2018 IL App (1st) 160698-U

No. 1-16-0698

Order filed November 26, 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. 10 CR 2228
	)	
DOUGLAS JOHNSON,	)	Honorable
	)	Kevin M. Sheehan,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Mikva and Justice Walker concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the circuit court's dismissal of defendant's postconviction petition where defendant failed to present an arguable claim of ineffective assistance of counsel for failing to inform him of the right to testify.

¶ 2 Defendant Douglas Johnson 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 (Act) (725 ILCS 5/122-1 *et seq.* (West 2014)). Defendant asserts that his petition raised an arguable claim of ineffective assistance of counsel where he alleged trial counsel failed to give him an

opportunity to testify or advise him he had the right to decide whether to testify at trial. We affirm.

¶ 3 Following a bench trial, defendant was found guilty of armed habitual criminal, unlawful use of a weapon by a felon, one count of possession of a controlled substance (cocaine) with intent to deliver, and one count of possession of cannabis with intent to deliver. He was sentenced to concurrent prison terms of 15 years, 6 years, 15 years and 5 years, respectively. A detailed recitation of the facts in this case is included in this court's earlier decision affirming defendant's convictions and sentences on direct appeal. See *People v. Johnson*, 2015 IL App (1st) 132197-U. We will recite the facts necessary to resolve the issue on appeal.

¶ 4 Defendant was charged with armed habitual criminal and various drug and firearm-related offenses stemming from a December 23, 2009, search executed at a residence on South Honore Street in Chicago pursuant to a search warrant. At trial, Chicago police officers testified they executed the search warrant shortly before 9 a.m. and discovered defendant, who was paralyzed from the chest down, laying on a couch about a foot from his wheelchair. Two women were laying on a mattress in the living room. The officers recovered a loaded handgun from the rear pouch of defendant's wheelchair.

¶ 5 The officers provided defendant his *Miranda* warnings, and he stated that the drugs they were looking for were in the kitchen, but he was holding onto them for a neighbor. Officers found a blue book bag in the kitchen containing three knotted baggies of suspect cocaine, a scale, and empty baggies. Another officer discovered a cubby hole at the head of the bed in a bedroom and found therein a clear Ziplock bag with suspect cannabis, a roll of $61, and a digital scale.

¶ 6 Additionally, in a bag on a ledge underneath a glass coffee table, officers found a state identification card for defendant that expired in 2003 and listed an address different from the Honore Street residence. The bag also contained a letter from an inmate at the Illinois Department of Corrections addressed to defendant at the Honore Street address.

¶ 7 The State admitted certified statements of defendant's conviction for a 2002 unlawful use of a weapon offense and a 1999 drug offense. The parties stipulated to the chain of custody for the narcotics evidence and to the chemical composition, which was found to be 118.3 grams of cocaine and 303.8 grams of cannabis.

¶ 8 After the State rested, defendant presented the testimony of Officer Michael Korwin, who participated in the search. Korwin testified that he was not involved in inventorying any of the recovered items but acknowledged his name appeared on some of the inventory sheets. He further testified that he recovered defendant's expired State identification card, the letter addressed to him at the residence on Honore Street, and some currency. Defendant then rested without presenting any other testimony or evidence.

¶ 9 The court found guilty defendant of armed habitual criminal, unlawful use of a weapon by a felon, one count of possession of a controlled substance (cocaine) with intent to deliver, and one count of possession of cannabis with intent to deliver. It sentenced him to concurrent prison terms of 15 years, 6 years, 15 years, and 5 years, respectively. On direct appeal, this court affirmed over defendant's contentions that the evidence was insufficient to prove him guilty beyond a reasonable doubt on two of the charges and two of his sentences were excessive. See *Johnson*, 2015 IL App (1st) 132197-U.

¶ 10 On November 16, 2015, defendant filed a *pro se* petition under the Act, the subject of the instant appeal, alleging his trial counsel was ineffective for failing to provide him an opportunity to testify or advise him he had the right to testify at trial. In support, defendant included his own affidavit, averring "I Douglas Johnson was not made aware by my trial lawyer or the Court that I had the right to testify at trial. Had I known I could testify I would have testified on my own behalf to refute the evidence against me." The circuit court summarily dismissed the petition on January 6, 2016. Defendant filed a timely notice of appeal.

