2017 IL App (1st) 151227-U

No. 1-15-1227

Order filed December 12, 2017

Second 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. 10 CR 7883
	)	
LARRY FONDREN,	)	Honorable
	)	Gregory Robert Ginex,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Neville and Justice Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's summary dismissal of defendant's *pro se* postconviction petition affirmed where his allegation of ineffective assistance of appellate counsel is without merit.

¶ 2 Defendant Larry Fondren appeals from an order of the circuit court of Cook County summarily dismissing his *pro se* postconviction petition as frivolous and patently without merit. On appeal, defendant contends that the court erred in dismissing his petition because he presented an arguable claim that his appellate counsel rendered ineffective assistance when she

did not assert on direct appeal that the State failed to prove beyond a reasonable doubt that he had the specific intent to kill his wife. We affirm.

¶ 3 It is undisputed that on March 31, 2010, defendant shot his wife, Gwendolyn Willhite, in the stomach. Defendant was charged with attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, aggravated domestic battery, and aggravated unlawful use of a weapon. The record shows that the defense theory at trial was that defendant did not have the specific intent to kill his wife.

¶ 4 At the bench trial, Willhite testified that she filed for divorce from defendant in December 2009, and he learned of those proceedings in January 2010. On March 31, Willhite returned home from school about 8:30 p.m. She walked into the bedroom to retrieve some clothes and saw defendant sitting at the head of the bed with his hands underneath a pillow. He had a "crazy look in his eye" and accused Willhite of having an affair. Willhite became frightened and left the room.

¶ 5 Shortly thereafter, Willhite reentered the bedroom and retrieved her clothes. Defendant was standing at the closet, then returned to his same position on the bed. As Willhite walked past the foot of the bed towards the bedroom door, defendant held up his right hand, covered by the pillow, and fired gunshots at her. Willhite said "[o]h, my God, Larry, what are you doing?" Defendant then rose from the bed and walked towards her, still with his hands underneath the pillow. Willhite walked backwards into the wall, felt a burning sensation below her heart, and realized she had been shot. Willhite threw her hair up over her head, slid down the wall, and "played dead." Defendant walked to the foot of the bed, extended his right hand, pointed the gun at Willhite's head, and fired another gunshot. Willhite heard the bullet pass over her head and

strike the wall. The couple's son then entered the bedroom, and defendant fled from the house. Willhite testified that she has a scar directly below her heart where the bullet entered her body, and an exit wound on her left side. Willhite repeatedly testified that she heard defendant fire three gunshots at her – two when she was standing, and the third one that passed over her head.

¶ 6 Larry Fondren, Jr. (hereinafter Fondren Jr.), the couple's adult son, testified that when he arrived home on the night of the shooting, his mother was in the house, and defendant was in the garage working on a car. Fondren Jr. claimed that the first time he saw that his mother had been shot was when the paramedics brought her onto the porch. He denied that he had been inside the house. The court then granted the State's request to declare Fondren Jr. a hostile witness. Fondren Jr. acknowledged that he was home about 8:30 p.m. He denied arguing with his father that evening. He denied seeing his parents enter the bedroom. He denied ever seeing his father with a .380-caliber handgun and denied hearing gunshots in the house that night. He denied that he ran into the bedroom and saw his father holding a gun and his mother shot in the stomach on the floor. He heard his parents arguing, but maintained that he learned his mother had been shot when the paramedics brought her outside.

¶ 7 Fondren Jr. did not recall speaking with a police officer at the house. He did not recall telling the officer "my motherfucking father just shot my mother. You better go get his ass." Nor did he recall telling the officer "you better find that bitch before I do. I'm going to kill that bitch." Fondren Jr. did not recall calling 911 and saying that his father had just shot his mother. Nor did he recall saying that if they did not come quickly that he was going to kill his father. The prosecutor advised Fondren Jr. that there was a tape of his 911 call. He maintained that he did not recall calling 911. He denied having a phone at that time. The State played the 911 tape in

court to refresh Fondren Jr.'s recollection. Fondren Jr. denied that it was his voice on the 911 call. Fondren Jr. testified that he has an adult brother, Josiah, who was also at the house on the night of the shooting when the police arrived. Fondren Jr. denied arguing with his father about a gun, and denied looking for a gun in the closet. He testified that he did not know his father had a gun.

