informed defendant that she completed the investigation and her recommended finding for the allegations was "unfounded."

¶ 21 Defense witnesses Je'mya and J'nae Williams, D.H.'s sisters, both testified that they never saw defendant in the bedroom they slept in with D.H.

¶ 22 Defense witness Eric Hall testified that he had seen defendant inside the bedroom used by D.H. but not while she was sleeping.

¶ 23 Defense witness Sheila Doyle, also known as Sheila Hall, testified that her niece D.H. and D.H.'s siblings stayed at her home certain nights in the summertime. She stated that she saw defendant in the bedroom with D.H. and her siblings "uncountable" times but never saw him "do anything inappropriate with anybody."

¶ 24 The trial court found defendant guilty of two counts of predatory criminal sexual assault of a child and one count of aggravated criminal sexual abuse with the remaining counts merging. The court found D.H. testified "fairly credibly" and that D.H.'s "lack of immediate outcry" was understandable given her age. It further noted that defendant's written statement and statements to police were "highly corroborative" of D.H.'s testimony and that it appeared defendant was attempting to minimize his role in the incidents. It sentenced defendant to consecutive prison terms of eight, eight, and three years.

¶ 25 On direct appeal, defendant argued his trial counsel was ineffective for failing to file a motion to suppress his statement as involuntary because he went "without adequate food or sleep and after multiple interrogations." *People v. Phillips*, 2014 IL App (1st) 120662-U, ¶ 24. We affirmed defendant's conviction. *Id.* ¶ 28.

¶ 26 Relevant here, defendant filed a verified *pro se* postconviction petition alleging, *inter alia*, that his trial counsel was ineffective by preventing him from exercising his right to testify at trial. Specifically, he alleged "trial counsel failed to call Defendant as a witness at trial which

defendant told his counsel's [*sic*] to call him as a witness trial counsel's [*sic*] refused to call defendant to testify." He also alleged that "Detective Schmuck did threaten and promises [*sic*] defendant something" and that "Detective Schmuck force [*sic*] defendant into making a false statement doing [*sic*] interrogation." The trial court summarily dismissed the petition as frivolous and patently without merit and, further, barred by *res judicata* or waiver.

¶ 27 On appeal, defendant argues the trial court erred in summarily dismissing his postconviction petition in the first stage of the proceedings. Specifically, he contends that trial counsel was ineffective when he failed to call him to testify and thus, prevented him from establishing that his custodial statements were false and coerced because Detective Schmuck threatened him.

¶ 28 The Post-Conviction Hearing Act provides a procedural mechanism for a defendant to assert a substantial denial of his constitutional rights in the underlying proceedings giving rise to his conviction. 725 ILCS 5/122-1 (West 2014); *People v. Tate*, 2012 IL 112214, ¶ 8. At the first stage of the proceedings, the trial court examines the petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). If the petition has no arguable basis in either law or fact, it should be summarily dismissed as frivolous or patently without merit. *Tate*, 2012 IL 112214, ¶ 9. A petition lacks an arguable basis in law or fact when it is based on "an indisputably meritless legal theory or a fanciful factual allegation." *Hodges*, 234 Ill. 2d at 16. Allegations are fanciful when they are "fantastic or delusional," while an indisputably meritless legal theory is one that is completely contradicted by the record. *Id.* at 16-17.

¶ 29 In order to state a claim for ineffective assistance of counsel, the defendant must show both that counsel's performance was objectively unreasonable and that he was prejudiced as a result of counsel's performance. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). In order to prevail on his ineffective assistance of counsel claim, the defendant must establish both prongs. See *People v. Colon*, 225 Ill. 2d 125, 135 (2007). "That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel's performance was deficient." *People v. Graham*, 206 Ill. 2d 465, 476 (2003).

¶ 30 In the context of a first-stage postconviction proceeding, the petition 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." *Hodges*, 234 Ill. 2d at 17. We review *de novo* the summary dismissal of a postconviction petition. *Id.* at ¶ 10.

¶ 31 Defendant argues trial counsel was ineffective because he refused to allow defendant to testify. A defendant has a fundamental constitutional right to testify at trial. *People v. Madej*, 177 Ill. 2d 116, 146 (1997), *overruled in part on other grounds People v. Coleman*, 183 Ill. 2d 366 (1998); *People v. Weatherspoon*, 394 Ill. App 3d 839, 855 (2009). The decision to testify ultimately rests with the defendant alone and is not considered to be a matter of trial strategy left to trial counsel. *People v. Brown*, 336 Ill. App. 3d 711, 719 (2002). Although this decision is made with the advice of counsel, only the defendant can determine whether or not to testify. *Id.* Trial counsel's undue interference with defendant's right to testify can constitute ineffective assistance of counsel if counsel refused to allow defendant to testify. See *People v. Youngblood*, 389 Ill. App. 3d 209, 217 (2009). The dismissal of a postconviction claim that trial counsel was ineffective for not allowing the defendant to testify must be affirmed unless the defendant made

a " 'contemporaneous assertion *** of his right to testify' " during trial. *Id.* (citing *People v. Brown*, 54 Ill. 2d 21, 24 (1973).

