2018 IL App (3d) 160114-U

Order filed May 11, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2018

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
	)	Will County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-16-0114
v.	)	Circuit No. 08-CF-2446
	)	
JESSE R. PEREZ,	)	Honorable
	)	Carla Alessio-Policandriotes,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.
Justices Holdridge and McDade concurred in the judgment

ORDER

¶ 1 *Held*: Circuit court properly dismissed defendant's postconviction petition at the first stage where it was not arguable that counsel's failure to cross-examine a witness at trial prejudiced defendant.

¶ 2 A jury found defendant, Jesse R. Perez, guilty on two counts of predatory criminal sexual assault of a child, and the circuit court sentenced him to terms of 49 years' and 38 years' imprisonment, to be served consecutively. Defendant appeals from the first-stage denial of his

postconviction petition, arguing that the petition presented an arguable basis in law and fact. We affirm.

¶ 3 FACTS

¶ 4 The State charged defendant by indictment with two counts of predatory criminal sexual assault of a child (720 ILCS 5/12-14.1(a)(1) (West 2008)). The indictment alleged that defendant committed two acts of sexual penetration on M.G. and that M.G. was under 13 years of age when defendant committed the offense. A jury trial commenced on March 12, 2012.

¶ 5 The details of defendant's jury trial have been set forth in great detail by this court on two occasions: defendant's direct appeal (*People v. Perez*, 2014 IL App (3d) 120837-U) and defendant's appeal from the denial of his motion for forensic testing (*People v. Perez*, 2016 IL App (3d) 130784). We rely on those cases in detailing the facts below.

¶ 6 M.G., nine years old at the time of the trial, was six years old when the incident in question took place. She testified that defendant took her to his house and told her to pull her pants down. Defendant inserted his penis inside her and moved forward and backward. M.G. testified that defendant also placed his mouth on her vagina. Defendant then attempted to wash her underwear before taking her back to her house where she lived with her mother and grandparents. M.G. testified that before she and defendant entered the house, "he said if I tell he's going to F me up."

¶ 7 After defendant left the house, M.G. told her mother, Judith, what had transpired. M.G. and her mother met with defendant's half-sister, Perla Perez, the next day at the library. M.G. told Perla what defendant had done. M.G. testified that a couple days later, she went to a hospital, where a doctor looked at her "private parts."

¶ 8 Judith testified that she had three children. Defendant was the father of two of her children but was not M.G.'s father. She was nine months pregnant with her youngest child when the events in question took place.

¶ 9 Judith further testified that M.G. was unusually quiet after she returned to her house with defendant on the night in question. After defendant left the house, Judith went into the bathroom to pick up M.G.'s clothes. She noticed blood on M.G.'s underwear. Judith knew the underwear to be the same that M.G. had been wearing earlier in the day. Judith testified that M.G. told her that defendant had hurt her "private area." M.G. told Judith that defendant had told her to remove her clothes. M.G. told Judith that when she was in the bed she felt pain in her private area, that she screamed and cried for defendant to stop, and that defendant spit "down there."

¶ 10 After M.G. told Judith what defendant had done, Judith called Perla. She met with Perla the next day at the library where M.G. told Perla what defendant had done. Judith testified that M.G.'s description of the incident to Perla was the same as M.G. had provided the previous night. Perla then arranged for a ride to St. Joseph's hospital in Joliet. At the hospital, Judith delivered M.G.'s underwear to a nurse. Judith also noticed blood on the underwear that M.G. was currently wearing. Upon instructions from the doctors at St. Joseph's hospital, Judith took M.G. to a hospital in Naperville the following day.

¶ 11 On cross-examination, Judith admitted she had heard rumors that defendant had spent three or four nights per week at another woman's house. She had first heard the rumors approximately a month prior to the events in question. The rumors "devastated" her and made her angry. On what defense counsel described as a "one-to-ten angry scale," Judith agreed that she was between 9 and 10. Defense counsel asked Judith if she had made any contact with

defendant since the incident. She replied that she had not. Defense counsel then commenced the following line of questions:

"Q. *** [Y]ou wanted [defendant] to marry you, didn't you?

A. No.

Q. You didn't?

A. No.

Q. If you didn't want him to marry you, why were you on the ten devastated level when you found out he was seeing another woman ***?

A. Because I had children by him.

Q. And you didn't want him to marry you?

A. No.

Q. But you were devastated to a ten when you found out he was cheating on you? You still had strong feelings for him, didn't you? You loved him?

A. Yes, I cared for him at the time.

Q. It's fair to say if you couldn't have him you didn't want anyone else to have him?"

Defense counsel's final question drew a sustained objection.

¶ 12 Perla testified that she met with Judith and M.G. at the library. M.G. told Perla that defendant had spit on her and, in Perla's words, "humped her harder." Perla continued: "I pointed toward my private area asking her if that was—if down there. And she pointed towards her private area and she said, 'yes, down there.' " Perla immediately brought M.G. to the hospital. Perla testified:

> "After we were at the hospital, [M.G.] actually got more into detail about what had happened also with the doctors and how [defendant] had covered her face, and that's around the time she repeated saying he humped her harder and she was crying and she told him to stop and he stopped."