¶ 11 Defendant argues the court erred in summarily dismissing his petition. He requests that we reverse the dismissal and remand for second-stage proceedings under the Act. The Act provides a three-stage mechanism for a defendant to assert a substantial denial of his constitutional rights in the original trial or at sentencing. 725 ILCS 5/122-1 (West 2014); *People v. Allen*, 2015 IL 113135, ¶ 20. The circuit court here dismissed defendant's petition at the first stage of the proceedings. At the first stage, 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). A defendant need only present the gist of a constitutional claim at the first stage of the proceedings. *Allen*, 2015 IL 113135, ¶ 24. If the petition has no arguable basis in either law or fact, it should be summarily dismissed as frivolous or patently without merit. *People v. Tate*, 2012 IL 112214, ¶ 9.

¶ 12 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. "The summary dismissal of a postconviction petition is reviewed *de novo*." *People v. Brown*, 236 Ill. 2d 175, 184 (2010).

¶ 13 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 a first-stage postconviction proceeding, a petition claiming 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." *Hodges*, 234 Ill. 2d at 17. The defendant must establish both prongs to prevail on his ineffective assistance of counsel claim. See *People v. Colon*, 225 Ill. 2d 125, 135 (2007).

¶ 14 Defendant argues trial counsel was ineffective where counsel failed to give him an opportunity to testify or advise him he had the right to testify at trial. 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). This decision ultimately belongs with the defendant 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.*

¶ 15 As defendant points out, an attorney's incomplete or inaccurate information to a defendant regarding his right to testify "is arguably a factor in consideration of whether counsel was ineffective." *People v. Nix*, 150 Ill. App. 3d 48, 51 (1986). However, to show ineffective assistance of counsel, defendant must show not only his attorney was arguably deficient but that

defendant was arguably prejudiced thereby. See *Madej*, 177 Ill. 2d at 146-47, *overruled in part on other grounds, Coleman*, 183 Ill. 2d 366.

¶ 16 Even assuming *arguendo* trial counsel's performance here was arguably deficient, defendant cannot show he was arguably prejudiced by counsel's alleged interference with his right to testify. Defendant's affidavit merely states, in relevant part, "[h]ad I known I could testify I would have testified on my own behalf to refute the evidence against me." Defendant does not indicate what details he would testify to, or how his testimony would "refute the evidence against [him]." Defendant's conclusory statement, bereft of any detail, is insufficient to show arguable prejudice, as broad conclusory allegations of ineffective assistance of counsel are not allowed under the Act, even at the first stage of the proceedings. See *People v. Delton*, 227 Ill. 2d 247, 258 (2008).

¶ 17 Moreover, the evidence against defendant was strong. During a search, defendant was found laying on a couch next to his wheelchair that contained a handgun in its rear pouch. Defendant had prior qualifying felony convictions and was therefore guilty of armed habitual criminal. See *Johnson*, 2015 IL App (1st) 132197-U, ¶¶ 10, 21. Further, drugs and drug paraphernalia were found in the home, including cocaine inside a book bag to which defendant directed the officers. A bag containing a letter addressed to defendant at the Honore Street residence where the drugs were found was found in the living room, along with defendant's expired State identification card. On direct appeal, defendant did not challenge the sufficiency of the evidence to show his possession of the cocaine, and we held the evidence was sufficient to show possession of the firearm and of the cannabis found in the bedroom. *Id.* ¶¶ 21, 27.

¶ 18 Where a gun was found inside defendant's wheelchair, drugs were found inside a residence in which defendant had mail delivered, and defendant admitted knowledge of the cocaine, his speculative claim that his testimony would have rebutted this evidence does not create a reasonable probability that the outcome of trial would have been different had he testified. He therefore cannot show arguable prejudice from counsel's alleged interference with his right to testify, and his postconviction petition fails to state the gist a constitutional claim of ineffective assistance of counsel.

¶ 19 Finally, we note that defendant's affidavit in support of his postconviction petition states that he "was not made aware by [his] trial lawyer or the Court that [he] had the right to testify at trial." To the extent defendant faults the trial court for failing to admonish him regarding his right to testify, our supreme court has held that the trial court is not required "to advise a defendant of his right to testify, to inquire whether he knowingly and intelligently waived that right, or to set of record defendant's decision on this matter." *People v. Smith*, 176 Ill. 2d 217, 235 (1997).

¶ 20 In sum, the circuit court properly dismissed defendant's postconviction petition at the first stage.

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

¶ 22 Affirmed.