2018 IL App (1st) 160059-U

No. 1-16-0059

Order filed August 17, 2018

Fifth 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 16362
	)	
LEARNELL BROWN,	)	Honorable
	)	Gregory R. Ginex,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Reyes and Justice Rochford concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court erred in summarily dismissing defendant's *pro se* postconviction petition where defendant's claim that his trial counsel coerced him into waiving his right to a jury trial was neither frivolous nor patently without merit.

¶ 2 Defendant Learnell Brown appeals the summary dismissal of his *pro se* petition for relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). He contends that the trial court erred in summarily dismissing his petition because he presented an arguable claim of ineffective assistance of trial counsel based on: (1) counsel's failure to

investigate and present a witness who would have impeached a State witness and supported his defense at trial; (2) counsel's denial of his right to testify; and (3) counsel's denial of his right to a jury trial. We reverse and remand for second stage proceedings.

¶ 3 Following a 2012 bench trial, defendant was convicted of two counts of aggravated kidnapping and one count of aggravated fleeing and eluding. He was sentenced to 15 years' imprisonment. On direct appeal, this court affirmed defendant's convictions over his challenge to the sufficiency of the evidence. See, *People v. Brown,* 2014 IL App (1st) 123394-U. Because we set forth the facts on direct appeal, we recount them here only to the extent necessary to resolve the issue raised on appeal. See *Brown,* 2014 IL App (1st) 123394-U.

¶ 4 The facts adduced at trial show that on September 13, 2011, defendant took Tamika Murphy's two sons Keon and David from an apartment they shared in North Riverside, Illinois without Tamika's permission. Defendant led members of the North Riverside and Chicago police departments on a high speed chase through the streets of the west side of Chicago. Defendant eventually collided with a parked car, and was apprehended after a brief foot chase. Keon suffered a cut under his eye as a result of the collision and David was not hurt. On September 14, 2011, Tamika and her sister Sabrina Murphy went to the North Riverside police station where they met with an assistant state's attorney (ASA), who interviewed the women and reduced their conversations into a typewritten statement that both women signed.

¶ 5 At trial, Tamika testified that in the early morning hours on September 13, 2011, she and defendant argued over who would use her car for that day. Tamika told defendant that she would drive him to his job in Romeoville so that she could use the car for the rest of the day. Defendant however, did not agree to this arrangement, and as Tamika was getting ready to drive him to

work, she heard her car being started and driven away. Tamika knew it was her car because no one else in her neighborhood was awake at that time of the morning. Tamika went back to sleep for awhile, but awoke later to ensure that her two sons, Keon and David, went to school. Defendant was not the boys' father but treated them like they were his sons.

¶ 6 Tamika decided that she was going to leave defendant and take her boys to live with her sister Sabrina. Tamika went to 555 West Harrison Street in Chicago to obtain a civil order of protection. After obtaining the order of protection, she texted defendant and informed him that she was leaving him. Defendant attempted to contact Tamika, but she refused to answer his calls.

¶ 7 Sometime later, Tamika received a phone call from Sabrina, who told her that defendant was trying to get in touch with her and that he had Keon and David. Sabrina also told Tamika that defendant said Allah was going to forgive him for what he was about to do and that he was taking Keon and David to meet Allah. Tamika tried calling defendant, but he did not answer her calls.

¶ 8 Tamika contacted the police and met with North Riverside police officer Christopher Devine at her apartment. Tamika called defendant several times asking that he come home with the children, but he refused. Defendant eventually instructed her to meet him at the intersection of Cicero Avenue and Lake Street in two minutes. He also asked her to place the phone near a television so he could hear if she was calling from the apartment or the police station. Tamika told defendant she did not have a car and could not be at Cicero and Lake in two minutes. Defendant hung up. Tamika testified she was not worried at that point about defendant returning her children. Tamika called defendant again and he told her to meet him at 50th Street and

Cermak Road. Tamika told defendant to bring her children back to the apartment and he again refused. Tamika contacted her cousin Fabrian Murphy to give her a ride to meet defendant.

¶ 9 Tamika testified that as she and Fabrian were driving toward 50th Street and Cermak, she phoned the police and learned that her car had been in an accident on Gladys and Karlov Avenues. When she arrived, Tamika observed that Keon had a scratch under his right eye. Tamika further testified that defendant has taken her children without her permission before and it was not a problem. She also testified that "I don't know where these charges came from, because they didn't come from me." Tamika admitted that this was the first time that defendant did not bring her boys home when she asked him to do so.

