2018 IL App (1st) 152153-U

No. 1-15-2153

Order filed July 16, 2018

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. 09 CR 14631
	)	
TOMMIE NAYLOR,	)	Honorable
	)	Domenica A. Stephenson,
Defendant-Appellant.	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: We affirm the summary dismissal of defendant's postconviction petition where defendant failed to raise an arguable claim of ineffective assistance of trial counsel for failing to investigate his mental health or request a fitness hearing prior to trial.

¶ 2 Defendant Tommie Naylor appeals the summary dismissal of his petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that

the trial court erroneously dismissed his petition where he stated the gist of a claim of ineffective assistance of trial counsel for failure to investigate his mental health and request a fitness hearing prior to trial. For the following reasons, we affirm.

¶ 3 Following a 2011 jury trial, defendant was convicted of aggravated criminal sexual assault (720 ILCS 5/12-14(a)(1) (West 2008) (recodified at 720 ILCS 5/11-1.30(a)(3) (effective July 28, 2016)) and aggravated kidnaping (720 ILCS 5/10-2(a)(3) (West 2008)), and sentenced to consecutive prison terms of 30 years and 10 years. We set forth the facts of the case in defendant's direct appeal (*People v. Naylor*, 2014 IL App (1st) 113005-U), and we recite them here to the extent necessary to our disposition.

¶ 4 The record shows that defendant was arrested on July 1, 2009, and charged with four counts of aggravated criminal sexual assault, four counts of aggravated kidnapping, criminal sexual assault, two counts of kidnapping, and unlawful restraint of the victim, C.B.

¶ 5 Following a pretrial hearing, the court allowed the State to present proof of other crimes, specifically the sexual assaults of T.B., S.W., S.D., and T.H., pursuant to section 115-7.3 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-7.3 (West 2008)).

¶ 6 The evidence at trial established that, on November 12, 2008, while holding "something sharp," defendant forced 15-year-old C.B. into his parked vehicle. Once inside, defendant forced his penis into C.B.'s vagina. Following the assault, C.B. was transported to the hospital where a sexual assault kit was collected. C.B. later identified defendant in a photographic array and a physical lineup.

¶ 7 The sexual assault kit was sent to the Illinois State Police Laboratory and the swabs from the kit tested positive for the presence of semen. The DNA profile found in the semen was

connected to another sexual assault investigation, although the forensic chemist could not identify the donor because at that time there was no standard against which to compare the profile.

¶ 8 Detective Clifford Martin testified that he investigated C.B.'s case and learned the DNA profile from her case was connected to an unknown male profile in two other sexual assault cases with similar circumstances in Chicago. During the course of his investigation, Martin discovered a black SUV registered to someone who lived in the vicinity of the attacks, and matched the description of the vehicle driven by the offender. Based on this information, Martin compiled a photographic array. C.B. and T.B. separately identified defendant as the offender in the array.

¶ 9 Defendant was arrested on July 1, 2009, and brought to the police station to stand in a physical lineup. While Martin and other officers were putting the lineup together, defendant "became irate, saying that he would not stand in the lineup and did not have to stand in the lineup." Martin was in the room with the lineup participants and had to physically restrain defendant by handcuffing him for the lineup procedure. At some point, Martin was notified that defendant was identified in the lineup and informed defendant of the identification. Defendant thereafter "broke into tears." When the officers attempted to photograph the lineup, defendant "began acting out again in an irate and irrational manner."

¶ 10 Following defendant's arrest, an evidence technician collected a buccal swab standard from defendant. A forensic scientist compared defendant's standard to the male profile found in the semen found on C.B. The forensic scientist concluded that defendant could not be excluded as the donor of the profile found on C.B. and that the chances of another person with the same profile as the donor was 27,000 times 6.9 billion.

¶ 11 The State called T.B. and S.W. to present other crimes evidence. Both T.B. and S.W. testified that, on separate occasions, defendant pulled them from the street and assaulted them in the back of his vehicle.