¶ 8 Bellwood police officer Warren Hernandez arrived at the scene and saw a few people standing in front of the house. Fondren Jr. was standing on the front stairs screaming into his cell phone. Fondren Jr. was irate and agitated, and initially would not answer Hernandez when asked what happened. Fondren Jr. eventually said "[t]hat motherfucker just shot my mother. You better get that bitch before I do." Hernandez then entered the home and found Willhite sitting on the bedroom floor, slumped against the wall, with a bullet hole in her stomach. He observed a second bullet hole in the wall about one inch from Willhite's head. Willhite told Hernandez that defendant shot her. After paramedics arrived, Hernandez went outside and was approached by Alfonso Gibbs. Based on their conversation, Hernandez drove to the home of Patricia Washington. Hernandez spoke briefly with Washington. Defendant then exited the house and was placed under arrest. On cross-examination, Hernandez acknowledged that Gibbs told him that he had spoken with defendant, and that defendant wanted to surrender to police.

¶ 9 Shortly after 8:30 p.m. on March 31, Alfonso Gibbs received a phone call from his friend, Patricia Washington. On the way to Washington's home, Gibbs saw several police cars at defendant's house. He stopped and told police that he knew where defendant was. The police drove Gibbs to Washington's house. Gibbs entered Washington's home and observed defendant sitting on a chair crying. Defendant told Gibbs "I think I messed up." Defendant also said that he

was tired and he did not know why he did what he did. Gibbs brought defendant outside and the police placed him under arrest.

¶ 10 Evidence technician David Martin searched the bedroom, which he described as "quite messy" with "lots of clothing, lots of debris strewn about it." Martin observed one bullet hole in the wall and recovered one spent shell casing from the floor near the closet. The following day, Bellwood police officer John Trevarthen recovered defendant's handgun, containing four live rounds, from a dumpster next to a fence that ran along an alley. Police also recovered the pillow from a chair in defendant's backyard.

¶ 11 Bellwood police commander Jiminez Allen testified that defendant gave a written statement to assistant State's Attorney (ASA) Ramon Moore. Defendant stated that Willhite no longer respected him, and he believed that she was seeing another man. On the night of the shooting, defendant and Willhite were arguing in the bedroom. Willhite said she and the kids were leaving the house. Defendant replied that he would leave. He went to the closet, noticed that his clothes were rearranged, and thought his son had taken his gun. He found his gun and covered it with a pillow so Willhite could not see it. Willhite was still yelling at him and called him a derogatory name. Defendant stated that he then "snapped and went into a rage." Defendant pointed the gun covered by the pillow at Willhite as she stood on the side of the bed. He pulled the trigger and fired a shot that missed her and struck the wall. Willhite fell to the floor. Defendant then pointed the gun towards the floor by Willhite and fired a second shot. Their son ran into the bedroom, and defendant fled from the house. Defendant ran through several yards, jumped several fences, and threw the gun in an alley. He ran to the house of his friend, Patricia Washington, and told her that he argued with Willhite and fired the gun in the house.

¶ 12 Following the State's case, defendant moved for a directed finding as to the counts for attempted first degree murder and aggravated unlawful use of a weapon (AUUW). The State acknowledged that the AUUW counts charged defendant with carrying a weapon in a motor vehicle, and that clearly no motor vehicle was involved in this case. Accordingly, the court found defendant not guilty of the AUUW counts. As to the attempted murder counts, defense counsel argued that the State failed to prove that defendant had the specific intent to kill his wife. The trial court reviewed the State's evidence and denied defendant's motion.

¶ 13 Defendant testified that he owned a 380 pistol that he kept in the garage because Willhite would not allow it in the house. In December 2009, he moved the gun to his bedroom closet because he was going on vacation and did not want his son to find it in the garage. When he returned from vacation, he loaded five bullets into the gun, and kept it in a box in the closet.

¶ 14 On March 31, 2010, defendant and Willhite were having difficulties in their marriage. When Willhite did not return home from work at her usual time, defendant called her and asked where she was. Willhite replied that it was none of his business and hung up. When he called her back, she did not answer. Defendant drank about half a pint each of vodka and cognac. When Willhite came home about 8:30 p.m., she and defendant argued in the bedroom about her whereabouts. Willhite left the room. She returned 20 minutes later and they continued arguing. Willhite said she was going to take their daughters and leave the house. Defendant replied that he would leave instead. He rose from the bed, went to his closet to get some clothes, and noticed that his clothes were disorganized. He checked to insure that his gun was still there. He removed the gun from the box, covered it with clothing, and sat back down on the bed. He covered the

gun because Willhite did not want it in the house, and if she saw it, it would cause more arguments.