¶ 10 Sabrina testified that she was Tamika's sister and aunt to Keon and David. On September 13, 2011, she received a call from defendant asking if she knew Tamika's whereabouts and to tell Tamika to come to home. Defendant called Sabrina a few minutes later telling her "Allah will forgive him about what he gonna [*sic*] do." Sabrina thought this was unusual because defendant was not a Muslim and he never referred to Allah before. Sabrina asked to speak to Keon who told her that he was near an abandoned building in an alley. Sabrina testified that Keon sounded normal. Sabrina called Tamika and told her what defendant said about Allah, that this was "serious," and that they need to find defendant. Sabrina also told Tamika that she was afraid and that Tamika should call the police.

¶ 11 Both Tamika and Sabrina were confronted with their statements to the ASA at trial. Tamika denied telling the ASA that she was worried that defendant had her children and that she begged defendant to bring her children back to her. Tamika said she only signed the statement because the ASA told her that she could be liable to the owner of the car that defendant had

crashed into during the chase. Tamika also said the ASA threatened that her children would be placed with the Department of Children and Family Services (DCFS) if she did not sign the statement. Tamika visited defendant while he was in custody and came to every court date. Sabrina did not recall telling the ASA that defendant told her he was taking her nephews to see Allah.

¶ 12 North Riverside police officer Christopher Devine testified that when he met Tamika she was nervous and frantic and told him that defendant had taken her children and was threatening them with physical harm. Devine told Tamika to phone defendant and to place the call on speaker phone so he could hear the conversation. Defendant answered the call but refused to tell Tamika where he was located. Defendant also told Tamika that he would not return the children to her. Devine and members of the North Riverside police department devised a plan on how to reunite the children with Tamika. The officers had Tamika contact defendant and tell him to meet her at Cicero and Lake Street in Chicago.

¶ 13 North Riverside detective Carlos Garcia testified he followed Tamika and Fabrian in an undercover vehicle, while Devine and his partner assisted in their marked car. As Garcia was driving, he saw defendant in Tamika's car at Madison and Cicero. Garcia followed defendant and contacted the Chicago police department for an assist in stopping him. Garcia activated his emergency equipment and attempted to curb defendant, who instead sped up and was travelling about 50 miles per hour in a 30 mile per hour zone. Defendant drove through a few red traffic lights without slowing down or stopping. As defendant drove through the intersection of Karlov and Gladys Streets, he struck a median and crashed into a parked car. Defendant opened the

driver's door and fled. Keon and David opened the passenger side door and ran to a nearby building. After a brief foot chase, the officers placed defendant in custody.

¶ 14 At the conclusion of the testimony, the court found defendant guilty of two counts of aggravated kidnapping and one count of fleeing and eluding. The court subsequently sentenced defendant to 15 years' imprisonment.

¶ 15 Defendant appealed his conviction, arguing that the evidence was insufficient to prove him guilty beyond a reasonable doubt. This court affirmed the judgment of the trial court. *Brown*, 2014 IL App (1st) 123394-U.

¶ 16 On May 21, 2015, defendant filed a *pro se* petition for postconviction relief under the Act, alleging that his trial counsel was ineffective for failing to: (1) investigate or call an available witness; (2) present evidence of Tamika Murphy's arrest for domestic disputes where defendant was the victim; (3) discuss with defendant that he had the right to testify; and (4) allow defendant to proceed to a jury trial due to financial conflicts. Defendant also alleged in the petition that he was actually innocent and that his appellate counsel was ineffective for failing to raise the claims of ineffective assistance of trial counsel on direct appeal.

¶ 17 In support of his petition, defendant attached his own affidavit and an affidavit from his aunt, Marlo Brown. In his affidavit, defendant averred that he felt "forced" into taking a bench trial. Defendant averred that he informed trial counsel that he wanted a jury trial, but counsel told him that, when the judge asks him if he wants a jury trial he should say "no" because "since he can't afford a jury trial, it would be better if he didn't p*** off the judge with this issue." In her affidavit, Brown averred that she spoke to trial counsel and informed him that "the family all thought it was best for [defendant] to have a jury trial," but counsel told her that he was not paid

enough and that "we don't need a jury trial because Tamika [Murphy] was going to testify for [defendant] and that's all we need."