¶ 12 Defendant did not testify. The jury found defendant guilty of aggravated criminal sexual assault and aggravated kidnaping.

¶ 13 On June 23, 2011, prior to sentencing, defense counsel informed the court that, "based on an evaluation," "the authorities at the Cook County Jail" transferred defendant to an in-patient psychiatric unit at Cermak Hospital. At defense counsel's request, the trial court ordered an evaluation in order to determine defendant's fitness to be sentenced, as well as fitness to stand trial in several future similar but unrelated cases. Dr. Nicholas Jasinski, a licensed clinical psychologist, and Dr. Nishad Nadkarni, a psychiatrist, from the Department of Clinical Services each evaluated defendant and each found him fit to stand trial and fit to be sentenced.

¶ 14 Following defendant's evaluations, defense counsel requested that the court declare defendant "fit with meds." The court declined to make a finding regarding defendant's fitness and stated, "The evaluation was fit to stand trial and they say he is fit to be sentenced. Nothing has changed. He was fit before." Counsel stated the following:

> "[DEFENSE COUNSEL]: There is some indications from my conversations with the defendant during the period I became concerned about this when he was housed in Kankakee after the trial, he was not getting his medication and this is what gave rise to the concerns. Before the evaluation was done, he was taking the medication. I would like an opportunity to talk to the doctor."

¶ 15 At sentencing, the court verified that defendant was taking medication. The following colloquy ensued.

"[THE COURT]: That [medication] doesn't effect [*sic*] your ability to understand what's happening in court, does it?

[DEFENDANT]: That's what did happen in the past –

[THE COURT]: No. I'm talking about what's happening in court today. Do you understand what's going on today? [Defendant], will you listen to what I'm asking you today. You're taking medication of some sort or another today?

[DEFENDANT]: Yes.

[THE COURT]: That does not interfere with your ability to understand what is going on in court, does it?

[DEFENDANT]: I'm not sure until I go through the motions. This is what's been happening to me since I've been in here.

[THE COURT]: Fine. Let's proceed. Defendant I think he's just trying to pull off another one of his little scams. He understands what's going on totally for sure at this point."

¶ 16 In mitigation, defendant's family submitted a statement on defendant's behalf, in which they described defendant as a "productive citizen" who was a father and husband and had a college degree and was a "dedicated employee" at his job that he maintained "all of his life."

¶ 17 Before defendant gave his statement in allocution, the following occurred.

"[DEFENDANT]: First of all, I want to say, Judge, when you were asking me questions I didn't understand the question until [defense counsel] has just explained to me.

[THE COURT]: What I'm asking, [defendant], you understand what's going on totally today, correct?

[DEFENDANT]: Yes, sir.

[THE COURT]: Fine.

[DEFENDANT]: I didn't understand the question when you asked the first time.

[THE COURT]: No problem. Go ahead, please.

[DEFENDANT]: With that being said, since I have been I haven't been able to understand a lot that was going on, that's why I was trying to explain to you, sir. Now that I'm able to understand, I'm getting caught up on what actually happened in the past so when I wrote this, I had actually showed it to my lawyer when I was sitting in the bullpen about the situation that's happening in which I'm now able to look and realize to see what was actually going on."

¶ 18 Defendant thereafter gave a statement, in which he denied committing the crime and alleged that "the detective" set him up. He additionally spoke about his family, religion, lack of criminal background, and the difficulties of incarceration. At the end of his statement, defendant stated,

"No disrespect to you, Judge, sometimes I don't understand the question. It don't have nothing to do with medication but I don't understand. I'm nervous, I'm scared. I'm fighting for my life. I don't really know what's going on until I'm sitting back in the jail

> system thinking about what just happened in this courtroom system so it's not a disrespect to you or nobody here. I just don't understand. And still sometimes afterward I sit back or my attorney explain to me what you just said."

¶ 19 The trial court ultimately sentenced defendant to consecutive sentences of 30 years' imprisonment for aggravated criminal sexual assault and 10 years' imprisonment for aggravated kidnaping.