¶ 32 As an initial matter, the trial court concluded that defendant had forfeited his claim by failing to raise it in his direct appeal. As a postconviction petition is a collateral attack on the trial court proceedings and not an appeal from the judgment of conviction, "issues raised and decided on direct appeal are barred by *res judicata*, and issues that could have been raised but were not are forfeited." *Tate*, 2012 IL 112214, ¶ 8. A postconviction claim that depends on matters outside the record is not ordinarily forfeited as claims outside the record cannot be brought on direct appeal. *Cf. People v. Jones*, 364 Ill. App. 3d 1, 5 (2005) ("[a]s petitioner's claim is based on matters outside the record, waiver does not bar his ineffective assistance claims"). Here, defendant's claim that he was deprived of his right to testify could not have been raised on direct appeal because it is based on personal, off-the-record discussions between defendant and his trial counsel. Thus, forfeiture does not prohibit consideration of his claim.

¶ 33 Turning to the merits of the postconviction petition, we find the trial court did not err in summarily dismissing the petition. In the postconviction petition, defendant states "trial counsel failed to call Defendant as a witness at trial which defendant told his counsel's [*sic*] to call him as a witness trial counsel's [*sic*] refused to call defendant to testify." However, the petition is silent as to when defendant had this discussion with counsel. A postconviction petition must allege that defendant contemporaneously asserted his right to testify. *People v. Enis*, 194 Ill. 2d 361, 399-400 (2001). If a defendant expresses his desire to testify prior to trial but then remains silent when his counsel rests the case without calling him to testify, he is deemed to have "acquiesced in counsel's view that defendant should not take the stand." *Id.* at 399. Nowhere in

the petition does defendant claim that, when the time came for him to testify at trial, he told his lawyer that he wanted to testify, despite counsel's urging to the contrary. As his petition, contains no allegation that he made any such assertion during trial, he has failed to state the gist of a claim that his right to testify was violated by counsel. *Youngblood,* 389 Ill. App. 3d at 217.

¶ 34 The petition does not allege that, during trial, defendant made an assertion of his right to testify despite defendant's pretrial colloquy with the trial court, wherein the court fully explained his right to testify and he told the court he would let it know if he wished to testify. Defendant having failed to allege that he made a contemporaneous assertion of his right to testify during his trial, we find that dismissal of defendant's claim is proper. See *Youngblood*, 389 Ill. App. 3d at 217; *People v. Thompkins*, 161 Ill. 2d 148, 178 (1994) (" 'In the absence of a contemporaneous assertion by the defendant of his right to testify, the trial judge properly denied an evidentiary hearing.' " (quoting *People v. Brown,* 54 Ill. 2d 21, 24 (1973))).

¶ 35 With respect to the prejudice prong of an ineffective assistance of counsel claim, defendant argues that where there is an unrebutted allegation that defendant's right to testify was violated, showing of arguable prejudice is unnecessary. We disagree. Our supreme court has decided such cases on the prejudice prong alone. See *Madej*, 177 Ill. 2d at 146, *overruled in part on other grounds Coleman*, 183 Ill. 2d at 388. We therefore may determine defendant's ineffective assistance of counsel claim based upon the prejudice prong.

¶ 36 We cannot find that defendant was arguably prejudiced by his trial counsel's performance and thus, affirm the dismissal of his postconviction petition on this basis as well. Defendant argues that if he were called as a witness, he would testify that "his custodial statements were false and coerced" and to the "circumstances under which those statements were made."

Defendant then contends that, without the inculpatory statements, D.H. would be far less credible to the trial court because her testimony was "fraught with inconsistencies." Defendant then proceeds into a lengthy sufficiency of the evidence argument. This argument is unconvincing.

¶ 37 Defendant's argument that his custodial statements were "false and coerced" is conclusory and devoid of any supporting facts. See *People v. Delton*, 227 Ill. 2d 247, 258 (2008) (finding broad conclusory allegations are not permitted even at the first stage of the proceedings). Further, even taking the other allegations in defendant's postconviction petition as true and construing them liberally, it is unclear what defendant would have testified to at trial. In his postconviction petition, he merely alleges, among other things, that "Detective Schmuck did threaten and promises [*sic*] defendant something" and that "Detective Schmuck force [*sic*] defendant into making a false statement doing [*sic*] interrogation."