¶ 18 On August 14, 2015, the trial court denied defendant's *pro se* postconviction petition, finding "there is nothing whatsoever in this entire post-conviction that requires this court to proceed any further. I find in totality that based on the affidavits, based on the record, based on the trial that the defendant's petition is frivolous and patently without merit and his petition for post-conviction is denied."

¶ 19 On January 13, 2016, defendant filed a motion for late notice of appeal that was granted.

¶ 20 On appeal, we first consider defendant's contention that the trial court erred in summarily dismissing his petition because he presented an arguable claim that his trial counsel was ineffective for denying his right to a jury trial.

¶ 21 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2012)) provides that the circuit court adjudicates a petition for postconviction relief in three distinct stages. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009).

¶ 22 At stage one, the trial court, without input from the State, examines the petition only to determine if the petition pleads a constitutional deprivation unrebutted by the record, rendering the petition neither frivolous nor patently without merit. 725 ILCS 5/122-2.1(a)(2), (b) (West 2012). If the petition is not dismissed at stage one, it proceeds to stage two, where section 122-4 of the Act provides for the appointment of counsel for an indigent defendant who wishes counsel to be appointed. 725 ILCS 5/122-4 (West 2012). At stage two, pursuant to section 122-5, the State has the opportunity to answer or move to dismiss the petition (725 ILCS 5/122-5 (West 2012)), and the trial court determines whether the petition alleges a substantial showing of a

constitutional violation. *People v. Phyfiher*, 351 Ill. App. 3d 881, 883 (2005). At stage one and stage two of the postconviction process, the trial court is not allowed to engage in any fact-finding because all well-pleaded facts not rebutted by the record are to be taken as true. *Phyfiher*, 351 Ill. App. 3d at 884.

¶ 23 If the petition is not dismissed at stage two, it proceeds to stage three for an evidentiary hearing, pursuant to section 122-6. 725 ILCS 5/122-6 (West 2012). At stage three, the trial court resolves questions of disputed fact. *Phyfiher*, 351 Ill. App. 3d at 884. An evidentiary hearing on the petition is required when the allegations of the petition, supported by the trial record and the accompanying affidavits, demonstrate a substantial violation of a constitutional right unrebutted by the record. *Phyfiher*, 351 Ill. App. 3d at 884.

¶ 24 In the case at bar, defendant's *pro se* petition was dismissed at the first stage. At the first stage, a trial court may dismiss a petition only if it is " ' frivolous or is patently without merit. ' " *People v. Cotto*, 2016 IL 119006, ¶ 26 (quoting 725 ILCS 5/122-2.1(a)(2) (West 2014)). A petition is frivolous or patently without merit if it " 'has no arguable basis *** in law or fact.' " *People v. Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *People v. Hodges*, 234 Ill. 2d 1, 11-12 (2009)). A petition has no arguable basis in law or fact if it is based on an indisputably meritless legal theory or a fanciful factual allegation. *Hodges*, 234 Ill. 2d at 16. "A legal theory is 'indisputably meritless' if it is 'completely contradicted by the record,' and a factual allegation is 'fanciful' if it is 'fantastic or delusional.' " *Papaleo*, 2016 IL App (1st) 150947, ¶ 19 (quoting *Hodges*, 234 Ill. 2d at 16-17). A postconviction petition may be summarily dismissed as frivolous and patently without merit based on both forfeiture and *res judicata*. *People v. Blair*,

215 Ill. 2d 427, 442 (2005). We review the dismissal of a first-stage postconviction petition *de novo*. *People v. Williams*, 2015 IL App (1st) 131359, ¶ 28; *Hodges*, 234 Ill. 2d at 9.

¶ 25 "Proceedings on a postconviction petition are collateral to proceedings in a direct appeal and focus on constitutional claims that have not and could not have been previously adjudicated." *People v. Holman*, 2017 IL 120655, ¶ 25. "Accordingly, issues that were raised and decided on direct appeal are barred from consideration by the doctrine of *res judicata*; issues that could have been raised, but were not, are forfeited." *Holman*, 2017 IL 120655, ¶ 25. "Thus, in Illinois, a defendant must generally raise a constitutional claim alleging ineffective assistance of counsel on direct review or risk forfeiting the claim." *People v. Veach*, 2017 IL 120649, ¶ 47. However, our supreme court has noted that the doctrines of *res judicata* and forfeiture are relaxed where fundamental fairness so requires, where the forfeiture stems from the ineffective assistance of appellate counsel, or where the facts relating to the issue do not appear on the face of the original record. *People v. English*, 2013 IL 112890, ¶ 22.