¶ 20 We affirmed defendant's convictions and sentences on direct appeal, but ordered his mittimus corrected. *People v. Naylor*, 2014 IL App (1st) 113005-U (unpublished order under Supreme Court Rule 23).

¶ 21 On March 12, 2015, defendant filed a *pro se* postconviction petition. In his petition, defendant claimed, *inter alia*, that trial counsel was ineffective for failing to investigate his mental health and request a fitness hearing prior to trial. Defendant claimed that, had counsel investigated defendant's mental health, counsel would have learned that, beginning on July 9, 2009, and throughout his incarceration, defendant took various psychotropic medications and was diagnosed with "acute depression, delusions, and paranoia." He further asserted that he was entitled to a fitness hearing prior to trial because he was taking psychotropic medications, and had counsel requested a fitness hearing prior to trial, "there is a reasonable probability that it would have been granted."

¶ 22 In support of his petition, defendant attached various medical records from Cermak, which included his diagnoses, treatment plans, and prescribed medications from intermittent dates in July and August of 2009, June 2011, and several dates in 2013. Defendant's medical records indicate that, throughout July and August 2009, he was diagnosed with depressive

disorder, "bipolar NOS," and prescribed several medications "to stabilize [his] mood and behavior." On August 20, 2009, the records indicate defendant "has not been given meds for past [three] [weeks]," and defendant indicated he was "much 'clearer headed off meds.' "

¶ 23 A report dated June 2, 2011, after defendant was found guilty, indicated defense counsel called the director of mental health at Cermak and "stated his client seemed unstable from his situation." An undated document noted defendant had "adjustment disorder NOS" and stated, "If the patient had not just been found guilty of sexual assault a neurological syndrome/CVA would be high on the differential. The causality is fairly clear that this is a reaction to an extreme stressor in a man with no previous mental illness."

¶ 24 On June 10, 2015, the trial court entered an order summarily dismissing defendant's postconviction petition, finding his claims were frivolous and without merit. This appeal followed.

¶ 25 On appeal, defendant contends that trial counsel was ineffective for failing to investigate his mental health and request a fitness hearing prior to trial.

¶ 26 The Act provides a three-stage process as a means for criminal defendants to challenge their convictions or sentences on grounds of constitutional violations. *People v. Beaman*, 229 Ill. 2d 56, 71 (2008). Defendant's petition for postconviction relief was summarily dismissed at the first stage. At the first stage of postconviction proceedings, the trial court independently reviews the petition, taking the allegations as true, and determines whether the petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2014). A petition 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 (2009); *People v. Tate,* 2012 IL 112214,

¶ 9. A claim has no arguable basis when it is based on an indisputably meritless legal theory, such as one completely contradicted by the record, or a fanciful factual allegation, such as those that are fantastic or delusional. *People v. Brown*, 236 Ill. 2d 175, 185 (2010).

¶ 27 To survive the first stage, a petition need only present the gist of a constitutional claim. *People v. Allen*, 2015 IL 113135, ¶ 24. Presenting a "gist" of a constitutional claim is a low threshold, and only limited detail is necessary for the petition to proceed beyond the first stage of postconviction review, as opposed to setting forth a claim in its entirety. *Hodges*, 234 Ill. 2d at 9; *People v. Williams*, 364 Ill. App. 3d 1017, 1022 (2006). Although defendant asserts that the trial court applied the wrong standard when evaluating his first stage petition, we apply a *de novo* review to a summary dismissal (*Hodges*, 234 Ill. 2d at 9), and therefore, "may affirm, on any proper ground, a procedurally proper summary dismissal that was based on an improper ground" (see *People v. Dominguez*, 366 Ill. App. 3d 468, 473 (2006)). On *de novo* review, we apply the same analysis that a trial court would perform and our review is "completely independent" of the trial court's decision. *People v. Tyler*, 2015 IL App (1st) 123470, ¶ 151.