¶ 38 Even liberally construing defendant's postconviction petition to infer he would testify to this, these allegations are directly rebutted by the record. Schmuck testified that he did not mistreat defendant during the interview. Further, Morrison testified that, outside the presence of Schmuck, defendant told her no threats or promises were made to induce his statement. Defendant also corrected and signed the written statement, wherein he indicated he was treated "fine" by Schmuck and that his statement was given freely and voluntarily. Finally, defendant never alleges that he would testify that he did not commit any of the actions giving rise to criminal charges against him. Given the inadequacy of defendant's allegations and with the allegations affirmatively rebutted by the record, we cannot say defendant was arguably prejudiced by not testifying at trial.

¶ 39 Defendant contends that, without his custodial statements, there is nothing to corroborate D.H.'s testimony. He then proceeds to argue the sufficiency of the evidence by noting D.H.'s testimony is "fraught with inconsistencies" and "hard to believe," and recounts D.H.'s conflicting testimony at trial. However, this is the same argument the trial court heard and rejected at trial. Additionally, we held the following in defendant's direct appeal:

> "Moreover, while defendant argues at length that his statement was the only evidence against him other than D.H.'s own testimony," that testimony was sufficient to convict him absent his statement so that there is no prejudice from the absence of a motion to suppress. While defendant notes discrepancies and contradictions in D.H.'s testimony, the trial court twice acknowledged them and found her a credible witness nonetheless. While defendant argues that D.H.'s account was uncorroborated, there was some corroboration in that she reported defendant's actions only when prompted by cousin Townsend finding her crying—circumstances that tend to weigh against the prospect that she was "framing" defendant. Lastly, while no witness from the Hall home corroborated the incidents described by D.H., she clearly testified that they occurred when everyone else was asleep, that she made no noise during the incidents, and that defendant had put his hand on her mouth to ensure so." *People v. Phillips*, 2014 IL App (1st) 120662-U, ¶ 27.

¶ 40 We therefore have already addressed defendant's contentions and determined that D.H.'s testimony, standing alone, was sufficient to convict defendant.

¶ 41 Lastly, defendant argues that *People v. Brown*, 336 Ill. App. 3d 711 (2002), and *People v. Dredge*, 148 Ill. App. 3d 911 (1986), control the case at bar. We disagree. Defendant notes

that, in those cases, the postconviction petitions were remanded for further proceedings on the defendants' mere claims that trial counsel violated their right to testify at trial, without supporting affidavits attached. See *Brown*, 336 Ill. App. 3d at 715, 722; see *Dredge*, 148 Ill. App. 3d at 912, 913-14. However, neither *Brown* nor *Dredge* address the rule that a petition must state the defendant contemporaneously raised his right to testify during trial. See *Youngblood*, 389 Ill. App. 3d at 217.

¶ 42 *Brown* is also distinguishable in that the defendant's original petition admittedly contained conclusory allegations on the ineffective assistance of counsel issue, but he filed it with an explanation that an amended petition sufficiently raising the gist of a constitutional claim would be forthcoming. *Brown*, 336 Ill. App. 3d at 720. An amended petition was filed but this court noted that it was unclear from the record whether the trial court "implicitly denied petitioner's request to amend or simply refused to address it." *Id*. at 720-721. Given the exculpatory nature of two affidavits from witnesses trial counsel did not call to testify as well as the defendant's allegation that he also wanted to testify but was prevented from doing so, information that was part of the amended petition which the trial court did not consider, this court found that the defendant's petition should move forward "[g]iven the rather unique circumstances of this case." *Id*. The reasoning in *Brown* is inapplicable here.

¶ 43 In *Dredge*, the court acknowledged that the defendant's allegation that she was deprived of her right to testify was unsworn and conclusory in nature. *Dredge*, 148 Ill. App. 3d at 913. The court noted, however, that her petition was verified and, "coupled with the fact that defendant's allegation that she was deprived of her right to testify at her trial is uncontradicted by anything appearing in the trial record," her petition sufficiently presented a gist of a

constitutional claim meriting further proceedings. *Id*. Here, the record shows that the court extensively admonished defendant on his right to testify and pressed the importance of this decision, which was defendant's alone to make. The court repeatedly told defendant to let it know if he wanted to testify, even if his counsel remained silent on the issue, or the court would assume defendant chose not to testify. Defendant agreed and responded that he understood. He never informed the court that he wanted to testify. We further note that more recent decisions have questioned the validity of *Dredge*. See *Youngblood*, 389 Ill. App. 3d at 219 (declining to follow *Dredge*); *People v. Hernandez*, 351 Ill. App. 3d 28, 34 (2009) (noting *Dredge* is suspect in light of our supreme court's decision in *People v. Collins*, 202 Ill. 2d 59, 66-69 (2002)).

¶ 44 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County.

¶ 45 Affirmed.