¶ 26 Although the parties do not address forfeiture, we briefly note that, because the facts relating to defendant's claim that counsel coerced him into taking a bench trial over a jury trial do not appear on the face of the original record, we will consider defendant's claim of ineffectiveness. See *People v. Barkes*, 399 Ill. App. 3d 980, 986 (2010) (where a defendant relies on matters outside the record, forfeiture does not apply).

¶ 27 To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance was objectively unreasonable under prevailing professional norms and that there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v. Domagala*, 2013 IL 113688, ¶ 36 (quoting

Strickland v. Washington, 466 U.S. 668, 694 (1984)). The *Strickland* standard has been adapted for postconviction proceedings. *People v. Tate*, 2012 IL 112214, ¶ 19. At the first stage of postconviction proceedings, a petition that alleges ineffective assistance of counsel "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." *People v. Tate*, 2012 IL 112214, ¶¶ 19-20; *Hodges*, 234 Ill. 2d at 17. Prejudice, in this context, means a reasonable probability that but for counsel's deficient performance, defendant would not have waived his right to a jury trial. *People v. Smith*, 326 Ill. App. 3d 831, 847 (2001). Defendants who retain private counsel are entitled to the same protection under the sixth amendment as defendants who are appointed counsel by the court. *People v. Royse*, 99 Ill. 2d 163, 169-70 (1983).

¶ 28 In this court, defendant claims that he presented an arguable claim that his trial counsel was ineffective for coercing him to involuntarily waive his right to a jury trial by telling him that counsel was not paid enough for a jury trial. In support of his claim, defendant attached two affidavits. In his affidavit, defendant averred that he felt "forced" into taking a bench trial. Defendant also averred that he told his trial counsel that he wanted a jury trial, but counsel told him to inform the judge that he did not want a jury because "since he can't afford a jury trial, it would be better if he didn't p*** off the judge with this issue." In her affidavit, Brown averred that she spoke to trial counsel and informed him that "the family all thought that it was best for [defendant] to have a jury trial." Counsel told Brown that he was not paid enough money for a jury trial and that "we don't need a jury trial because Tamika [Murphy] was going to testify for [defendant] and that's all we need."

¶ 29 In summarily dismissing defendant's petition and ruling on this claim, the trial court found that:

> "[T]he record and the file clearly reflect the defendant waived a jury trial. Now there is allegations talk about his attorney persuading him not to take a jury trial. But, again, based on the record the defendant has shown nothing to support his claim other than his opinion and speculation. It assumes that trial counsel did order the defendant to take a bench trial but that was addressed at trial. Such a decision to offer advice is basically a matter of trial strategy. And again there is a jury waiver."

¶ 30 The State responds that the trial court did not err in summarily dismissing defendant's ineffectiveness claim where the record rebuts his assertion that counsel denied his right to a jury trial. In support of this argument, the State maintains that defendant's written and in-court jury waiver established that he voluntarily chose to participate in a bench trial. We disagree.

¶ 31 The right to a trial by jury in a criminal case is "fundamental to the American scheme of justice" and is guaranteed by both the United States and Illinois Constitutions. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968); U.S. Const. amends VI, XVI; Ill. Const. 1970, art. 1 §§ 8, 13. Section 103-6 of the Code of Criminal Procedure provides that every person accused of a crime has a right to a trial by jury unless the accused understandingly waives such right in open court. 725 ILCS 5/103-6 (West 2014). To be valid, a defendant must make the waiver knowingly and voluntarily. *People v. Bannister*, 232 Ill. 2d 52, 65 (2008). The determination of whether the right to a jury trial has been validly waived depends on the fact of each particular case. *People v. Frey*, 103 Ill. 2d 327, 332 (1984). Ultimately, the decision to waive a jury trial belongs to the defendant. *People v. Segoviano*, 189 Ill. 2d 228, 240 (2000).

¶ 32 The record is clear that defendant's in-court and written waiver demonstrates that he waived his right to a jury trial. After accepting defendant's written jury waiver, the following colloquy occurred:

"THE COURT: All right. Mr. Brown, is this your signature on the jury waiver? Is that your signature?

DEFENDANT: Yes, ma'am.

THE COURT: By signing that waiver you are giving up your right to have this case tried by a jury composed of 12 members of the community who must reach a unanimous decision. Instead the case will be tried by me alone with input in the decision-making process with anyone else. Do you understand that?

DEFENDANT: Yes, ma'am.

THE COURT: Now, did you discuss signing that waiver with your attorney?