¶ 15 As they continued arguing, defendant got up and walked to the edge of the bed. He held the gun in his right hand and covered it with a pillow because he did not want her to see it. He was not pointing or aiming the gun at Willhite. Defendant then heard the gun discharge. He did not recall pulling the trigger, nor how many times it discharged. Willhite was standing near the closet and window, and after the gun discharged, she sat down on the floor. Willhite asked "Larry, what did you do?" Their son then entered the room and said "Pops, you shot mom." Defendant did not know that he had shot Willhite. He then panicked and ran from the house carrying the pistol and the pillow. He threw the pillow in the backyard. As he ran down an alley, he threw the gun over a fence. Defendant ran six or seven blocks to Washington's house. When Gibbs arrived there, defendant went outside and surrendered to police.

¶ 16 Defendant opined that he fired the gun only once because he previously loaded it with five bullets, and there were four bullets remaining when police recovered the weapon. Defendant testified that he did not intend to shoot or kill his wife.

¶ 17 On cross-examination, defendant denied accusing his wife of having an affair. He knew, however, that she was not at school that night because she had already completed her degree. Defendant acknowledged that he was upset because Willhite would not tell him where she was. Defendant testified that he could not recall many of the statements in his written statement. He claimed that he was in a lot of pain when he gave his statement because he injured his ankle when he jumped over a fence.

¶ 18 In rebuttal, the State called ASA Moore, who verified that defendant made the statements contained in his written statement. Defendant never stated that he was in pain from injuring his ankle while he fled the scene.

¶ 19 The trial court found that the fact that defendant did not try to assist his wife, but instead, ran from the scene, threw the pillow away, and threw the gun in a dumpster showed his "clear intent." The court further found that the proximity of defendant and Willhite in the bedroom, and the fact that he moved from the bed to fire the second shot, showed that the shooting was intentional. The trial court found defendant guilty of attempted first degree murder, aggravated battery with a firearm, aggravated discharge of a firearm, and aggravated domestic battery.

¶ 20 Defendant filed a motion for a new trial and attached an affidavit from Willhite. In it, Willhite averred that on the night of the shooting, defendant had been drinking and appeared to be "not in his right mind." She did not believe that defendant intended to kill her, but instead, that he shot her due to his psychological and emotional condition which resulted from a combination of anti-depressants, alcohol, and their argument which she provoked. The trial court denied defendant's motion, stating "[t]he evidence in this case shows a deliberate thought out process of someone who was attempting to hide a weapon and then fire that weapon and fire it again intending to kill someone, not a sudden and intense passion where the gun just happened to be there." The court then merged all of the convictions into the attempted murder conviction and sentenced defendant to the minimum term of 31 years' imprisonment.

¶ 21 On direct appeal, the parties filed an agreed motion for summary disposition requesting that defendant's mittimus be corrected. This court granted that motion. *People v. Fondren*, No. 1-13-0629 (2014) (dispositional order).

¶ 22 On November 13, 2014, defendant filed the instant petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2014)). On appeal, defendant only challenges his claim that appellate counsel rendered ineffective assistance when she did not argue that the State failed to prove beyond a reasonable doubt that he had a specific intent to kill his wife. Defendant asserts in his petition that he never intended to shoot Willhite, but instead, that he acted under a sudden and intense passion that was provoked by Willhite's remarks during their argument. He also claims that the evidence showed that only one shot was fired because only one shell casing was recovered.

¶ 23 The circuit court found that the allegations raised in defendant's postconviction petition were meritless and completely rebutted by the trial record. The court specifically found that appellate counsel's decision not to challenge the sufficiency of the evidence was not ineffective assistance because defendant's conviction would not have been reversed. The court acknowledged that only one bullet casing was recovered, but pointed out that photographs showed that the bedroom was a "mess," and that the other casing could have gone anywhere. The court also noted that defendant admitted in his statement that he waited for his wife because he thought she was having an affair, and that he fired the gun twice. The court concluded that defendant's postconviction petition had no arguable basis in law or fact, and summarily dismissed it as frivolous and patently without merit.