¶ 28 To state a claim of ineffective assistance of counsel in first stage postconviction proceedings, defendant must allege that it is arguable that: (1) counsel's performance "fell below an objective standard of reasonableness;" and (2) defendant was prejudiced by counsel's deficient performance. *Hodges*, 234 Ill. 2d at 17 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)).

¶ 29 Defendant argues that it is arguable that (1) counsel's failure to investigate his mental health and request a fitness hearing prior to trial was deficient because the record indicates counsel knew about his mental condition prior to trial, yet did nothing to ensure his fitness; and

(2) he was prejudiced by the deficiency because there is a "reasonable probability" he would have received a fitness hearing had counsel requested one.

¶ 30 Due process bars the prosecution of an unfit defendant. *People v. Hanson,* 212 Ill. 2d 212, 216 (2004). A defendant is unfit to stand trial if, due to a mental or physical condition, he or she is unable to understand the nature and purpose of the proceedings or to assist in the defense. 725 ILCS 5/104-10 (West 2010). A defendant is presumed fit to stand trial and is not presumed unfit merely because he or she is receiving psychotropic medication. 725 ILCS 5/10410, 104-21(a) (West 2010); *People v. Brown*, 236 Ill. 2d 175, 186 (2010). While the issue of a defendant's fitness for trial may be raised at any time by either party or the trial court, a fitness hearing is required only upon a *bona fide* doubt of a defendant's fitness. 725 ILCS 5/104-11(a) (West 2010); *Brown*, 236 Ill. 2d at 186. A number of factors may be considered in assessing whether a *bona fide* doubt of fitness is raised, including a defendant's irrational behavior, his demeanor at trial, any prior medical opinion on the defendant's competence, and any representations by defense counsel on the defendant's competence. *Brown,* 236 Ill. 2d at 186 (citing *People v. Eddmonds*, 143 Ill. 2d 501, 518 (1991)). However, no fixed or immutable sign "invariably indicates the need for further inquiry on a defendant's fitness." *Id.* Instead, "the question is often a difficult one implicating a wide range of manifestations and subtle nuances." *Id.*

¶ 31 Here, we find defendant failed to show that counsel's performance was arguably deficient. Defendant does not allege in his petition that he actually informed counsel that he was taking psychotropic medication, being treated for any mental disorder, or was unable to understand the proceedings. All he argues is that, had counsel read his health records, dating

back to July 2009, counsel would have known to request a fitness hearing. The fact that a defendant suffers from mental disturbances or requires psychiatric treatment does not automatically result in a *bona fide* doubt of his fitness. *Eddmonds*, 143 Ill. 2d at 519. "Fitness speaks only to a person's ability to function within the context of a trial. It does not refer to sanity or competence in other areas. A defendant can be fit for trial although his or her mind may be otherwise unsound." *People v. Easley*, 192 Ill. 2d 307, 320 (2000) (citing *People v. Murphy*, 72 Ill. 2d 421, 432 (1978)); see also *Eddmonds*, 143 Ill. 2d at 519-20. Moreover, " '[e]ffective counsel is not required to be clairvoyant.' "*People v. Morgan*, 2015 IL App (1st) 131938, ¶ 77 (quoting *People v. Vasser*, 331 Ill. App. 3d 675, 685 (2002). Unless defendant informed counsel of his condition or treatment, or there were other indicators of erratic or irrational behavior prior to trial that there might exist a *bona fide* doubt as to defendant's fitness, there would be no reason for counsel to investigate defendant's fitness or request a fitness hearing.