DEFENDANT: Yes, ma'am.

THE COURT: But ultimately, that decision has to be yours. So is it your decision not to have a jury trial in this case?

DEFENDANT: Yes, ma'am."

¶ 33 However, defendant's jury waiver does not preclude the possibility that his waiver was not free of coercion by counsel. This is especially so where, during the trial court's admonishments, defendant was not asked if he was forced or coerced into waiving his right to a jury. Given the lack of such admonishment, the record does not rebut the specific allegation in defendant's petition. See *People v. Smith*, 326 Ill. App. 3d 831, 848 (2001) (finding that the defendant's jury waiver did not positively rebut the defendant's allegation that his trial counsel

caused him to waive his jury right by advising him that the judge owed him a favor). Here, as a result of counsel's alleged insistence on a bench trial, it is entirely possible that, at the time defendant waived his right to a jury trial, he believed that a bench trial was the only option available to him. According to defendant's affidavit, he wanted a jury trial, but counsel instructed him that since he could not provide counsel with the additional funds for a jury trial, he should not anger the judge and instead request a bench trial. The affidavit from defendant's aunt suggests that his family was able to pay the additional funds counsel requested for a jury trial, but counsel told her that a jury trial would be unnecessary because Tamika would testify for defendant.

¶ 34 At this stage of the proceedings, all well pleaded facts are to be taken as true unless rebutted by the record. *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). Here, we do not find that defendant's claim of ineffective assistance of counsel is based upon fanciful factual allegations. The record shows that defendant's trial counsel was private and not appointed by the court. Defendant's case proceeded to a bench trial. Defendant attached to his postconviction petition an affidavit in which averred that he told his trial counsel that he wanted a jury trial, but counsel told him that "since he can't afford a jury trial, it would be better if he didn't p*** off the judge with this issue." Defendant also attached an affidavit from his aunt that supports his argument that he wanted a jury trial, but counsel refused to represent him in a jury trial unless he provided more money for a jury trial. Counsel also told defendant's aunt that defendant did not need a jury trial because Tamika was going to testify for him. The record shows that Tamika did in fact testify that, on the date in question, she was not upset by defendant's actions and that, essentially, defendant did not need her permission to take the children. Tamika denied telling the ASA that

she was worried that defendant had her children and that she begged defendant to bring her children back to her. She said she only signed the statement because the ASA told her that she could be liable to the owner of the car that defendant had crashed into during the chase and because the ASA threatened that her children would be placed with DCFS if she did not sign the statement.

¶ 35 In light of this record**,** there is a possibility that an out-of-court conversation took place between trial counsel and defendant's aunt regarding unpaid legal fees and Tamika's testimony that led counsel to coerce or mislead defendant into believing that he could not elect a jury trial. Thus, the allegations of defendant's trial counsel's insistence for additional payment for a jury trial as the motivation for instructing defendant to request a bench trial, if true, raise the gist of a constitutional claim of ineffective assistance of counsel. See *People v. Porter,* 122 Ill. 2d 64, 74 (1988) (to survive the first stage of the postconviction process, *pro se* petition need only state the gist of a constitutional claim). Therefore, defendant has alleged sufficient facts to show that trial counsel's alleged coercive conduct was prejudicial to his right to a jury trial and that there was a reasonable likelihood that defendant would not have waived his right to a jury trial if it were not for trial counsel's conduct.

¶ 36 In sum, although we take no position on the merits of defendant's claim or his ability to prove that he was denied effective assistance of counsel, we find that his claim is not positively rebutted by the record. As such, it is neither frivolous or patently without merit and should advance to the second stage of postconviction proceedings. *Hodges,* 234 Ill. 2d at 11; 725 ILCS 5/122-2.1(b) (West 2014).

¶ 37 Because partial summary dismissal of a postconviction petition is not permitted by the Act, we need not address defendant's claim that his attorney was ineffective for failing to investigate and call a witness to testify and that trial counsel denied defendant his right to testify. See *People v. Romero,* 2015 IL App (1st) 140205, ¶ 27 ([i]f a single claim in a multiple-claim postconviction petition survives the summary dismissal stage of proceedings under the Post-Conviction Act, then the entire petition must be docketed for second-stage proceedings regardless of the merits of the remaining claims in the petition.)

¶ 38 For the foregoing reasons, we reverse the judgment of the circuit court of Cook County and remand the matter for further proceedings pursuant to the Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)).

¶ 39 Reversed and remanded.