¶ 24 On appeal, defendant contends that the circuit court erred when it dismissed his postconviction petition because he presented an arguable claim that appellate counsel rendered ineffective assistance when she did not argue that the State failed to prove beyond a reasonable doubt that he had the specific intent to kill his wife. Defendant claims that the physical evidence

consisting of a single shell casing and one hole in the wall shows that he fired only one shot. He further claims that he had a plausible reason for concealing the gun because Willhite did not want it inside the house. He also argues that the State did not provide any reason why he would want to kill Willhite, and notes that she stated in her affidavit that she did not believe he intended to do so. Defendant claims that the strongest indicator that he lacked intent to kill is the fact that he failed to complete the murder when nothing prevented him from doing so. Defendant asserts that a challenge to the sufficiency of the evidence was arguably meritorious, and thus, he was prejudiced by counsel's failure to raise the issue.

¶ 25 The State responds that the circuit court's summary dismissal of defendant's petition was proper because defendant's allegation is without arguable merit. The State asserts that counsel made a reasonable strategic decision that a challenge to the sufficiency of the evidence would not have been meritorious because the evidence of defendant's intent to kill was overwhelming.

¶ 26 We review the circuit court's summary dismissal of defendant's postconviction petition *de novo*. *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998). The Act provides a process whereby a prisoner can file a petition asserting that his conviction was the result of a substantial denial of his constitutional rights. 725 ILCS 5/122-1 (West 2014); *Coleman*, 183 Ill. 2d at 378-79. Our supreme court has held that a petition may be summarily dismissed as 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). A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id*. A legal theory that is completely contradicted by the record is indisputably meritless. *Id*.

¶ 27 Claims of ineffective assistance of appellate counsel are evaluated using the two-prong test handed down by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Harris*, 206 Ill. 2d 293, 326 (2002). To succeed, defendant must show that counsel's failure to raise the issue on direct appeal was objectively unreasonable, and that he was prejudiced by this decision. *Id.* In other words, defendant must establish that, but for counsel's error, there is a reasonable probability that his appeal would have been successful. *People v. Petrenko*, 237 Ill. 2d 490, 497 (2010). However, at the first stage of postconviction proceedings, allegations of ineffective assistance of counsel are judged by a lower pleading standard, and a petition raising such claims may not be summarily dismissed if it is arguable that counsel's performance fell below an objective standard of reasonableness, and it is arguable that defendant was prejudiced. *People v. Tate*, 2012 IL 112214, ¶¶ 19-20.

¶ 28 Appellate counsel is not required to raise every conceivable issue on direct appeal, and if counsel concludes an issue is without merit, then his decision to refrain from raising it is not incompetence, unless his appraisal of the merits was patently erroneous. *People v. Smith*, 195 Ill. 2d 179, 190 (2000). Generally, counsel's decision not to raise an issue on appeal is given substantial deference. *Harris*, 206 Ill. 2d at 326. Unless the underlying issue is meritorious, defendant was not prejudiced by counsel's failure to raise it on direct appeal. *People v. Barrow*, 195 Ill. 2d 506, 523 (2001).

¶ 29 To prove defendant guilty of attempted murder in this case, the State was required to show that, without lawful justification and with an intent to kill, defendant shot Willhite about her body, constituting a substantial step towards committing first degree murder. 720 ILCS 5/8-4(a) (West 2010); 720 ILCS 5/9-1(a)(1) (West 2010). An intent to kill can be established by

evidence of the surrounding circumstances including the character of the assault, use of a deadly weapon, and other matters from which such intent can be inferred. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 39. Defendant's intent to kill can be inferred when it is shown that he willingly and voluntarily committed an act, the natural tendency of which is to destroy another person's life. *Id.* An intent to kill can be proven where the surrounding circumstances show that defendant fired a gun at or towards another person with malice or a total disregard for human life. *Id.* "This court has previously found that '[t]he very fact of firing a gun at a person supports the conclusion that the person doing so acted with an intent to kill.' " *Id.* (quoting *People v. Ephraim*, 323 Ill. App. 3d 1097, 1110 (2001)). Whether defendant had an intent to kill is a determination for the trier of fact, and on appeal, that finding will not be disturbed unless there is a reasonable doubt as to defendant's guilt. *Id.*

¶ 30 In this case, the record reveals that appellate counsel did not render ineffective assistance when she did not argue that the State failed to prove that defendant intended to kill his wife because the issue was without merit. The evidence presented at trial was sufficient for the trial court to find that defendant had the specific intent to kill his wife, and if challenged on direct appeal, defendant's conviction for attempted murder would not have been reversed.