¶ 13 Dr. Dan Magdziarz examined M.G. in the emergency room. He observed a two-millimeter abrasion on the opening of M.G.'s vagina. Dr. George Kuburov examined M.G. three days after the alleged incident. He observed "a tear through the hymen that extended down into the lower part of [M.G.'s] genital area." He also observed M.G.'s hymen to be swollen, red, and hemorrhagic. The parties stipulated to a report describing what M.G. said during the examinations. Kuburov and Magdziarz testified pursuant to the stipulation. Kuburov testified that M.G. said defendant did "something" that "hurt" her private. Magdziarz testified that defendant made M.G. pull down her pants and then "went too hard," which caused her to bleed.

¶ 14 Denise Payton, a staff member at Will County Children's Advocacy Center, conducted a videotaped interview with M.G. three days after the incident. The court admitted the interview recording over defendant's objections. In the interview, M.G. tells Payton that defendant took her into a house and told her to take off her pants and underwear. M.G. then says, "I was bleeding." When Payton asks why, M.G. explains, "because he was, like, humping me too hard." She then tells Payton: "He stopped and then I cried."

¶ 15 The jury found defendant guilty on both counts and the court sentenced him to terms of 49 years' and 38 years' imprisonment, to be served consecutively. This court affirmed the convictions and sentences on direct appeal. *Perez*, 2014 IL App (3d) 120837-U.[1]

[1]During the pendency of his direct appeal, defendant filed a motion for forensic testing. The circuit court denied that motion, but this court reversed and ordered the requested testing be conducted. *Perez*, 2016 IL App (3d) 130784. No issues regarding forensic testing are raised in the instant appeal.

¶ 16 On November 23, 2015, defendant filed a *pro se* postconviction petition. In the petition defendant alleged, *inter alia*, that defense counsel rendered ineffective assistance for failing to impeach Judith's testimony that she had made no contact with defendant since the incident with the 11 letters that Judith had sent to defendant while he was in pretrial custody. Defendant alleged that Judith had sent the letters under the name "Jayda Noche." He attached to his petition a letter showing that "11 handwritten letters to [defendant] from Jayda Noche" had been tendered from defendant's original private attorney to his public defender. Defendant did not attach the letters to his petition, nor did he make any allegations regarding their contents. The circuit court summarily dismissed defendant's petition.

¶ 17 ANALYSIS

¶ 18 On appeal, defendant argues that the circuit court erred in dismissing his petition because it presented an arguable basis in both law and fact that defense counsel rendered ineffective assistance. He urges this court to reverse the circuit court's ruling and remand for second-stage proceedings.

¶ 19 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2014)) sets out a three-stage proceeding in which a criminal defendant may assert that his conviction resulted from a substantial denial of his rights under the United States Constitution, the Illinois Constitution, or both. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). At the first stage, the court must accept as true and liberally construe all of the allegations in the petition unless contradicted by the record. *People v. Edwards*, 197 Ill. 2d 239, 244 (2001). A defendant need only allege sufficient facts to state the "gist" of a constitutional claim in order for his petition to be forwarded to the second stage. *Hodges*, 234 Ill. 2d at 9. That is, the petition must assert " 'legal points arguable on their merits.' " *Id.* at 11 (quoting *Anders v. California*, 386 U.S. 738, 744

(1967)). The circuit court may summarily dismiss a first-stage petition as frivolous or patently without merit where it has no arguable basis in law or fact. *Id.* at 16.

¶ 20 To ultimately prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was objectively unreasonable and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Of course, a defendant need not prove ineffective assistance by this standard at the first stage of postconviction proceedings. At this stage, "a petition alleging ineffective assistance 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.

¶ 21 In the present case, we take as true defendant's allegation that the "Jayda Noche" letters were actually written by Judith and that her testimony that she had not contacted defendant was therefore untrue. On these facts, defendant must show it is arguable that had counsel impeached Judith's testimony that she had not been in contact with defendant, her credibility would have suffered such a blow that a reasonable probability exists that the jury would have acquitted defendant. See *People v. Hale*, 2013 IL 113140, ¶ 17 ("[W]e may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance."). Defendant is unable to make such a showing.

¶ 22 Initially, the evidence against defendant was overwhelming. M.G., nine years old at the time of trial, provided a consistent accounting of defendant's actions. Importantly, M.G. shared some or all of that account with no fewer than five people: Judith, Perla, Dr. Magdziarz, Dr.

Kuburov, and Payton. This plainly rebuts defendant's assertion on appeal that Judith's "credibility was central to the State's case." Even if Judith's credibility was somehow irreparably harmed by the existence of the letters, M.G.'s firsthand testimony was still corroborated by four other witnesses. Indeed, even if Judith had not testified at all, the evidence against defendant would have remained overwhelming.

¶ 23 Moreover, defendant's argument that defense counsel's impeachment with the letter "would have significantly impacted the jury's perception of [Judith's] credibility" strains credulity. To be sure, Judith testified that she had not been in contact with defendant, and taking defendant's allegations regarding the letters as true, the letters would have shown that testimony to be false. But Judith's contact with defendant was not an issue in the case. The act of writing letters to defendant has no immediate bearing on her testimony regarding M.G. There is not even arguably a reasonable probability that impeachment on the ancillary topic of Judith's contact with defendant would have led the jury to disregard every other witness's testimony and find defendant not guilty of predatory criminal sexual assault of a child.

¶ 24 CONCLUSION

¶ 25 For the foregoing reasons, we affirm the judgment of the circuit court of Will County.

¶ 26 Affirmed.