¶ 32 There were no such indicators here. Defendant points to nothing in the pretrial proceedings that would have put counsel on notice that inquiry into defendant's mental state was warranted. Rather, to support his claim, defendant relies on the fact that he cried after being arrested; was aggressive and crying at the lineup identification; was prescribed psychotropic medication in July 2009, two years before his trial; and "his condition worsened" after his trial. We find these facts insufficient to indicate to counsel that inquiry into defendant's mental health was necessary. Again, defendant does not claim he informed counsel of these alleged manifestations of his unfitness for trial. Further, the medical records attached to defendant's petition are incomplete and alternate between 2009 and various dates after his trial took place in 2011 and 2013. While some records from 2009 show that defendant was diagnosed with

depressive and bipolar disorders, many of the records indicating defendant's condition are dated after his trial. One such record names his guilty finding as a cause of his diagnoses and notes that he has no history of mental illness. Defendant's condition after trial is not determinative of his state of mind prior to trial. See *e.g.*, *People v. Weeks*, 393 Ill. App. 3d 1004, 1010 (2009) ("The question of fitness may be fluid. Someone who appeared to have difficulty understanding his plight in 2007 may be rational in 2008."). Further, we note that, when counsel was concerned about defendant after his trial, he requested and was granted, an evaluation. Accordingly, we cannot find that defendant made an arguable claim that counsel acted unreasonably in failing to investigate his mental condition before trial.

¶ 33 Defendant nevertheless relies on *People v. Brown*, 236 Ill. 2d 175 (2010), to assert that his petition set forth the gist of a claim of ineffective assistance sufficient to proceed to second stage proceedings. In *Brown*, the defendant was shot by police after lunging at an officer with a butcher knife and subsequently convicted of attempted first degree murder of a peace officer. *Id.* at 179. At sentencing, the defendant asserted that he had been depressed, previously tried to kill himself, and attacked the officers because he wanted them to kill him. *Id.* at 180. The defendant thereafter filed a postconviction petition alleging ineffective assistance of counsel for failing to request a fitness hearing. *Id.* at 181. In support of his petition, the defendant attached medical records documenting his bipolar disorder and his medications, in addition to affidavits from relatives who averred that defense counsel had been informed that the defendant had a history of attempting suicide and was taking medication to treat his disorder. *Id.* In his petition, the defendant alleged that on the day of the offense, he was attempting "suicide by police" and had trouble understanding the nature of the proceedings against him due to his medications. *Id.*

¶ 34 This court affirmed the summary dismissal of defendant's petition, but the supreme court reversed and remanded the case for second stage proceedings. *Id.* at 181-82, 195-96. Our supreme court found that the combination of the nature of the offense, defendant's history with mental illness, his allegation that defense counsel knew defendant was taking psychotropic medication for bipolar disorder, and his allegation that the medication caused an inability to understand the trial proceedings arguably raised a *bona fide* doubt of the defendant's ability to understand the nature and purpose of the proceedings and assist in his defense. *Id.* at 191. Accordingly, the supreme court found that defendant's petition was not frivolous or patently without merit in that it had an arguable basis in both law and fact. *Id.* at 186, 191.

¶ 35 We find *Brown* distinguishable. Unlike in *Brown*, defendant here had no history of mental illness and his underlying convictions for sexual assault and aggravated kidnaping were entirely unrelated to the apparently stress-related illnesses that defendant suffered from after his trial. Crucially, defendant does not allege that he was unfit or unable to understand the nature of the proceedings or that he informed his attorney of any illnesses, medications, and treatments. Although defendant initially claimed at sentencing that he did not understand some of the court's questions, he later clarified that defense counsel had explained them to him. Moreover, in contrast to *Brown*, where the defendant's relatives averred they informed defense counsel that the defendant was on medication and had a history of mental illness, defendant's family here made no such claim. Rather, they gave a statement at sentencing outlining numerous ways that defendant was a productive member of society and maintained a job with the United States Postal Office for well over a decade. Thus, unlike in *Brown*, we find defendant failed to present any arguable claim that counsel was deficient in failing to investigate his mental health or

request a fitness examination prior to trial. Because we find defendant failed to state an arguable claim that counsel's performance was deficient, we need not address whether defendant was arguably prejudiced. *People v. Enis*, 194 Ill. 2d 361, 377 (2000) (noting the failure to satisfy either prong of *Strickland* will defeat an ineffective assistance claim).

¶ 36 For the foregoing reasons, we affirm the order of the circuit court of Cook County.

¶ 37 Affirmed.