¶ 31 The evidence showed that defendant sat at the head of the bed holding a loaded gun hidden underneath a pillow, and waited for Willhite to enter the room. As Willhite walked past the foot of the bed, defendant raised the gun, covered by the pillow, and fired gunshots at her. He then rose from the bed and walked towards Willhite, still holding the gun underneath the pillow. As Willhite "played dead," defendant walked to the foot of the bed, extended his right hand, pointed the gun at Willhite's head, and fired another gunshot. The evidence showed that gunshot

struck the wall just one inch from Willhite's head. In addition, defendant admitted in his written statement that he "snapped and went into a rage." He stated that he pointed the gun covered by the pillow at Willhite and pulled the trigger. He further stated that after Willhite fell to the floor, he pointed the gun towards the floor by her and fired a second shot. This evidence clearly showed that defendant intentionally fired at least two gunshots directly at Willhite. The trial court could therefore reasonably infer that he intended to kill her.

¶ 32 We reject defendant's claim that the physical evidence showed that he fired only one gunshot. There was not one, but two bullet holes found in this case – the bullet hole in the wall and the entry wound to Willhite's stomach. The fact that only one shell casing was recovered is of no import. As the circuit court noted, the bedroom was "messy" with clothing and debris strewn about, and the other casing could have gone anywhere.

¶ 33 Nor are we persuaded by defendant's argument that he concealed the gun because Willhite did not want it inside the house, and he did not want to cause an additional argument. Accordingly to defendant's own testimony, the gun was hidden in a box inside his closet. When defendant went to the closet to get his clothes, he checked to insure that the gun was still there. It was. Rather than leaving it secreted in the closet, defendant removed the gun from the box, covered it, and returned to the bed. If he did not want Willhite to know the gun was in the house, he simply would have left it hidden in the closet. His actions show that he intended to use the gun, and that he did not want Willhite to know that he was armed.

¶ 34 Defendant's claim that the State did not provide a reason or motive for why he would want to kill Willhite is contradicted by the record. The evidence showed that defendant believed that Willhite was having an affair. She had filed for divorce, refused to tell him her whereabouts,

and did not answer his calls. Defendant admitted that he was angry over these matters, and when Willhite called him a derogatory name, he "snapped and went into a rage."

¶ 35 Finally, the fact that defendant failed to complete the murder does not show that he lacked the intent to do so. Abandonment is not a defense to criminal attempt. *People v. Winters*, 151 Ill. App. 3d 42, 406 (1986). " '[T]he fact that an assailant, armed with a deadly weapon, chooses to flee *** rather than choosing to inflict a fatal injury, does not negate the existence of the intent to kill.' " *Id.* at 409 (quoting *People v. Maxwell*, 130 Ill. App. 3d 212, 217 (1985)).

¶ 36 Here, defendant missed shooting Willhite in the head by one inch. The fact that she threw her hair up as she slid down the wall may have saved her life. The evidence shows that after that shot, their son ran into the room, said "Pops, you shot mom," and defendant then fled the house. Their son's sudden appearance prevented defendant from firing additional shots. The fact that defendant did not complete the murder is of no significance.

¶ 37 The record therefore demonstrates that the evidence was sufficient for the trial court to find, and the court did in fact clearly find, that defendant had the specific intent to kill Willhite. Based on this record, appellate counsel's determination that there was no merit in a challenge to the sufficiency of the evidence based on a lack of intent to kill was not patently erroneous. Had counsel raised the issue on direct appeal, it would not have been successful. As a result, defendant's claim that appellate counsel was ineffective for failing to raise the issue on direct appeal provides no arguable basis that counsel's performance fell below an objective standard of reasonableness, or that he suffered prejudice. *Tate*, 2012 IL 112214, ¶¶ 19-20. Accordingly, the circuit court's summary dismissal of defendant's postconviction petition was proper.

¶ 38 For these reasons, we affirm the judgment of the circuit court of Cook County summarily dismissing defendant's postconviction petition.

¶ 39 Affirmed.